IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2013-404-002864
[2015] NZHC 993

BETWEEN	ABDUR RAHIM MIAH Plaintiff
AND	THE NATIONAL MUTUAL LIFE ASSOCIATION OF AUSTRALASIA LIMITED Defendant

Hearing: 12 March and 24 July 2015

Appearances: Mr R J Hooker for the Plaintiff
Mr J Knight and Mr A Neris for Defendant

Judgment: 1 September 2015

JUDGMENT OF ASSOCIATE JUDGE DOOGUE

This judgment was delivered by me on
***1 September 2015 at 4 pm**, pursuant to*
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date……

Background

[1] The following statement of background is taken from the synopsis of submissions which counsel for the defendant, Mr Knight, filed:

> 1. The defendant, The National Mutual Life Association of Australasia Limited, which at material times traded as **AXA New Zealand** but which currently trades (and is referred to herein) as **AMP**, applies for the following orders:
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> 1.1 defendant's summary judgment;
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> 1.2 in the alternative, strike out of Mr Miah's (amended) statement of claim dated 28 October 2014 in its entirety and the consequent dismissal of the proceeding; and/or
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> 1.3 security for costs in the sum of $20,000, and that this proceeding be stayed until security for costs is given; and
>
> 1.4 the costs of and incidental to this interlocutory application on an indemnity basis (should AMP succeed in obtaining summary judgment or strike out) or on a "2B" scale basis (should security for costs be ordered).

[2] The plaintiff's counsel, Mr Hooker, does not dispute the chronology of relevant events is as follows.

[3] In June 2006, the National Mutual Life Association of Austrasia Ltd (AMP) issued a life insurance policy (the Policy) for $2 million over the life of Mr Miah's wife.

[4] The Policy was jointly owned by Mr Miah and his wife.

[5] On 4 April 2007, Mr Miah was adjudicated bankrupt so that his right to receive payment under the Policy vested in the Official Assignee (the Assignee).

[6] In June 2007, Mr Miah made a claim to AMP under the Policy after his wife was murdered in Bangladesh in May 2007.[1]

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[1] Mr Miah was charged with the murder of his wife but was acquitted of any involvement. His brother was convicted: *Miah v Official Assignee* [2013] NZHC 2726 at [22].

[7] After Mr Miah was discharged from bankruptcy, he requested that the Assignee assign to him the Policy. The Assignee refused.

[8] Mr Miah unsuccessfully challenged the Assignee's refusal to assign the Policy in the High Court.[2]

[9] The Assignee has confirmed he has not abandoned his interests in the Policy.

Principles

[10] I accept Mr Knight has provided an accurate statement of the principles required when deciding the present applications before the Court. As it happens, it is only necessary to refer to the principles which govern summary judgment.

[11] The relevant legal principles may be summarised succinctly and ought to be uncontroversial:

(a) The court may give summary judgment against a plaintiff if the defendant satisfies the court that none of the causes of action in the plaintiff's statement of claim can succeed.[3]

(b) Summary judgment "permits a defendant who has a clear answer to the plaintiff which cannot be contradicted to put up the evidence which constitutes the answer so that the proceedings can be summarily dismissed".[4]

(c) The court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept evidence uncritically that is inherently lacking in credibility or is inherently

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2 *Miah v Official Assignee*, above n 1.
3 High Court Rules, r 12.2(2).
4 *Westpac Banking Corporation v MM Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA) at [60]. See also *McGechan on Procedure* (online looseleaf ed, Brookers) at [HR12.2.07]–[HR12.2.08].

improbable.[5] The court may take a robust and realistic approach where the facts warrant it.

(d) If the defendant supplies evidence that would satisfy the court that the claim cannot succeed, a plaintiff will usually have to respond with credible evidence of its own.[6]

Issues

[12] A complication which developed in this case was that between the date when the proceeding was adjourned part-heard and the resumed hearing in July, Mr Hooker, on behalf of the plaintiff, filed an amended statement of claim dated 23 July 2015. The claims in the current iteration of the statement of claim are as follows:[7]

> 4 The new first cause of action alleges, contrary to the previous pleadings, that the insurance policy was owned by the plaintiff and Mrs Miah as tenants in common in equal shares (presumably from the policy's commencement although this is not express). The result is said to be that Mr Miah is entitled to receive half of any proceeds payable under the life component (the **death benefit**) of the policy (being Mrs Miah's entitlement) as executor of Mrs Miah's estate. There is no allegation that this right was affected by the plaintiff's bankruptcy.
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> 5 The new second and third causes of action now allege that the plaintiff's bankruptcy has resulted in the plaintiff and Mrs Miah owning the policy as tenants in common in equal shares (the second cause of action previously alleged that Mr Miah is entitled to all of the proceeds payable under the death benefit by operation of the law of survivorship because Mr and Mrs Miah were joint owners of the policy with the consequence that Mr Miah became the sole owner on her death).
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> 6 As a result, the second cause of action alleges that Mrs Miah is entitled to an equal share of any proceeds payable under the death benefit, which Mr Miah is entitled to enforce as executor of her estate.
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> 7 The third cause of action alleges that Mr and Mrs Miah owned the policy as tenants in common but that the policy was "*personal*" to Mr Miah and that, as a result, Mr Miah is entitled to the entirety of any proceeds payable under the death benefit.

