In The Supreme Court Of Bermuda

COMMERCIAL COURT

COMPANIES (WINDING UP)

2020: No 306

IN THE MATTER OF PB LIFE AND ANNUITY CO., LTD

AND IN THE MATTER OF THE COMPANIES ACT 1981

AND IN THE MATTER OF THE INSURANCE ACT 1978

Before: The Hon. Chief Justice Hargun

Appearances: Mr David Chivers KC and Mr Rhys Williams of Conyers Dill & Pearman Limited for Universal Life Insurance Company

Mr David Scorey KC and Ms Victoria Greening of Resolution Chambers for Colorado Bankers Life Insurance Company, Bankers Life Insurance Company, Southland National Reinsurance Corporation and Southland National Insurance Corporation

Mr Michael Todd KC and Ms Katie Tornari of Marshall Diel & Myers Limited for the Joint Provisional Liquidators of PB Life and Annuity Co., Ltd

Mr Matthew Mason and Ms Kehinde George of ASW Law Limited for the Bermuda Monetary Authority

Date of Hearing: 7 December 2022

Date of Judgment: 12 January 2023

JUDGMENT

Winding up of an insurer registered under the Bermuda Insurance Act 1978; whether an "insurance debt" owed to an overseas reinsured is required to be paid in priority under section 36A(2) of the Act; whether a reinsurance agreement between the Bermuda insurer and an overseas reinsured is an "insurance contract" pursuant to sections 36 and 36A of the Act; whether a debt owing under the reinsurance agreement constitutes an "insurance debt" within the meaning of sections 36 and 36A of the Act

HARGUN CJ

Introduction

1. PB Life and Annuity Co., Ltd. ("**the Company**") is a company incorporated in Bermuda pursuant to the Companies Act 1981 and is registered as an insurer under the Insurance Act 1978 ("**the Act**"). On 18 September 2020, the Bermuda Monetary Authority ("**the BMA**") presented a petition for the winding up of the Company ("**Petition**") on the grounds that the Company was cash flow insolvent under the provisions of section 161 and 162 of the Companies Act 1981 and further on the basis that the Company had failed to comply with the statutory filing requirements in recent years. The Company was placed into provisional liquidation by Order of the Court dated 25 September 2020, appointing Ms. Rachelle Frisby and Mr. John Johnston as the Joint Provisional Liquidators ("**JPLs**"). The hearing of the Petition has been adjourned a number of times and remains outstanding.

2. The Company is the reinsurer of a sole cedent, Universal Life Insurance Company ("**ULICO**"), a life insurance company licensed in and domiciled in Puerto Rico, offering (amongst other things) life insurance, annuities, and investments to members of the public in Puerto Rico. Pursuant to a Coinsurance Reinsurance Agreement between ULICO and the Company entered into on 30 June 2017 ("**the Reinsurance Agreement**"), the Company agreed to reinsure a substantial majority of ULICO's insurance liabilities.

3. By summons dated 27 April 2022 ("**Summons**"), ULICO seeks an order declaring that:

   (1) The Reinsurance Agreement between ULICO and the Company is an "*insurance contract*" pursuant to sections 36 and 36A of the Act.

   (2) A debt owing to ULICO pursuant to Article II of the Reinsurance Agreement is an "*insurance debt*" pursuant to sections 36 and 36A of the Act.

   (3) In a winding up of the Company, an "insurance debt" owed to ULICO would be paid in priority to all other debts of the Company save for "*preferential debts*" (as defined in the Act).

4. The declaratory relief sought by ULICO is supported by an affidavit filed by Mr. Jose Benitez, President of ULICO, dated 11 March 2022. In that affidavit Mr. Benitez states that an issue has arisen in the provisional liquidation as to whether or not, in a liquidation, ULICO would have priority over other creditors under the provisions of the Act. Mr. Benitez explains that this priority question is of fundamental importance to ULICO and also to the provisional liquidation process more generally.

5. By Order dated 6 May 2022, the Court ordered that any other interested party wishing to appear at the hearing of the summons to oppose the application should notify the JPLs of such intention by no later than 1 June 2022.

