Privy Council Appeal No. 83 *of* 1934

The Public Trustee of New Zealand - - - - - *Appellant*

v.

Sarah Charlotte Lyon - - - - - - - *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 19TH DECEMBER, 1935

Present at the Hearing:

LORD BLANESBURGH.
LORD ATKIN.
LORD THANKERTON.
LORD MAUGHAM.
LORD ROCHE.

[*Delivered by* LORD THANKERTON]

The appellant is administrator of the estate of George Douglas Lyon, who died domiciled in New Zealand on the 8th August, 1932, leaving a will dated the 17th April, 1929, of which probate was granted to the appellant on the 4th October, 1932.

The estate of the deceased proved to be insolvent, the liabilities amounting to over £4,000, and the assets amounting in value to about £3,000. Among the assets there was included a policy of insurance granted to the deceased by the Scottish Widows' Fund and Life Assurance Society for the sum of £500, the amount payable on his death, including bonus additions, being approximately £800. By paragraph 5 of his will the deceased gave and bequeathed all policies of insurance on his life at his death to such of them his wife and children, other than his daughter Elizabeth Waugh Lyon, as should be living at his death and if more than one in equal shares *per capita* with a provision for substitution of the children of any such child who might predecease him. The respondent is the widow of the deceased, and, along with four infant children of the deceased, whose interests she represents, are the parties entitled under paragraph 5 of the will to the bequest of the policy above mentioned.

On the 9th February, 1933, the appellant took out an originating summons in the Supreme Court of New Zealand, Wellington District, in which the respondent was named as

defendant. By direction of the Court the summons was served upon the respondent as representing her own interest and the interests of the four infant children and upon Frederick Clements Page as representing his own interests and the interests of all the other creditors secured and unsecured of the deceased. The main question on which a determination was sought was as follows :—

> " Are the provisions of section 65 of the Life Insurance Act, 1908, applicable to the moneys payable under policy No. 173690 issued in Scotland on the life of the said deceased so as to render such moneys (which form part of the estate of the said deceased) not available for payment of the debts of the said deceased ? "

On the 31st July, 1933, the originating summons was heard by Ostler J., who decided that the provisions of section 65 were not applicable to the policy so as to render its proceeds not available to the creditors. The respondent appealed from that judgment, and, on the 12th April, 1934, the Court of Appeal of New Zealand, by a majority (Herdman J. dissenting), allowed the appeal, and decided that the proceeds of the policy were not available to the creditors. The present appeal is taken from that judgment.

The provisions of section 65 of the Life Insurance Act, 1908, are as follows :—

> " (1) Subject to the provisions of this Act, no policy now issued or hereafter to be issued, the holder of which becomes bankrupt under any law for the time being in force relating to bankruptcy nor any interest in such policy or in any moneys payable thereunder shall pass to the trustee in such bankruptcy or in any way become part of such bankrupt's estate available for distribution among his creditors; nor shall such policy or any interest therein or in any moneys payable thereunder be capable of being seized or levied upon or taken into execution by or under the process of any Court whatever or pass under a general assignment of the policy-holder's property or become available for the payment of debts under an intestacy.
>
> " (2) Where a policy-holder dies leaving a will the policy-moneys shall not be applied in payment of his debts or of any legacies payable under his will unless in and by his will he has by express words specially referring to such moneys declared that the same shall be so applied.
>
> " (3) Neither a general bequest of a policy-holder's personal estate upon trust for payment of debts or legacies nor a general direction for the payment of debts or legacies out of any fund of which under any such will the policy-moneys are made to form part shall be deemed to render any such moneys available for payment of debts or legacies."

In his will the deceased made no express declaration that the policy moneys were to be applied in payment of his debts.

The question at issue arises out of the facts relating to this particular policy. The policy was issued on the 11th March, 1904, by the Scottish Widows' Fund and Life

Assurance Society to the deceased, who, at that time, was a domiciled Scotsman and resident in London. Under the policy £500 and bonus additions were payable to the deceased, his executors, administrators and assigns on the deceased surviving the 28th February, 1942, or on his death should that event happen previously. The insurers have their head office in Edinburgh, and have never carried on business in New Zealand, nor have they ever had any office or agent in New Zealand.

The appellant maintained (1) that subsection 2 of section 65 of the Act did not apply to policy moneys due under a policy issued by a company which did not carry on business in New Zealand and have a secretary or other officer in New Zealand, and (2) that, even assuming that the subsection did so apply, the administration of the policy moneys fell to be made according to the law of Scotland, by virtue of which they are available for creditors.

The Act of 1908 is divided into two parts, Part I (sections 2 to 40) relating to life insurance companies, and Part II (sections 41 to 80) relating to life insurance policies. Each part has its own definition section. The definition section in Part II, which is section 41, provides, so far as is material :—

> "41. In this Part of this Act, if not inconsistent with the context :—
>
> "'Company' means any person or association, whether incorporated or otherwise, not being established under any Act relating to friendly societies, which issues or is liable under policies as herein defined ; and includes companies now or hereafter established out of New Zealand as well as those now or hereafter established in New Zealand, and mutual associations as well as proprietary : and also includes the Government Insurance Commissioner under the Government Life Insurance Act, 1908 :
>
> "'Policy' means any contract, so long as such contract remains in force, heretofore or hereafter lawfully entered into by a company, the terms of which are dependent upon the contingencies of human life :
>
> "'Policyholder', 'holder of a policy', and 'holder' mean respectively the person for the time being legally entitled to a policy."