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5 *Krukziener v Hanover Finance Ltd* [2008] NZCA 187 at [26].

6 *Westpac Banking Corporation v MM Kembla New Zealand Ltd*, above n 4, at [64] and *Bernard v Space 2000 Ltd* (2001) 15 PRNZ 338 (CA) at [27].

7 This is a summary contained in the supplementary submissions which Mr Knight filed and which accurately summarise the current state of the plaintiff's statement of claim.

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9 The new fourth to sixth causes of action are essentially the same as the previous third to fifth, and turn on whether any entitlement that Mr Miah has to receive any proceeds payable under the death benefit constitutes "*property*" that has vested in the Official Assignee (**Assignee**) by dint of s 42 of the Insolvency Act 1967 and which has not subsequently been abandoned. That issue has been addressed in AMP's synopsis of submissions.

[13] Mr Miah contends there are a number of reasons for asserting that the Policy never became part of his estate in the bankruptcy. That is because:

> it is not an item of property which is identified by the provisions of the Insolvency Act 1997 as passing into his estate; and
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> the wife owned the policy, or her interest in the policy passed to her estate following her death and the husband as executor now has the right to enforce the policy as the legal owner of it.

[14] There are difficulties with the contention that the husband puts forward. These will be examined as each issue is considered.

[15] It should also be mentioned that Mr Knight reminded me at the resumed hearing of this matter that he had made oral submissions on a point which appeared to be of interest to me and which I invited the parties to address at the resumed hearing. That was the potential effect of Mr Miah's adjudication on bankruptcy severing any joint tenancy in the Policy. For reasons which will become apparent below, although the topic will be discussed, it is not dispositive of the outcome of the application for summary judgment which the defendant has made.

The first cause of action

[16] The first cause of action pleads that Mr Miah is the trustee and executor of the estate of his late wife. It also alleges that, in that capacity, he is entitled to one half of the share in the Policy.

[17] The defendant seeks judgment under this cause of action on the ground that, contrary to the position claimed in the amended statement of claim and stated by Mr Hooker in his submissions, the husband and the wife jointly owned the property and,

therefore, as a result of the operation of survivorship, all of the rights in respect of the Policy passed to Mr Miah on the death of his wife.

Who is entitled to the insurance proceeds on the death of Mrs Miah?

[18] The issue is whether the right to receive payment of the death benefit under the Policy was a joint right or a right held by Mr Miah alone. In relation to that issue, Mr Knight submitted:

> (i) The (contingent) contractual right to be paid the death benefit under the policy – being the only relevant *chose in action* conferred by the policy – was held solely by Mr Miah for his exclusive benefit.[8]
>
> 18. The corollary is that Mrs Miah was never entitled to be paid the death benefit because the contingent contractual right was not joint. And, because of that, Mrs Miah did not have a beneficial interest in that right to receive payment either – whether as a joint tenant or tenant in common with Mr Miah – which could be enforced as against AMP.
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> 19. Thus, because Mrs Miah did not have a contractual right – and therefore no beneficial interest in that right either – to receive payment of the death benefit, Mr Miah's bankruptcy could not result in severance of any such beneficial interest in the right which could, in turn, pass to Mrs Miah's estate and be enforced by her personal representative as against AMP in this proceeding.

[19] I agree with the general approach that is taken by the defendant, which is to the effect that the question of who has the entitlement to the proceeds of the Policy which has been owned by two or more parties after death is to be resolved by way of contractual interpretation of the Policy. It is not simply a case of a party saying that there were two owners of the Policy and that, depending upon whether they are properly to be characterised as joint or several owners, rights of ownership will accrue to either the survivor (by way of survivorship in the case of a jointly owned chose in action) or to the survivor together with the estate of the party who died (if it is to be categorised as property which was owned by the parties severally). The starting point is the case of *Murphy v Murphy*, where Thomas LJ said:[9]

> 17. In my view, although there was no evidence, as I have stated, in relation to the circumstances surrounding the policy, the plain inference to be drawn was that the death benefit was intended by the

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8 *Murphy v Murphy* [2003] EWCA (Civ) 1862 at [17].

9 Above n 9.

> parties to be payable to the survivor of either Mr or Mrs Murphy; it was to be for the exclusive benefit of the survivor to enable the survivor to deal with the financial consequences of the death of one of them. That would be the ordinary inference to be drawn when a life insurance is effected for a fixed sum without profits, without a surrender value and without an endowment element; it was not a so called "savings product", but pure life insurance. There is nothing to displace that ordinary inference. Nor is there anything to suggest that in this case it was ever intended that the estate of the deceased was intended to benefit; there would have been no point. It was not an endowment policy where it would ordinarily be intended that the benefit payable on maturity would be available for them jointly. …

[20] Thomas LJ further stated:[10]

> I cannot conceive that the parties to this fairly standard contract contemplated anything other than the death benefit always being payable to the survivor.