6. By Notice of Intention to Appear and Oppose dated 23 June 2022, Colorado Bankers Life Insurance Company; Bankers Life Insurance Company; Southland National Reinsurance Corporation; and Southland National Insurance Corporation ("**the NC Companies**") gave notice of their intention to oppose the application of ULICO made in the Summons dated 27 April 2022. This Notice stated in paragraph 1 that "*For the avoidance of any doubt the Companies do **not** submit to the jurisdiction of the Supreme Court of Bermuda and are **not** to be taken as so doing in any way, whether as a consequence of their objection to (or other participation in) the Summons, or otherwise... Their participation in the Summons involves no assertion of any private right which the Companies may have against PBLA, still less any attempt to enforce any such right. Their participation in the Summons is contemplated strictly and solely as an attempt to assist the Supreme Court of Bermuda in circumstances where, absent such assistance, another party (or an amicus curiae) would necessarily be required to provide it instead.*"

Statutory provisions governing priority of insurance debts

7. The general rules governing the priority of creditors in a winding up of a company are contained in section 236 of the Companies Act 1981 which provides for the following waterfall of priority:

Preferential payments

236 (1) In a winding up there shall be paid in priority to all other debts—

(a) all taxes owing to the Government and rates owing to a municipality at the relevant date;

(b) *all wages or salary, whether or not earned wholly or in part by way of commission or whether payable for time or piece work of any employee of the company in respect of services rendered to the company during four months next before the relevant date;*

(c) *all accrued holiday remuneration becoming payable to any employee, or in the case of his death to any other person in his right, on the termination of his employment before or by the effect of the winding-up order or resolution;*

(d) *unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation or of merger with another company, all amounts due in respect of contributions payable during the twelve months next before the relevant date by the company as the employer of any persons under the Contributory Pensions Act 1970 or any contract of insurance;*

(e) *unless the company is being wound up voluntarily merely for the purposes of reconstruction or of amalgamation or of merger with another company, or unless the company has, at the commencement of the winding up, under a contract with insurers capable of being transferred to and vested in the workman, all amounts due in respect of any compensation or liability for compensation under the Workmen's Compensation Act 1965 , being amounts which have accrued before the relevant date.*

8. It is common ground that section 236 is not an exhaustive statement of the law where the company is registered as an insurer under the Act. Part VII of the Act, as Mr. Todd KC correctly submits, modifies this waterfall in the event of the insolvency of certain insurance companies. Part VII makes specific provision for the winding up of insurers, and for the priority of payment of certain liabilities on the winding up of insurers.

9. The relevant provisions for determining the present application by ULICO are sections 36 and 36A of the Act. The previous section 36 was repealed and substituted with effect from 30 July 2018 by paragraph 7 of the Insurance Amendment (No 2) Act 2018. Paragraph 8 of the same Act inserted a new section 36A with effect from the same date.

10. Section 36A of the Act provides as follows:

Winding up of insurers

(1) This section applies in the case of a winding up under the Companies Act 1981 of—

(a) an insurer which was carrying on or entitled to carry on only long-term business;

(b) an insurer which was carrying on or was entitled to carry on only general business;

(c) a section 24(6) composite insurer; or

(d) a composite insurer, where the long-term business of the composite insurer has been or is to be transferred as a going concern to another long-term insurer in accordance with section 37.

(2) Subject to subsection (3) and to rules made by virtue of section 40, and subject to the prior payment of Employment Act preferential debts and Companies Act preferential debts, the insurance debts of the insurer must be paid in priority to all other debts of the insurer.

(3) The insurance debts of an insurer shall rank equally among themselves and be paid in full unless the assets of the insurer are insufficient to meet them, in which case they abate in equal proportions.

11. Section 36(11) provides that:

"For the purposes of this Part-

*"**Companies Act preferential debts**" means the debts mentioned in section 236(1) (a), (b), (c), (d) and (e) of the Companies Act 1981;*

...

