In The Supreme Court of Bermuda

COMMERCIAL JURISDICTION

2023: No. 149

IN THE MATTER OF CICA LIFE LIMITED

AND IN THE MATTER OF SECTION 25 OF THE INSURANCE ACT 1978

Before: **The Hon. Chief Justice Hargun**

Appearances: **Mr Nicholas Miles of Kennedys Chudleigh Limited for the Company**

Mr Jeffrey Elkinson of Conyers Dill & Pearman Limited for the Bermuda Monetary Authority

Dates of Hearing: **25 May 2023**

Date of Judgment: **27 July 2023**

REASONS FOR RULING

Compliance with the requirement that "sufficient notice of the scheme has been served on each policyholder affected" under section 25(3) of the Insurance Act 1978.

HARGUN CJ

Introduction

1. Section 25 of the Insurance Act 1978 ("**the Act**") deals with the approval by the Court of any scheme under which long-term business of any insurer is to be transferred to another insurer. Section 25(3) provides that the Court should not entertain any such petition unless the Court is satisfied "*that sufficient notice of the scheme has been served on each policyholder affected*…"

2. At the conclusion of the hearing on 25 May 2024 the Court made the following Ruling: "*For reasons to be given, the Court orders that for the Court to be satisfied that a policyholder has been "served" by mail, there must be some evidence by registered mail or other record of service, confirming that the scheme documents had been delivered to the policyholder or evidence that they have been delivered to his last known address*." The Court now sets out its reasons for that Ruling.

3. In considering whether "*sufficient notice of the scheme has been served on each policyholder affected*" it is relevant that section 51 of the Act expressly deals with the issue of service of documents. Section 51 provides that:

> *"Notices*
> *51 (1) This section has effect in relation to any notice, direction or other document required or authorised by or under this Act to be given to or served on any person other than the Authority.*
> *(2) Any such document may be given to or served on the person in question—*
> *(a) by delivering it to him;*
> *(b) by leaving it at his principal place of business; or*
> *(c) by sending it to him at that address by facsimile or other similar means which produces a document containing the text of the communication.*
> *(3) Any such document may in the case of a company be given to or served—*

(a) by delivering it to the company's principal place of business or registered office in Bermuda; or
(b) by sending it by registered post addressed to the company's principal place of business."

4. By way of background, theTransferor is an exempted company registered as Class E insurer under the Act. The Transferee is a company registered in Puerto Rico as an international stock insurer. It is licensed by the Office of the Insurance Commissioner of Puerto Rico. It holds a Class 5 International Insurance license. The Transferor is closed to new business. All new international life business under the CICA brand is now written by the Transferee. The Scheme of Transfer provides for the transfer of the entire in-force business of the Transferor to the Transferee. The purpose of the Scheme of Transfer is to transfer the business to the jurisdiction which is more convenient to policyholders having regard to its Spanish-speaking environment, US territory status and is a US FATCA jurisdiction.

5. The Bermuda Monetary Authority ("**the BMA**") is content not to object to the Scheme of Transfer on its merits but has objected to the Transferor's proposal for notifying "Non-Email policyholders". This is a group representing about 50% of the policyholders and approximately 29,500 in number, on the basis that the proposal did not involve use of registered/trackable physical mail for all Non-Email policyholders across the board. The Transferor says registered/trackable mail service across the board is disproportionate and that its proposal (which does use an element of trackable mail but is otherwise predominantly by first class mail) fulfils the requirement of section 25(3). The Transferor's proposal comprises a targeted approach to type of physical mail service for Non-Email policy holders resident outside the USA. The Transferor proposes first-class mail service to those in jurisdictions with a local mail service with a high or reasonably high "scan rate"; and trackable service to those policyholders in 4 of the top 12 jurisdictions, which have a poor scan rate (Chile, Paraguay, Uruguay and Nicaragua).

6. Mr Miles, for the Transferor, urges the Court to adopt the approach taken in the English authorities on notification to policyholders regarding transfers under Part VII of the UK Financial Services and Markets Act 2000. Basing himself on the English authorities Mr

Miles submits that section 25(3) of the Act may be satisfied by any communications strategy that (i) has the "*ability to reach the intended target groups or is likely to draw the transfer to the attention of a significant proportion of the relevant policyholders*" (relying upon the decision of Floyd J in *Direct Line v Churchill* [2011] EWHC 1667 (Ch) at [10] and [11]; and (ii) is a "*reasonable and proportionate approach to ensuring that the policyholders who have an objection to the scheme have the opportunity of raising it*" (*Direct Line v Churchill* at [8]).

7. Mr Miles argues that the Court should adopt the English approach since the test is based on whether the communication strategy can be expected or has the ability to achieve the above ends and not on whether it does as a matter of fact. He also contends that the impossibility or impracticality of actual delivery is not an impediment to compliance (relying upon the judgment of Norris J in *Re Aviva International Insurance Limited* [2011] EWHC 1901 (Ch at [19]). Mr Miles submits that a broad interpretation is warranted because the purpose of the section can be substantially achieved by a variety of mechanisms. He says that the purpose of notification under section 25(3) is the same as the purpose of notification of a Part VII transfer as held by Norris J in *Re Aviva International Insurance Limited* at [7] and [8]:

> "*… The point of a notice stating that an application has been made being sent to each policyholder is so that each affected policyholder can participate, if they so choose, in the transfer process, either by making written representations or by appearing at the sanction hearing to express any objection. [8] The exercise of the power of waiver must therefore involve a consideration of the extent to which that purpose can still be fulfilled by alternative arrangements*."