[21] Pill LJ (concurring with Thomas LJ) held:[11]

> 45. In my judgment, the plain inference to be drawn is that the death benefit was intended by the parties to be payable to the survivor. Where there are two proposers, the policy is plainly devised for those in a close relationship. As between husband and wife, the purpose of a policy providing for the payment of a lump sum upon the first death is readily understandable. A fund is made available to assist one spouse to deal with the consequences for that spouse of the death of the other and I have no doubt that the policy was devised by the insurers with that in mind. *Those entering into the contract, both the proposers and the insurers selling it to them, would be likely to have been astonished at the suggestion that the estate of the deceased had an interest in the sum payable under the policy*. The subjective intent of the proposers is not of course decisive but, in construing the contract objectively, the Court is entitled, and should, give weight to the likely purpose of the policy and the intention of the parties.

[22] In *Murphy*, both the lives of the husband and wife were insured and, in addition to the life insurance component, they were also covered in regard to terminal illnesses.

[23] The decision in *Murphy* has been described[12] as reflecting a presumption that arises in cases of its kind.

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10 At [20].

11 (emphasis added).

12 For instance, in John Birds, Ben Lynch and Simon Milnes (eds) *MacGillivray on Insurance Law: Centenary Edition* (12th ed, Sweet & Maxwell, London, 2012) at [25–261] it is

[24] It is also consistent with the ordinary presumption, at least in cases where the owners of the policy are in a close relationship such as a family is, that the contract will normally be construed so as to provide that the death benefit will be payable to the surviving policy owner and thus does not inure to the benefit of the estate of the life insured (with the obvious exception of a policy where the life insured and owner are the same person).[13]

[25] That principle is apparent in the case of a joint policy on the lives of a husband and wife, where the contractual right to the death benefit is a right to which each is entitled on the death of the other. It is not a joint right but one belonging solely to the survivor. Consequently the contractual right – and thus any beneficial interest in that right – is not severable.[14]

[26] I accept the submission for the defendant that this presumption is recorded in the leading insurance texts.[15]

[27] Whether the presumption in *Murphy* applies to a given case depends upon consideration of the contractual arrangements that the parties actually entered into.

[28] Mr Hooker submitted that the English authority ought to be disregarded and that it was not of persuasive authority. He relied upon the New Zealand case of

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explained that: "The policy in question had two elements – a term life element and provision for payment on terminal illness. The majority of the Court of Appeal held that the life insurance element was not held jointly, as there was a clear inference that the proceeds were to be paid to the survivor, although all the judges regarded the part providing for a terminal illness payment as held jointly. It was important that the life insurance element was pure life insurance with no savings or endowment element, where the natural inference would have been to the contrary."

13 *Halsbury's Laws of England* Insurance (online looseleaf ed, LexisNexis, 2011) vol 60 Insurance at [507].

14 *Halsbury's Laws of England* Insurance (online looseleaf ed, LexisNexis, 2011) vol 60 Insurance at [507].

15 Birds, Lynch and Milnes, above n 13, at [25–261]; Robert Merkin and Chris Nicoll (eds) *Colinvaux's Law of Insurance in New Zealand* (Thomson Reuters, Wellington, 2014) at 726 and 742; and footnotes 33 and 117 therein. See also David St L Kelly and Michael Ball (eds) *Kelly & Ball Principles of Insurance Law* (online looseleaf ed, Butterworths) at [13.0250] where it is stated that: "Where the policy is a savings or an endowment policy, it may be arguable that the benefit that is payable on the death of the first policyholder to die is payable to the survivor and to the estate of the deceased life insured. In the absence of exceptional circumstances, that possibility is, however, ruled out in a case of pure life insurance, where the insurance is for a fixed amount and there is no entitlement to participate in profits. However, a benefit payable because of a trauma or terminal illness suffered by one of two surviving policyholders may be payable to both of them."

Sovereign Assurance Co Ltd v Scott, where the Court of Appeal was addressing a case in which limitation issues arose in the context of a policy for a fixed benefit payable under a critical illness policy. Because, in that case, the Court of Appeal expressed the view that the English law ought not to be followed, the same conclusion should be reached in the present case, Mr Hooker says. In *Scott v Sovereign Assurance Company Ltd*, the Court noted that the English authorities to the policy in that case because:[16]

> … its terms required that distinct conditions are met before a cerebrovascular incident may qualify as an insured event comprising a stroke.

[29] The last passage explains why the Court of Appeal did not consider the English authorities to be of assistance. Plainly, our Court of Appeal regarded the standard conditions found in equivalent policies in England to be different from those applicable in this country. A reluctance to follow English authority in that circumstance is understandable. I will make further comments on the approach that was taken by the English Court of Appeal in *Murphy* further on in this judgment in an attempt to assess whether it is consistent with the general approach to the interpretation of contractual documents that has been adopted in New Zealand. For the moment, it is enough to say I do not accept that *Sovereign Assurance* places a prohibition on any consideration of English authority in insurance cases.

[30] To resume the discussion about the Policy in this case, it is to be noted that the Policy was to be owned by both the husband and the wife with the sole life insured being that of the wife. Payment of the benefits under the Policy would occur in the event of the death of the wife, alone.

[31] There is no doubt that, as an owner of the Policy, the wife during her lifetime or her estate after her death retained a contractual right to, for example, enforce the terms of the Policy against the insurance company. That, however, is a different thing from the right, on her part, to require payment to be made to her of the proceeds of the Policy on the occurrence of the event insured, namely her death.