*"**Employment Act preferential debts**" means the debts mentioned in section 33(3) (a), (b) and (c) of the Employment Act 2000;*

*"**insurance contract**" means any contract of insurance, capital redemption contract or a contract that has been recorded as insurance business in the financial statements of the insurer pursuant to the Insurance Accounts 1980 or the Insurance Account Rules 2016, as applicable;*

*"**insurance debt**" means a debt to which an insurer is or may become liable pursuant to an insurance contract, excluding debts owed to an insurer under an insurance contract where the insurer is the person insured;"*

12. Section 1(1) of the Act provides that *"**insurance business**" means the business of effecting and carrying out contracts— (a) protecting persons against loss or liability to loss in respect of risks to which such persons may be exposed; or (b) to pay a sum of money or render money's worth upon the happening of an event, and **includes re-insurance business**"* (emphasis added).

Position of the parties in relation to the issues raised in the Summons

13. As noted above, the declaratory relief sought by ULICO in terms of paragraphs 2 and 3 of the Summons dated 27 April 2022 is opposed by the NC Companies. The NC Companies oppose an order declaring that a debt owing to ULICO pursuant to Article II of the Reinsurance Agreement is an "*insurance debt*" pursuant to sections 36 and 36A of the Act; and that in a winding up of the Company, such an "*insurance debt*" owed to ULICO pursuant to Article II of the Reinsurance Agreement would be paid in priority to all other debts of the Company save for "*preferential debts*" (as defined in the Act).

14. The JPLs appointed by the Court have taken a neutral position in relation to the relief sought in the Summons. Likewise, the BMA made no submissions of its own on the interpretation of sections 36 and 36A of the Act as it considered that these are properly left to ULICO and the NC Companies. In the written submissions filed on its behalf, the BMA made certain observations in relation to the legislative history of sections 36 and 36A of the Act.

Issue 1: whether the Reinsurance Agreement between ULICO and the Company is an "*insurance contract*" pursuant to sections 36 and 36A of the Act?

15. Both ULICO and the NC Companies submit that the Reinsurance Agreement between ULICO and the Company is an "*insurance contract*" pursuant to sections 36 and 36A of the Act. This position is also accepted and supported by the BMA.

16. As noted earlier, section 36(11) defines an "*insurance contract*" as "*any contract of insurance, capital redemption contract or a contract that has been recorded as insurance business in the financial statements of the insurer pursuant to the Insurance Accounts 1980 or the Insurance Account Rules 2016, as applicable.*" Mr. Scorey KC emphasised that what constitutes an "*insurance contract*" is dependent upon what has been recorded as "*insurance business*".

17. The reference to "*insurance business*" in section 36(11) is, in turn, defined by section 1(1) as "*... the business of effecting and carrying out contracts - (a) protecting persons against loss or liability to loss in respect of risks to which such persons may be exposed; or (b) to pay a sum of money or render money's worth upon the happening of an event,* ***and includes re-insurance business***." (Emphasis added).

18. The Court accepts the submission made by Mr. Chivers KC and Mr. Scorey KC that in light of this definition of "*insurance business*" in section 1(1) of the 1978 Act, it is apparent that the phrases "*insurance contract*" and "*insurance business*" are defined expansively, and both include reinsurance. Accordingly, the Court makes an Order declaring that the Reinsurance Agreement between ULICO and the Company is an "*insurance contract*" pursuant to sections 36 and 36A of the Act.

Issue 2: whether a debt owing to ULICO pursuant to Article II of the Reinsurance Agreement is an "*insurance debt*" pursuant to sections 36 and 36A of the Act?

19. As noted earlier, section 36(11) of the Act provides that the expression "***insurance debt***" means a debt to which **[A] an insurer** is or may become liable pursuant to an insurance contract, excluding debts owed to **[B] an insurer** under an insurance contract where **[C] the insurer** is the person insured. Thus, the word "insurer" appears three times in the definition of "*insurance debt*".

20. Mr. Chivers KC for ULICO submits that it is clear that reference [A] is to the insolvent insurer, which in this case is the Company. He says it is equally clear that reference [B] is to the insurer that is a creditor claiming in the winding up, which in this case is ULICO. The question for the determination for the Court is whether reference [C] "*the insurer*" means the creditor claiming in the winding up or means the insolvent insurer itself.