8. Mr Miles also relied upon the English decisions in *Provident Insurance plc v Financial Services Authority* [2012] EWHC 1860 (Ch) (Henderson J); *Direct Line v Financial Services Authority* [2011] EWHC 1482 (Floyd J); *In the Matter of Lloyd's Insurance Company SA* [2020] EWHC 1388 (Ch) (Trower J); *Ecclesiastical Life Limited v Financial Services Authority* [2010] EWHC 3871 (Ch) (Floyd J); and *Re Names at Lloyd's for the 1992 and Prior years of Account* [2008] EWHC 2960 (Ch) (Floyd J).

9. However, as submitted by Mr Elkinson, the English legislation, dealing with the issue of notification and service of the scheme document, is materially different from the Bermuda provisions set out in sections 25(3) and 51 of the Act. Unlike the relevant Bermuda provisions, the English regulations expressly allow the court to *waive* the service requirements. As noted by Floyd J in *Re Names at Lloyd's for the 1992 and Prior years of Account :*

> *"The requirements placed on Applicants seeking transfers under the Part VII of the Act are set out in the Financial Services and Markets Act 2000 (Control of Business Transfers) (Requirements on Applicants) Regulations 2001, 2001 S.I. No. 3625 ("the Regulations"). Those for insurance business are set out in regulation 3, which reads as follows, so far as material:*
>
> > *"3 (1) An applicant under Section 107 of the Act for an order sanctioning an insurance business transfer scheme ("the scheme") must comply with the following requirements:*
> >
> > *(2) A notice stating that the application has been made must be -*
> >
> > *(a) published - ...*
> >
> > *(ii) in two national newspapers in the United Kingdom; and…*
> >
> > *(b) sent to every policyholder of the parties.*
> >
> > *(4) a copy of the report and a statement setting out the terms of the scheme and containing a summary of the report must be given free of charge to any person who requests them.*
> >
> > *4 (1) Subject to paragraph (2), the court may not determine an application under section 107 for an order sanctioning an insurance business transfer scheme*
> >
> > *(a) where the applicant has failed to comply with the requirements in regulation 3 (2), (3) or (6);..*
> >
> > *(2)* ***The requirements in regulations 3(2) (a) (ii) and (iii) and (b) may be waived by the court in such circumstances and subject to such conditions as the court considers appropriate****."*

10. The English authorities cited by Mr Miles are primarily dealing with the issue whether it is appropriate to "*waive*" the requirements in the regulations in the particular circumstances

of the given case. In contrast Section 25(3) of the Act requires that "*the* ***Court is satisfied*** *that* ***sufficient notice of the scheme*** *has been* ***served on each policyholder affected***." The Court has no discretion to waive this statutory requirement before it may sanction the transfer. The requirement of "*service*" is dealt with by section 51 of the Act. Accordingly, the Court has to be satisfied that (i) the relevant notice sufficiently summarises the scheme in the scheme document; and (ii) the document has been *served* in accordance with section 51 of the Act.

11. In construing section 51 of the Act the Court bears in mind that, like any other legislative provision, the Court seeks to give effect to the purpose for which the provision exists. As this Court noted in *Re Jardine Strategic Holdings Limited* [2022] SC (Bda) 27 at [44]:

> "*The primary indication of legislative intention is the legislative text, read in context and having regard to its purpose. The modern approach to statutory interpretation is to have regard to the purpose of a particular provision and interpret its language, so far as possible, in a way which best gives effect to that purpose: Barclays Mercantile Finance Ltd v Mawson [2004] UKHL 51, at [28]. As Lord Bingham explained in R (Quintavalle) v Secretary of State for Health [2003] UKHL 13, at [8]:*
>
> > *"The basic task of the court is to ascertain and give effect to the true meaning of what Parliament has said in the enactment to be construed. But that is not to say that attention should be confined and a literal interpretation given to the particular provisions which give rise to difficulty …. Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment."*

12. The Court accepts that the purpose of sections 25(3) and 51 of the Act is, as was noted by Norris J in *Re Aviva International Insurance Limited* at [7] and [8] in relation to the English provision "*so that each affected policyholder can participate, if they so choose, in the transfer process, either by making written representations or by appearing at the sanction*

hearing to express any objection". The Court also accepts that in some cases it would be impossible to personally serve all the policyholders. The legislative purpose underlining sections 25(3) and 51 is best served by construing section 51(2) of the Act as allowing the Transferor to serve the scheme document on a policyholder by (a) delivering it to him; (b) delivering it to his last known address; or (c) by sending it to him at that address by facsimile or other similar means.

13. In order for the Court to be "*satisfied*" the Court must be provided with evidence that the service has in fact been effected in accordance with section 51 of the Act. In the ordinary case, where service cannot be effected by email, it would require service by registered mail or other recorded service confirming that the scheme document has been delivered to the policyholder or evidence that the scheme document has been delivered to his last known address. It was for these reasons that the Court made its Ruling on 25 May 2023.

14. The Court will hear the parties in relation to costs, if required, at the sanction hearing.

Dated this 27th day of July 2023

THE SEAL OF THE SUPREME COURT OF BERMUDA

NARINDER K HARGUN
CHIEF JUSTICE