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16 *Scott v Sovereign Assurance Company Ltd* [2011] NZCA 214 at [38].

[32] The Policy does not contain any express provision prescribing to whom payment is to be made on the occurrence of the death of the life insured, the wife. The relevant provisions of the Policy are:

> 22. Benefits under the Income Protection and Business Expenses Insurance Components are payable to the Life Insured i.e. Mrs Miah. All other benefits are payable to "*you*".
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> 23. "*You*" means the "*Policy Owner*", which in turn is defined as:
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> 24. means the person or persons named as Policy Owner in the Schedule and if more than one means all such persons jointly.

[33] It was contended for the defendant that the estate of the wife did not have an entitlement to the proceeds of the Policy following her death. It is further argued that such rights Mr Miah had passed to the Assignee on his bankruptcy.

A contractual interpretation

[34] The reasoning which the majority in *Murphy* adopted has been confirmed in subsequent English authorities, including the Court of Appeal decision of *Lim v Walia*.[17] It does not appear to have been the subject of consideration by New Zealand authorities.

[35] The reasoning by which the majority in *Murphy* came to its decision would seem to be consistent with that which is applicable in contractual interpretation cases in this country. That is, in determining the contractual intention of parties to insurance policies, the background circumstances known to the parties and any inferences that could be drawn from the subject matter of the contract are able to be admitted for consideration.[18]

[36] It accords with, for example, what Tipping J said in *Vector Gas Ltd v Bay of Plenty Energy Ltd*,[19] which requires the court, in interpreting the contract of insurance, to consider the facts and circumstances known to, and likely to be operating, on the parties' minds.

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17 *Lim v Walia* [2014] EWCA Civ 1076.
18 See *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] NZLR 444.
19 At [19].

[37] In *Murphy,* there was apparently no evidence of circumstances before the Court which would displace the usual inference. Although, unlike *Murphy*, the purpose of the Policy here was not to provide payment of a lump sum upon the first death of either spouse in a close relationship (since payment of the benefits under the Policy would only occur in the event of the death of the wife), it seems likely that, just as it was in *Murphy*, the intention of insuring the life of Mrs Miah was to provide financial assistance to her survivor, her husband, in the event of her death in order "to deal with the financial consequences of the death of [the spouse]".[20]

[38] There is no evidence of circumstances which would point to a different intention such as that she had responsibilities to financially care for persons outside her immediate family (including her husband). Thus there would have been no point in making a payment to the deceased wife. Certainly, as between the husband and the wife, it seems unlikely that they would have intended that part of the Policy would fall into her estate before finally finding its way into the hands of the husband once completion of the administration of her estate was accomplished. No reason was suggested as to why such an indirect means would be provided for the money to find its way to the husband as the surviving spouse.

[39] While it is difficult to imagine a case where the parties could have had an understandable motive for structuring the insurance arrangements so as to result in the wife receiving part of the insurance payout upon her death, it might be possible, if the appropriate evidence was available, to arrive at such an outcome. Such a result might be inferred to have been the intention in the case, where, for example, the family had structured their collective finances in such a way that the wife assumed a contingent liability to a creditor of the family. As a bare possibility, the court might, in such a case, consider whether it had been intended that part of the insurance proceeds should be retained by the wife's estate to meet such a liability. Even then, having regard to the close relationship between them, it might have been expected that the husband, on receiving the proceeds of the insurance, would see to it that his wife's debts were paid, that being one of the consequences that the parties foresaw occurring. But there is no such evidence in this case.

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[20] *Murphy*, above n 9, at [17].

[40] While Mr Hooker referred to the need to consider the contract in its factual context as being a reason why summary judgment should be declined, he did not specify what he meant by that and he did not point to any circumstances of the kind that I have just mentioned as justifying a departure from the approach in *Murphy*, which would appear to be the conventional approach to interpretation of insurance contracts.

[41] My conclusion is that, on the death of Mrs Miah, the husband became the sole surviving owner of the chose in action, represented by the right to claim the insured sum under the Policy. Therefore the first cause of action pleading that the parties owned the benefits payable under the Policy as tenants in common cannot succeed.

[42] While the Policy in fact was owned by Mr and Mrs Miah jointly, that does not affect the question of who was intended to benefit from the exercise of the contractual rights which were part of the obligations comprising the Policy. The fact that Mrs Miah may, at one point, have been an owner of the Policy does not mean that she thereby becomes entitled to compel the insurance company to pay the benefits under it to her legal successors upon her death. There is no reason, either, why the rights to enforce the Policy against the insurance company should be viewed as passing to the husband and to her legal successors on her death.

[43] My conclusion, therefore, is that the first cause of action in the amended statement of claim cannot succeed. That is to say, Mr Miah as the personal representative of his late wife does not acquire a one-half interest in the Policy which beneficially belongs to the estate of his late wife.

Argument that the rights under the Policy were not property which passed to the Assignee

[44] At this point, I will address an argument that Mr Hooker put forward at the first part of the hearing of the applications to the effect that the Policy was not assigned to the Assignee. The point is an important one because it underlies the

question of who has the right to enforce the Policy. Mr Miah has asserted such a right but that has not been accepted by the Assignee, as I have explained earlier.