21. Mr. Chivers KC submits that either interpretation produces a rational result. If the Legislature intended [C] to mean the creditor claiming in the winding up then the effect will be to exclude reinsurance contracts from the ambit of the statutory priority. He says that this is a possible (and rational) outcome, being for example the position adopted in the UK under regulation 2(4) of the Insurers (Reorganisation and Winding Up) Regulations which provides that "*for the purposes of these Regulations a contract of insurance does not include a reinsurance contract.*" If the Legislature intended [C] to mean the insolvent insurer then the outcome is also rational. Debts owed by the insolvent insurer under an insurance contract - for example unpaid premium payments - would be excluded from the statutory priority. Mr. Chivers KC submits that there is no doubt that the expression [C] "*the insurer*" is ambiguous and the task for the Court is to discern the legislative intent.

22. Mr. Scorey KC agrees that it is clear that [A] is the liquidating insurer and that [B] must be another insurer, being a creditor of [A]. However, Mr. Scorey KC submits that as a matter of language, [C] ("*the insurer*") can be a reference back either to [A] (the insurer in liquidation) or to [B] (the insurer creditor). He submits that this linguistic feature gives rise to two complementary readings of the exclusory carve-out, depending on whether the liquidating insurer [A] is the cedent of the reinsurer under the relevant reinsurance contract. In cases where [C] refers back to [A] (the insurer in liquidation), the excluded debt will be the liability of cedent [A] to pay, for example, reinsurance premium to reinsurer [B] under a contract of insurance (between cedent [A] and reinsurer [B]). In cases where [C] refers back to [B], the excluded debt will be the liability of reinsurer [A] (the Company) to pay out in respect of insurance liabilities ceded to it by cedent [B] (ULICO) under a contract of reinsurance (between cedent [B] and reinsurer [A]).

23. Mr. Scorey KC submits that this is not a case where the Court has to choose between two rival interpretations of the statutory language. Rather, he submits, the statutory language is capable of being read in two discrete ways depending on which of [A] or [B] happens to be the cedent and which the reinsurer in any given case. In both scenarios, he contends, the liability owed by [A] to [B] under a contract of reinsurance is excluded from the definition of "*insurance debt*".

24. The applicable principles of statutory interpretation under Bermuda law are summarised in the judgment of this Court in *Re Jardine Strategic Holdings Ltd* [2022] SC (Bda) 27 Com at [44]. For present purposes it is sufficient to note that the sole object of statutory interpretation is to arrive at the legislative intention. 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] HKHL 51 at [28]). The general rule is that it is impermissible to look at Parliamentary material to discern the intention of Parliament.

25. The above general principles are subject to the exception that where the legislation is ambiguous or obscure or leads to an absurdity the Court may consider Parliamentary material as an aid to construction of the statutory provision. The rationale and scope of this exception is set out in the judgment of Lord Browne-Wilkinson in *Pepper v Hart* [1993] AC 593 at 634F-635B and 640C:

"*... It is an inescapable fact that, despite all the care taken in passing legislation, some statutory provisions when applied to the circumstances under consideration in any specific case are found to be ambiguous. One of the reasons for such ambiguity is that the members of the legislature in enacting the statutory provision may have been told what result those words are intended to achieve. Faced with a given set of words which are capable of conveying that meaning it is not surprising if the words are accepted as having that meaning. Parliament never intends to enact an ambiguity. Contrast with that the position of the courts. The courts are faced simply with a set of words which are in fact capable of bearing two meanings. The courts are ignorant of the underlying Parliamentary purpose. Unless something in other parts of the legislation discloses such purpose, the courts are forced to adopt one of the two possible meanings using highly technical rules of construction... Why in such a case should the courts blind themselves to a clear indication of what Parliament intended in using those words. The court cannot attach a meaning to words which they cannot bear, but if the words are capable of bearing more than one meaning why should not Parliament's true intention be enforced rather than thwarted?*

...