In the opinion of their Lordships the definition of "company" is inconsistent with its limitation to such companies as carry on business in New Zealand; such a limitation would require to be expressed in the definition and it is not so expressed. Nor is any such limitation expressed in Section 65, and therefore the appellant's contention must rest upon an implication shown to arise from an inconsistency of the definitions in Section 41 with the context of the operative sections which are mentioned. Both the learned Judges who were in favour of the appellant's contention have held that the definition of "company" and of "policy" must be qualified throughout Part II. Ostler J. held that Part II

relates only to life insurance policies issued in New Zealand or issued elsewhere by a company which was doing business in New Zealand in compliance with a proposal made in New Zealand. Herdman J. held that Part II related only to policies issued by companies carrying on business in New Zealand; he stated that nothing much was to be inferred from the definitions. But it is a natural inference from the terms of the definition section that there are at least some sections in which the definitions will not be inconsistent with the context, and they should not easily be put aside as inconsistent with the context of every clause.

In sections 67 and 68 (insurances by parents on lives of children), section 69 to 74 (moneys payable under a policy for benefit of minors, etc.), section 75 (insurances by minors), not only are the provisions consistent with the full application of the definition section, but there seems to be good reason against any limitation such as is suggested. It follows in their Lordships' opinion, that any inconsistency of context affecting the provisions here immediately in question must be found within a narrower range. For this reason their Lordships are unable to regard the group of sections (42 to 63), which relate to assignments and mortgages of policies, which appear to affect only companies which have a locale in New Zealand, as within this narrower range, which should at least be confined to sections 64, 65 and 66, which are grouped under the one heading as relating to the protection of policies that can properly be regarded as within that range.

Under section 64 protection is given against forfeiture of a policy for non-payment of premiums, so long as the premiums and interest in arrear are not in excess of the surrender value as declared by the company in the statement of its life assurance and annuity business, the preparation of which by the company is prescribed by section 19 of Part I of the Act. It would seem clear that this protection could not be effective as against a company which was in no way subject to the jurisdiction of the New Zealand Courts, and the definitions would be correspondingly limited by this context. But the forms of protection provided for by section 65 are quite independent of that provided by section 64.

The provisions of section 65 preclude any recourse by the policyholder's creditors against his life policies during his life, or on his death intestate or testate, unless, in the latter case, he expressly directs that the policy-moneys shall be applied in payment of his debts. There is nothing in the terms of this section to limit the applicability of the definitions. Further, the section is dealing with policies and policy-moneys as assets of the policyholder, and there does not appear to be any reason, in principle, for excluding such policies as the one here in question, which is an asset of the policyholder, from the protection given by the section. On the contrary there seems every reason why the rights of

creditors who *ex hypothesi* are in New Zealand should be regulated by this section even though the assets come into New Zealand from abroad. But it remains to consider whether the provisions of section 66, as amended by section 4 of the Life Insurance Amendment Act, 1925, which fall to be read along with section 65, provide a context inconsistent with this view. The first three subsections of section 66 present no difficulty; subsections 4 to 8, which largely relate to a policyholder's bankruptcy in New Zealand, do present some difficulty, but, in the opinion of their Lordships, such difficulty is not sufficient having regard to the clear and unqualified terms of section 65 as to involve the limitation of the latter. Their Lordships agree with the statement of Kennedy J., who says :—

> "The object of section 65 plainly is to encourage provision by way of insurance for the person insured and his wife or children, even to the extent of freeing the proceeds of an insurance policy from the claims of creditors. Individuals, and not policies, are the objects of the solicitude of the legislature. If that be the true view, as I think it is, then there does not appear any reason why protection should apply for the benefit of a policyholder, his wife or children, in respect of a policy which has been issued in New Zealand or on a proposal made in New Zealand, but should not apply for the benefit of the same person or persons in respect of a policy issued abroad on a proposal there made."

Their Lordships are, accordingly, of opinion that section 65 is applicable to the moneys payable under the policy here in question.

The appellant next maintains that, even assuming the failure of his argument on the construction of the Act of 1908, the policy-moneys are Scots assets and fall to be administered according to the law of Scotland, under which they are available to creditors. Their Lordships are unable to accept this contention. The policy-moneys were in fact recovered by the appellant from the Insurance Society without the production of a grant of representation from the Scottish Courts by virtue of section 11 of the Revenue Act, 1884, as amended by section 19 of the Revenue Act, 1889, and there was thus no administration in Scotland; they are now being administered in New Zealand. The appellant is in this difficulty; if the provisions of section 65 merely bar the right of recovery in New Zealand, such bar will operate to prevent their recovery in the New Zealand administration, in course of which the present question arises. If on the other hand, section 65 destroys the right or title of the New Zealand creditors as against the policy-moneys which form part of the estate of a person domiciled in New Zealand then, even if there had been a Scottish administration, the New Zealand creditors could not have proved in the Scottish administration any claim of debt against the policy-moneys.

Their Lordships will humbly advise His Majesty that the appeal should be dismissed with costs.

(33081—3A) Wt. 8034-41 90 1/36 P.St. G.338

In the Privy Council.

THE PUBLIC TRUSTEE OF NEW ZEALAND

v.

SARAH CHARLOTTE LYON

DELIVERED BY LORD THANKERTON

Printed by HIS MAJESTY'S STATIONERY OFFICE PRESS,
Pocock Street, S.E.1.

1935