[45] Counsel referred to the definition of what property passes to the Assignee under s 2 of the Insolvency Act 1967 (the Act):[21]

> **Property** means land, money, goods, things in action, goodwill, and every valuable thing, whether real or personal, and whether situated in New Zealand or elsewhere; and includes obligations, easements, and every description of estate, interest and profit, present or future, vested or contingent, arising out of or incident to property.

[46] It was Mr Hooker's submission that the Policy was not a "valuable thing" at the point when Mr Miah was bankrupted because, at that point, his wife was still alive and so the contingency upon which the insurance company would be required to pay out $2 million had not occurred. At a more fundamental level, his submission implicitly asserts that even though the class of property categorised as a "chose in action" was specifically included, his contention was that unless it also conforms to the description of being a "valuable thing", then it did not comprise "property" within the meaning under the Act. I do not accept any such limitation should be placed upon what class of chose in action is recognised as property under this section. I consider that "valuable thing" was included as a catch-all phrase so that no other types of property in addition to those specifically defined in the section would escape the net. That is to say, the inclusion of the words "valuable thing" was intended to be read expansively and not restrictively in the way Mr Hooker submitted.

[47] Secondly, the submission that the Policy was of no value is not sustainable. The Miahs had paid money to obtain insurance cover and clearly regarded what they received in the return as being valuable. As a result, they had a contractually enforceable right to obtain a payment in the event that the wife died. Their position was better than it would have been if there was no life insurance policy at all. They were not subject to any doubt that they would have been worse off if they had allowed the Policy to lapse. They would have been required to start over in obtaining life insurance cover over the wife's life; a procedure that could have

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[21] Which the parties agree was the applicable one in the circumstances of this case.

resulted in cover being declined because of a change of assessment of the risk or because of changes in insurers' policies about assuming life risk. The fact that the Policy expressly stated that it had no "cash value", which Mr Hooker relied upon, does not rule out that the Policy had other forms of value.

[48] Further, it is clear that any chose in action belonging to the bankrupt vests in the Assignee.[22] I therefore reject this particular submission.

Second cause of action

[49] The second cause of action alleges that the Policy was owned jointly by the Miahs and that, on the bankruptcy of Mr Miah on 4 April 2007, the Policy was owned by the estate of Mrs Miah and the Assignee as tenants in common in equal shares.

[50] This approach assumes that because the Policy was owned by two separate persons, the benefit that was payable under it was to be divided equally between those two persons. That approach leaves no room for the analysis that, while the Policy was owned by two spouses, it was over the life of one of them and the intention was that, if that spouse died, the proceeds of the Policy would go to the surviving spouse, the husband.

[51] Who owned the Policy is of paramount importance on this approach. The approach is inconsistent with the analysis I have adopted in regard to the first cause of action which holds that the right to the proceeds on the occurrence of the wife's death rested with the husband. That right, which was inchoate on the date when the bankruptcy order was made, translated into a right to a claim under the Policy on the death of the wife at a point when the husband was still bankrupt.

Severance of joint interest

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22 *Re Ingram* [1933] NZLR 219 (SC).

[52] A joint tenancy can be brought to an end by severance. It is clear that one of the actions that can cause severance is an assignment. The statutory assignment that takes place when an assignee on bankruptcy is appointed can have this effect:[23]

> Before I turn to consider the current insolvency legislation I should mention briefly the manner in which a beneficial joint tenancy can be severed: (1) by an act of one of the joint tenants operating on his own interest so as to sever it. This might be voluntary or involuntary alienation; (2) by mutual agreement; (3) by a course of dealing sufficient to intimate that the interests were to be treated as tenants in common (see generally Williams v Hensman (1861) 1 John & H 546 at 557, 70 ER 862 at 867 and Burgess v Rawnsley [1975] 3 All ER 142, [1975] Ch 429); to which can be added (4) the statutory method of notice in writing under s 36(2) of the Law of Property Act 1925
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> It was common ground before us that under the previous bankruptcy legislation the bankruptcy of a living joint tenant caused a severance, since the bankruptcy operated as an involuntary alienation of his severable share.

[53] The authority for that proposition, *Re Palmer*, was a case of a joint tenancy of realty. It was decided under the relevant United Kingdom statute.[24]

[54] The proposition that an appointment of an Assignee effected an assignment of a chose in action was accepted in *Performing Right Society Ltd v Rowland*, a case where the entitlement in question was to royalties from writing songs.[25]

[55] The point is discussed in Heath and Whale as follows:[26]

> 4.51 Severance of Joint Interest
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> It has long been understood and was reaffirmed in *Re Dennis* that where any sort of property is owned by joint tenants (ie joint ownership rather than as tenants-in-common) the bankruptcy of one of the owners operates to sever the joint tenancy. The effect of this is that the property does not pass by survivorship to the other joint tenant, but transforms the joint ownership so that property is held by both tenants as tenants-in-common…

[56] *Re Dennis* was a case about a husband and wife who owned two properties as beneficial joint tenants.[27] Prior to the death of the wife, the creditor presented a bankruptcy petition on the husband and, after the wife's death, a receiving order was