I therefore reach the conclusion, subject to any question of Parliamentary privilege, that the exclusionary rule should be relaxed so as to permit reference to Parliamentary materials where (a) legislation is ambiguous or obscure, or leads to an absurdity; (b) the material relied upon consists of one or more statements by a Minister or other promoter of the Bill together if necessary with such other Parliamentary material as is necessary to understand such statements and their effect; (c) the statements relied upon are clear."

26. The Court is satisfied that the meaning of "*insurance debt*" and in particular the words "*excluding debts owed to an insurer under an insurance contract where the insurer is the person insured*", in section 36(11), is indeed ambiguous or obscure. The mere fact that on one possible interpretation, as contended for by Mr. Scorey KC, the differing meaning of the expression "*the insurer*" leads to two "*complementary*" readings does not mean that the provision is not ambiguous or obscure. The fact remains that the interpretation of "*insurance debt*" contended for by Mr. Chivers KC (the *alternative* meanings of the expression "*the insurer*") is another possible interpretation and the Court has to decide which interpretation represents the legislative intention. In the circumstances, the Court is satisfied that it is permissible for the Court to look at Parliamentary material to see if members of the Legislature were advised by the Minister as to the result which was intended to be achieved by the statutory provision.

27. The Court was provided with the Hansard Report for 20 July 2018 which records the statement made by Hon. E. David Burt, the Premier and the Minister of Finance, to the members of the House of Assembly, on the second reading of the Insurance Amendment (No.2) Act 2018:

"*Mr Speaker, I am pleased to present to this Honourable House the Bill entitled the Insurance Amendment (No. 2) Act 2018. This Bill seeks to amend the Insurance Act 1978, which I will refer to going forward as the principal Act, by making a number of changes to enhance the protection of members of the public who are insurance policyholders by introducing preferential treatment of the policyholders' liabilities ahead of the general creditors in the event of liquidation or winding up of the Bermuda insurer. Mr Speaker, for the winding up of an insurer this Bill introduces a new category of debt into the existing liquidation waterfall that is contained in the Companies Act 1981...*

Mr Speaker, the Bill will protect the policyholders by giving higher priority in the winding up of an insurer. ***The persons impacted would be all policyholders and would include***

insurance and reinsurance contracts for both domestic and overseas policyholders. Both retail and commercial insurance coverages are included. To be clear, this means all insurance policyholders." (emphasis added)

28. It seems reasonably clear that this statement by the Minister of Finance was understood by the Leader of the Opposition, the Honourable Jeanne J. Atherden to mean that the proposed legislation applied to reinsurance contracts. The Opposition Leader is recorded as stating:

"Mr Speaker, I think it is very important for us to recognise that, as the Premier and Finance Minister said, there has been consultation with the industry and these amendments have what I call a basis for making sure that some things that have happened in the past do not happen in the future, and, therefore many of the issues which have been of concern have been dealt with.

I think the thing that I found was very important, and I say this because anybody who is out there who has a policy with an insurer would be comforted by the fact that if you are a policyholder you are given higher priority. ***And also be aware that you also have the insurance and reinsurance contracts for domestic and overseas policyholders that are right up there as well.***

... the bottom line is that we want people to take out long-term contracts. ***We want people to, you know, have their life insurance, and their reinsurance, et cetera. But we also want to know that they are comfortable knowing that their position is protected.***" (emphasis added)

29. The statement made by the Minister of Finance reflects the sentiments expressed by the BMA in its Consultation Paper on Policyholder Protection, June 2017, where at paragraph 14 it is stated that:

"In this CP, the Authority is issuing a revised proposal for the preferential treatment of policyholders' claims ahead of general creditors and Bermuda Government in the event of the liquidation or winding up of a Bermuda insurer... The policyholder protection framework would include a simple priority in the payment of ***claims for policyholders including long-term and general business, insurance and reinsurance contracts for both domestic and overseas policyholders and would include retail and commercial insurance coverages***" (emphasis added).