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23 *In re Palmer* [1994] 3 All ER 835 (CA).
24 Insolvency Act 1986.
25 *Performing Right Society Ltd v Rowland* [1997] 3 All ER 336 (Ch).
26 P Heath & M Whale (eds) Heath & Whale on Insolvency (looseleaf ed, LexisNexis) at [4.51].
27 *Re Dennis* [1992] 3 All ER 436 (Ch).

made against the husband and he was adjudicated bankrupt some months later. The question was whether the beneficial joint tenancy had been severed before the wife's death or after her death so that, at the time of her death, the two properties were owned by the husband and wife in equal shares (her shares being passed to the children under her will). It was held that the adjudication of the husband as bankrupt after the death of his wife did not have the effect of retrospectively severing the joint tenancy before her death. Thus the conclusion was that the husband, as the surviving joint tenant, was entitled to the whole beneficial interest in both properties which vested in the trustee in bankruptcy on adjudication.

[57] So, to summarise, it would appear that the statutory assignment that occurs on bankruptcy can result in the severance of jointly held property.

[58] But, as the decision in *Murphy* and cases that followed it makes clear, whether or not adjudication on bankruptcy has the effect described in Heath and Whale is dependent upon the nature of the interest held.

[59] In the present case, having regard to the conclusions I have reached (that it was not the contractual intention of the parties to the Policy for the successors of Mrs Miah to receive part of the payment), there was no joint tenancy in place which could be severed by the adjudication on bankruptcy of Mr Miah. Nor can it have been intended that the bare rights of enforcing the Policy would be passed to her personal representatives to exercise in conjunction with that of Mr Miah.

[60] For the foregoing reasons, I conclude that the second cause of action cannot succeed.

Third cause of action

[61] This cause of action appears to be based upon a contention that the cause of action arising under the Policy constitutes a claim which is personal to the bankrupt and which therefore lies outside the scope of property rights which are assigned to the Assignee by operation of law on adjudication. Therefore, assuming that my conclusions with respect to the first and second causes of action are correct, that is

still not the end of the matter because Mr Miah claims that, even if he did acquire part or the entirety of the right to claim the proceeds of the Policy, he retains those personally and they do not belong to the Assignee in his bankruptcy.

The personal property argument

[62] From the starting point, it was asserted that the claim which the plaintiff brings is partly to recover compensation for harm to interests which are personal to the bankrupt. In Mr Hooker's submission, the Policy is able to be viewed in the circumstances of this case as insurance for loss of a wife and companion. The right to bring such a claim thus does not fall into the estate of the bankrupt.

[63] Reference was made to *Mulkerrins v Pricewaterhouse Coopers*.[28] The governing principle is stated by the authors of Heath and Whale in the following way:[29]

> Therefore, a bankrupt's right of action does not pass to the Official Assignee where the damages are to be estimated by an immediate reference to pain felt by the bankrupt in respect of his or her body, mind or character. It has been held that the Official Assignee cannot sue for, criminal conversion, defamation, battery, or injury to the person by negligence.

[64] The contract for life insurance is not of this category. A contract of life insurance may be defined as a contract under which the insurers undertake, in consideration of specified premiums being continuously paid throughout the life of a particular person, to pay a specified sum of money upon the death of that person.[30]

[65] The source of the rights of parties to life insurance policies is to be found in the law of contract. The contract is contingent only upon the death of the person nominated in the policy. The obligation to pay is not dependent upon proof of personal anguish, stress, grief anxiety or any other matter that could lend to the claim elements of a personal nature. No doubt, the circumstances in which rights under the contract crystallise also happen to coincide with experience of the various personal

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28 *Mulkerrins v Pricewaterhouse Coopers* [2003] UKHL 41.

29 Above n 27, at [4.26].

30 *Halsbury's Laws of England* Insurance (online looseleaf ed, LexisNexis, 2011) vol 60 Insurance at [476], citing *Dalby v India and London life assurance Co* (1854) 15 (CB) 365, Ex Ch at 387.

responses just described. But the obligation to pay is not in any way contingent upon such matters being proved.

[66] It follows that the plaintiff cannot succeed in establishing that the rights under the life insurance contract are personal to him and therefore do not pass to the Assignee on adjudication. As well, assuming that ownership of the Policy was severed on adjudication, the right of ownership of the Policy (which is substantively for his personal benefit rather than being one which he holds for another beneficially interested person) can only be enforced by Mr Miah's personal representative, the Assignee.

[67] The matters raised under the personal property argument do not assist the plaintiff.

Fourth cause of action

[68] The fourth cause of action asserts that the Policy was personal to the life of the deceased and payable on her death to the plaintiff. It alleges that the Assignee has a statutory obligation to pay the liabilities of the estate which, in this case, totaled $1,035,609.34. It then alleges that the surplus was to be held on trust for the bankrupt. The following allegation is made:

> 48. The defendant if it had paid to the official assignee the policy money and the interest the official assignee after paying the creditors of the plaintiff together with any interest and deducting costs in accordance with the provisions of the Insolvency Act 2006 would have paid the surplus of approximately $1 million to the plaintiff

[69] The submission for the plaintiff in this regard was as follows:

> 44. The [fourth] cause of action pleads that the Plaintiff always had an equitable interest in the Policy even if the legal interest is owned by the OA.
>
> 45. The evidence before the Court is that the value of the Policy exceeded the creditor's claims. Any surplus estate must be paid to the bankrupt[31]. That is a statutory provision and is mandatory. The Plaintiff asserts a right to the surplus. The creditors were known. It is correct that the Court does not know what the costs were of the

[31] Insolvency Act 1967, s 104

> OA but it is reasonable to accept that they would not be in excess of $1,000,000.00 for the administration of an estate. If the costs of the OA were considered to be unreasonable then the bankrupt has rights of appeal.[32]

[70] Mr Miah can only sue the insurance company if he is the owner of the contractual rights which would be the foundation for such a claim. As I have previously stated, those rights were assigned by operation of law to the Assignee. The Assignee has not availed himself of the right to sue the insurance company in right of Mr Miah. Apparently, his view is that the insurance company has substantial grounds of defence available to it arising from the asserted non-disclosure of the Miahs true financial circumstances under the Policy. Because of this factor, the Assignee considers there is a risk of substantial costs orders being made against Mr Miah in the event that the Policy is assigned to him and the defendant is unsuccessfully sued. He would have been prepared to agree to an assignment if there was what he regarded adequate security provided against the eventuality of costs orders being made but the parties were unable to come to agreement in that regard. He therefore declined to consent to the assignment of the Policy to Mr Miah.

[71] The submission which is made for the plaintiff is essentially that because he has an equitable interest in the legal right that the Assignee has against the insurance company, he can sue the insurance company, himself, without any intermediate step being taken such as an assignment to him of the legal right. No authority is referred to as supporting such a right to sue. I do not consider that there is any such right. The contentions which are made on behalf of Mr Miah are inconsistent with s 42 of the Act which brings about a statutory assignment of the property of the bankrupt, including choses in action.

[72] Plainly, the Act does not contain any entitlement for an ex-bankrupt in the position of the plaintiff to require a re-assignment. The obligations of the Assignee are, in part, headed under s 104 of the Act. So far as relevant, it provides:

> **104 Priorities**

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[32] Insolvency Act 1967, s 226.

> Subject to the provisions of this section and to any other enactment, the money received by the Assignee by the realisation of the property of the bankrupt shall be applied by him as follows:
>
> …
>
> j) tenthly, … in payment to the bankrupt of any surplus;

[73] There is no statutory provision that governs the circumstances in which property can be assigned from the Assignee back to the bankrupt.

[74] Mr Miah wished to have the Policy assigned to him but the parties were not able to agree on the conditions subject to which that would occur. In the end, the Assignee declined to make the assignment that Mr Miah sought and Mr Miah unsuccessfully challenged that decision, pursuant to s 86 of the Act. The decision of the Assignee was upheld in a judgment of this Court, delivered on 21 October 2013.[33] Mr Miah, as a party to the judgment in that case, is bound by the result, of course. He cannot compel the Assignee to transfer the Policy back to him. He cannot sue without that first having occurred.

[75] Those considerations are a complete answer to this cause of action.

Fifth cause of action

[76] The fifth cause of action asserts that the plaintiff acquired full ownership of the Policy as a result of the alleged abandonment of any property that the Assignee had in the Policy.

[77] For the reasons noted in paragraph [70] of this judgment, it seems clear that, as matters stand, there is no prospect of the Assignee taking steps to sue on the Policy.

[78] The submission is therefore made for the plaintiff that the effect of the actions of the Assignee has been to abandon the Policy, meaning it is no longer to be regarded as his property. The submission then proceeds on the assumption that, if

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[33] *Miah v Official Assignee*, above n 1.

the Assignee has abandoned the Policy, the plaintiff must have a right to take it over as the owner.

[79] However, this is not a case where a party has expressly abandoned a right. To the contrary, the Assignee has stated that the rights under the Policy have not been abandoned. Any argument that there has been an abandonment is seen as arising implicitly from the fact that the Assignee would not agree to enforce the rights in the Policy other than on terms that did not prove acceptable to the plaintiff. This does not give rise to a reasonable inference that he intended to abandon the Policy.

[80] It is quite inconsistent with such being the intention of the Assignee when he had made it clear that he would only cooperate in attempts to enforce the Policy on certain stated conditions. It is not arguable that by not agreeing to the conditions upon which the plaintiff wished to take an assignment of the Policy, that the Assignee is to be taken to abandon any rights in the Policy. That is not a logical inference to be drawn from his actions. It is still less arguable when it is considered that, if the argument were correct, the effect of the failure of the Assignee to agree with Mr Miah on the terms on which the Policy should be assigned would have resulted in the plaintiff getting what he wanted anyway, which is an unrestricted right to enforce the Policy in his own name. I therefore consider that the first part of the argument fails.

[81] There is another difficulty of this cause of action which relates to the issue of whether the plaintiff can argue that the chose in action continued in existence even after it was abandoned. I do not accept that is possible having regard to the authority of *Edmonds Judd v Official Assignee*.[34] In that case, a concession had been made by the parties in the High Court to the effect that an Assignee could divest himself of property either by way of the disclaimer procedure contained in s 75 of the Insolvency Act 1967 or by way of abandonment of the chose in action which was the subject of discussion. It further seems to have been common ground of the parties in the High Court that, as a result of abandonment by the Assignee, it was open to the bankrupt to avail himself of a chose in action that he had which would otherwise be vested in the Assignee.