30. Footnote 2 of the Consultation Paper recorded that "*References in this paper to insurers are intended to apply equally to reinsurers unless noted otherwise.*"

31. The Court is satisfied that the statement made by the Minister of Finance to the House of Assembly is clear that the proposed legislation intended to provide priority protection to all policyholders, both domestic and overseas, and intended to apply to both insurance and reinsurance contracts. Accordingly, the Court accepts Mr. Chivers KC's submission that, having regard to the clear statement made by the Minister of Finance, [C] "*the insurer*" cannot mean [B] "*an insurer*" or else reinsurance contracts would be excluded, contrary to the clear legislative intention.

32. The Court also accepts Mr. Chivers KC's submission that the statement made by the Minister of Finance also shows, clearly, that it is the *policyholders* to whom the protection is intended to be afforded. The priority is not intended to apply to a person simply because they have a claim under an insurance contract. It is the *holder* of the policy who has the priority and not the *issuer* of the policy. Accordingly, the Court accepts that [C] "*the insurer*" must mean [A] "*an insurer*", i.e. the insolvent insurer in its capacity as a policyholder and not as issuer.

33. Mr. Scorey KC points to the fact that the draft of the Bill annexed to the BMA Consultation Paper was in a completely different form. He says that the concept promoted by the BMA Consultation Paper in June 2017 apparently favoured conferring priority on debts owing under contracts of insurance *and* reinsurance alike. The amendments to the Act passed by the Insurance Amendment (No.2) Act 2018 were substantially different and, it is said, included a clear carve-out excluding debts owing under reinsurance contracts. Mr. Scorey KC argues that the fact that the text of the legislation regarding the priority waterfall changed in this way must reflect a corresponding shift in the intention of the Legislature away from the proposals in the BMA Consultation Paper and towards the approach protecting consumers only, as favoured in the UK.

34. The Court is unable to accept this submission. It is correct that the provisions of sections 36 and 36A of the Act are different from the draft Bill that was annexed to the BMA Consultation Paper. As pointed out in its written submissions, the BMA's recommended priority waterfall would have given policyholders priority over most existing preferential creditors, including priority over Government taxes. This was not acceptable to the Government. Instead, the priority of existing preferential creditors under the Employment Act 2000 and section 236 of the Companies Act 1981 remained unaffected by sections 36 and 36A. Otherwise, there is no perceptible shift in the intention of the Legislature away from the proposal in the BMA Consultation Paper and towards the approach protecting consumers. As noted earlier, the statement made by the Minister of Finance to the House of Assembly, borrowing the wording from the BMA Consultation Paper, made it clear that the proposed priority protection applied to both domestic and overseas policyholders and to both insurance and reinsurance contracts.

35. Mr. Scorey KC also points to the fact that the concept of an "*insurance debt*", which did not exist in the draft Bill annexed to the BMA Consultation Paper but appeared in the 2018 Bill, is borrowed from the English legislation. He says that there are clear points of similarity between the English 2004 Regulations and sections 36 and 36A of the Bermuda Insurance

Act 1978 (introduced in 2018). Mr Scorey KC referred to the definition and concept of "*insurance debt*" in Regulation 2(2) of the English legislation as "*a debt to which a UK insurer is, or may become liable, pursuant to a contract of insurance, to a policyholder or to any person who has a direct right of action against the insurer, and includes any premium paid in connection with the contract of insurance (whether or not that contract was concluded) which the insurer is liable to refund.*"

36. It seems reasonably clear that the concept of "*insurance debt*" in sections 36 and 36A is borrowed from the English legislation. However, there are significant differences. The English legislation expressly provides by Regulation 2(4) that "*for the purposes of these Regulations a contract of insurance does not include a reinsurance contract.*" In contrast, as noted earlier, the Minister of Finance made it clear in his statement to the House of Assembly that the proposed priority waterfall was intended to impact "*all policyholders and would include insurance and reinsurance contracts.*"