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[34] *Edmonds Judd v Official Assignee* [2000] NZLR 135 (CA).

[82] The Court of Appeal judgment made it clear that it did not necessarily agree with the approach taken in the High Court. It was of the view that it was questionable that, under the scheme of the Act, there was any room for a non-statutory means for the Assignee to divest himself of a chose in action by abandonment which was a separate process from the established statutory right of disclaimer of onerous property. While the Court of Appeal accepted that in the case of physical property, or choses in possession, abandonment could lead to a third party acquiring rights, the position could well be otherwise in the case of choses in action. It was more likely, the Court said, that, on abandonment, a chose in action ceased to exist.

[83] In my respectful view, the approach outlined in the Court of Appeal judgment must be correct.

[84] I respectfully agree with the following statement of the law in Garrow and Fenton's *Law of Personal Property in New Zealand*:[35]

> The phrase "chose in action" or "thing in action" has appeared in English Law over the centuries but its history has been a developing one. Its usage has differed but the meaning adopted here is its extended sense: a thing which "you must bring an action to realise, a thing which you cannot take but must go to law to secure". The usage adopted here, which is, it is submitted the prevailing one in contemporary terms, is that it covers all rights regarded as property enforceable only by action in the courts.

[85] Further, no authority has been cited which establishes that the principles which govern the ability to acquire ownership by taking possession of an abandoned chose in possession or chattel have been extended beyond that class of property. Indeed, given the intangible nature of choses in action, it is impossible to envisage how one party might abandon such an article of property and another take possession of it.

[86] No authority has been cited which supports the proposition that the failure of A to take proceedings for breach of a contract with B opens the door to C, or any

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[35] Roger Tennant Fenton *Garrow and Fenton's Law of Personal Property in New Zealand* (7th ed, LexisNexis Ltd, Wellington, 2010) at [9.1].

other party putting himself forward, as a legitimate claimant who is able to enforce his newly acquired right by action. This is what Mr Miah wishes to do.

[87] However, from the point where any interests that he had in the Policy were statutorily assigned to the Assignee, the plaintiff had no right to enforce the insurance contract. He was no different from any other person and has the same absence of rights as other persons generally in the contract.

[88] Unless the person claiming ownership establishes his connection to the original circumstances in which the chose in action first came into existence, or a valid assignment from some other person who is able to establish that matter, he will have no rights. The conclusion must be that the plaintiff is not able to demonstrate why he has a right to enforce the contract.

[89] I have made no reference thus far to the evidence of the Assignee that there was no intention to abandon the claim. It may be that such evidence would also assist the case for the defendant but it is not necessary to decide this issue on factual grounds when, as a matter of law, the plaintiff is unable, even had there been an abandonment, to show that the right to sue had accrued to him.

[90] It follows that the defendant is entitled to summary judgment in regard to this cause of action as well.

Sixth cause of action

[91] The plaintiff seeks a declaration that the defendant took the wrong approach to assessing the claim which he made under the Policy and wrongly declined it.

[92] In my view, it is unarguable that the Plaintiff has a right to a declaration of this kind. The plaintiff has no right to enforce the Policy. The contractual rights to take that step have vested in the Assignee.

[93] As such, the Assignee owns the chose in action, that is the Policy, and it is he who would be beneficially entitled to the proceeds should a successful claim be made under the Policy.

Conclusion

[94] The plaintiff and his late wife were the legal owners of the Policy. However, the contractual intention of the parties to the Policy was that, on the death of the wife, the proceeds of a successful claim under the Policy would be payable to the husband.

[95] On the bankruptcy of the husband in April 2007, and prior to the death of the wife, the owners of the Policy became the wife and the Assignee. However, the only party who could benefit from a successful claim under the Policy would remain the plaintiff. That circumstance was not affected by reason of the statutory assignment of the Policy to the Assignee.

[96] After the death of the wife, it seems likely that the Policy was acquired by the Assignee in right of the bankrupt who was the survivor of the two joint owners of the Policy.

[97] In any event, the right to any benefit under the Policy, by whoever enforced it as owner, resided with the plaintiff. Any expectation that he had to benefit as a result of the Policy was plainly "property" as defined in s 2 of the Act. The contingent right to benefit under the Policy before the death of the wife, and the vested right that was the plaintiff's from the date of her death, passed to the Assignee. There it has rested since. It was not within the power of the plaintiff to re-acquire this right from the Assignee. All of the claims which the plaintiff brings must fail because they are based upon the position that is inconsistent with the foregoing findings.

[98] Because of the conclusions I have come to, the defendant must be entitled to summary judgment on all of the plaintiff's claims. There is therefore no need for the Court to consider the alternative basis for relief pursuant to the strike-out applications which the defendant has brought as an alternative procedure for seeking judgment.

[99] The parties should confer on the matter of costs and if they are unable to agree they are to file memoranda not exceeding five pages on each side within 10 working days.

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J.P. Doogue
Associate Judge