37. Finally, Mr. Scorey KC noted that the draft bill to the BMA Consultation Paper provided for priority in respect of "*all prepaid premium amounts made by a policyholder prior to the inception of the contract of insurance.*" He says that this provision in the draft Bill is inconsistent and contrary to what Mr. Chivers KC contends is the purpose of the legislative provisions set out in sections 36 and 36A. The Court does not consider that there is any necessary inconsistency. The provision in the draft bill is dealing with prepaid premium amounts by a policyholder to an insolvent insurer/reinsurer. Mr. Chivers KC contends that sections 36 and 36A do not contemplate that priority be given to unpaid premiums payable by the insolvent insurer to its reinsurer. Mr. Chivers KC correctly submits that debts arising under a contract of insurance, but which are *not owed* by the insolvent insurer *in the capacity of insurer* have no logical place in a scheme of priority which is intended to benefit insureds.

The Mischief Rule

38. Even if the Court had concluded that it was not entitled to review the Parliamentary material under the exception set out in *Pepper v Hart*, the Court would have been entitled to consider the available material for the purposes of ascertaining the mischief against which the legislative provision was intended to protect. The decision of the Privy Council in *The Presidential Insurance Company Limited v Resha St Hill* [2012] UKPC 33 makes it clear that the use of the Parliamentary material to identify the mischief at which the legislation was directed is permissible even if the separate exception recognised in *Pepper v Hart* does not apply. At [23]-[24] Lord Mance held:

"23. The respondent submits that assistance can, however, be obtained as to the general background and as to the mischief which the legislation was addressing by looking at the reports of the proceedings in Parliament: see e.g. Gopaul v Iman Bakash [2012] UKPC 1, para 3 per Lord Walker, and R (Jackson) v. Attorney General [2005] UKHL 56, [2006] 1 AC 262, para 97 per Lord Steyn. But Lord Steyn was careful to distinguish this principle from the more radical separate principle recognised in Pepper v Hart [1993] AC 593. He said of the former principle that "the use of Hansard material to identify the mischief at which legislation was directed and its objective setting" was permissible, but that "trying to discover the intentions of the Government from Ministerial statements in Parliament is constitutionally unacceptable". The separate principle in Pepper v Hart [1993] AC 593 only allows a court to have regard to go further in looking at statements in Parliament where (a) legislation is ambiguous or obscure or leads to absurdity, (b) the Parliamentary material relied upon consists of one or more statements by a minister or other promoter of a bill together with such other statements and material as are necessary to understand such statements and (c) the statements relied upon are clear.

24. It is therefore permissible as a first step to look at Hansard to try to identify the mischief at which the amendment of s.4(7) was aimed and its objective setting."

39. Again, it is clear from the statement made by the Minister of Finance to the House of Assembly that one of the objectives of the legislation under consideration was to ensure that the reputation of Bermuda, as an international financial centre, was not damaged by the lack of protection provided to the overseas policyholders in the event of insolvency of the Bermuda insurer. In this regard the Minister of Finance is recorded as having said:

"*In the event of an insurance failure, policyholders may be disadvantaged socially and economically if the insurer is unable to satisfy its obligations. Mr. Speaker, ultimately such failures can undermine confidence in the insurance industry and potentially have adverse effects on the wider financial system. The failure and winding up of a significant Bermuda insurer without adequate protection of policyholders could damage the jurisdiction's reputation and undermine the supervisory regime. Therefore, it is of utmost importance to have a policyholder regime in place.*

...

Mr. Speaker, as a well regarded financial centre and a leading insurance centre, Bermuda and the BMA intend to protect policyholders and to be further aligned with international standards.

Mr. Speaker, it is important for us to briefly mention how this policy position evolved and developed. The work on this policy began formally in 2014 with the BMA issuing a discussion paper on policyholder protection. The Authority continued this work by releasing a consultation paper in June 2017 on the same subject that outlines the intention to proceed with preferential payments of policyholders as the chosen approach."

40. The BMA Consultation Paper makes clear that the policyholder protection is not limited to domestic policyholders but is intended to also protect international policyholders and applies both to insurance and reinsurance contracts:

"*In this CP, the Authority is issuing a revised proposal for the preferential treatment of policyholders' claims ahead of the general creditors and Bermuda Government in the event of liquidation or winding up of a Bermuda insurer. This preferential treatment would come into force for insurance contracts as of the date enabling legislation is passed.* ***The policyholder protection framework would include a simple priority in the payment of claims for policyholders including long-term and general business, insurance and reinsurance contracts for both domestic and overseas policyholders and would include retail and commercial insurance coverages***." (emphasis added)

41. In light of the above statement made by the Minister of Finance and the passage in the BMA Consultation Paper, the Court accepts Mr Chivers KC's submission that given the stated intention to protect the reputation of Bermuda as a financial centre, the elements of retail, commercial and reinsurance contracts written in Bermuda are all equally within the intended scope (and hence remedying the mischief) of the policy that forms the background to the legislation.

The legislative purpose without reference to the Parliamentary material

42. The definition of "*insurance debt*" set out in section 36(11) of the Act ("*a debt to which an insurer is or may become liable pursuant to an insurance contract*") necessarily means that any obligation between the parties to the contract of insurance will fall within the definition. As pointed out by Mr. Chivers KC, that will include obligations owed by the insurer to the insured (payment against the claim) as well as obligations owed by the insured to the insurer (payment of premium).

43. Mr Chivers KC submits that there is a clear legislative purpose in excluding from the ambit of priority debts which are not truly "*insurance*" debts, a task that can only be done with the language of the type used here. Debts arising under a contract of insurance but which are not owed by the insolvent insurer *in the capacity of insurer* have no logical place in a scheme of priority which is intended to benefit insureds.

44. Mr. Chivers KC points out that a company that owes money to its insurer for unpaid premium will (on an insolvent winding up) treat that as it would any other debt - i.e. pari passu with ordinary creditors. The Court accepts Mr. Chivers KC's submission that no legislative purpose can be gleaned in giving debts owed to an insurance company priority simply because they are owed to an insurance company. The Court accepts that there is no rational basis to give priority to claims for unpaid premium to an insurer simply because the debtor is, itself, an insurance company. It follows therefore that the Legislature must have intended the definition of "*insurance debt*" to exclude liabilities that would arise in the winding up of any company whether or not an insurer. The Court accepts that to exclude from the definition of "*insurance debt*" debts that arise but do not have priority in the winding up of any other company it is necessary for [C] "*the insurer*" to be [A] - i.e. the insolvent insurance company itself.

45. Furthermore, the Court accepts Mr. Chivers KC's submission that, if the intention of the Legislature was to exclude reinsurance contracts from the scope of section 36A, that could easily have been achieved by excluding such contracts from the definition of "*insurance contract*". Indeed, the English legislation, referred to in paragraph 36 above, employs that precise technique. It makes little sense to expressly provide in the Act that reinsurance contracts are included within the definition of "*insurance contracts*" only to exclude debts arising *under* reinsurance contracts.

Issue 3: whether in a winding up of the Company, an "*insurance debt*" owed to ULICO would be paid in priority to all the debts of the Company save for "*preferential debts*"

46. Mr Chivers KC and Mr Scorey KC contend, and the Court agrees that the answer to Issue 3 simply follows from the answer to Issue 2. Accordingly, for the reasons set out in paragraphs 19 to 45 above, the Court grants the relief sought in paragraph 3 of the Summons dated 27 April 2022.

Conclusion

47. For the reasons set out above the Court declares that:

(1) The Reinsurance Agreement between ULICO and the Company is an "*insurance contract*" pursuant to sections 36 and 36A of the Act;

(2) A debt owing to ULICO pursuant to Article II of the Reinsurance Agreement is an "*insurance debt*" pursuant to sections 36 and 36A of the Act; and

(3) In a winding up of the Company, an "*insurance debt*" owed to ULICO would be paid in priority to all other debts of the Company save for "*preferential debts*" (as defined in the Act.

48. The Court will hear the parties in relation to the issue of costs, if required.

Dated this 12th day of January 2023

SEAL OF THE SUPREME COURT OF BERMUDA

NARINDER K HARGUN
CHIEF JUSTICE