

8/12/11

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**



285/10

CAUSE NO. F 5 2010

BETWEEN:	ADVANTAGE LIFE & ANNUITY COMPANY SPC	PLAINTIFF
AND:	FREDERICK A. FORSTER	1ST DEFENDANT
	GRAHAM TAYLOR	2ND DEFENDANT
	LYNDA YABLON, EXECUTOR OF THE ESTATE OF SALLY FURMAN	3RD DEFENDANT
	LYNDA YABLON	4TH DEFENDANT
	LYNDA YABLON, EXECUTOR OF THE ESTATE OF MEL YABLON	5TH DEFENDANT
	SUE FURMAN	6TH DEFENDANT
	CHERYL MONDSCHHEIN	7TH DEFENDANT
	BJORN AASEROD	8TH DEFENDANT
	JUDITH DOUGLAS	9TH DEFENDANT
	RANDOLPH WHITNEY BAE	10TH DEFENDANT

Coram: The Hon. Mr. Justice Angus Foster

Appearances: Mr. Sam Dawson of Solomon Harris for the Plaintiff

Ms. Bernadette Carey of Conyers Dill & Pearman for the 7th Defendant

Mr. Rupert Coe of Appleby for the 8th Defendant

No appearance by or on behalf of the 1st to 6th Defendants or the 9th and 10th Defendants

Heard: Wednesday, 16th November 2011

JUDGMENT/

JUDGMENT

1. This matter concerns the interpretation of a single premium life insurance policy issued by the Plaintiff (“the Insurance Company”) over the life of a Mr. Jeffery Furman, now deceased, a United States citizen formerly of New York City, USA (“Mr. Furman”). The ultimate question in issue is the determination of the identity of the beneficiaries of the policy proceeds (which currently amount to approximately US\$2.67m) (“the Beneficiaries”) on a true construction of the insurance policy (“the Policy”) and in the relevant surrounding circumstances. The 3rd to 10th Defendants are all persons who, may be or claim to be Beneficiaries. I shall explain who the 1st and 2nd Defendants are later in this Judgment.

2. The Policy, which is No: ALIP9905-1003, was issued on 31st May 1999 by the Insurance Company, which is a Cayman Islands SPC and part of the Crusader Group of Cayman companies. It is managed by Crusader International Management (Cayman) Ltd, a licensed Cayman Islands entity. The Policy expressly states that it is governed by the laws of the Cayman Islands. Although all of the Defendants are resident outside the Cayman Islands, leave to serve the proceedings on each of them pursuant to GCR O.11, r 1(1)(d)(iii) was granted on 26th January 2011 and neither that order nor the jurisdiction of this court has been the subject of any challenge. Accordingly, there is no dispute that this court is the appropriate forum for determination of the questions in issue and that Cayman Islands law applies.

The Relief Claimed

3. By its Originating Summons dated 17th December 2010 the Insurance Company claimed certain declarations concerning the Policy. However, by the formal Notice of Appointment to Hear the Originating Summons dated 1st November 2011, (“the Notice of Hearing”) which was served on all the Defendants who had acknowledged service of the Originating Summons, the Insurance Company clarified more precisely the declarations which it was seeking from the Court as follows:

1. *A declaration that on a true construction of the terms of the Life Insurance Policy issued by the Plaintiff and dated 31st May 1999 (“the Policy”), the letter from Jeffery Furman [Mr. Furman] to the Plaintiff dated 5th October 2008 does not constitute a valid substitution of the beneficiaries to the Policy;*

2. *A declaration that on a true construction of the terms of the Policy, upon the death or dissolution of any beneficiary to the Policy, that beneficiary’s entitlement is to be divided amongst the remaining beneficiaries to the Policy (“the Remaining Beneficiaries”) in the same percentages as their original entitlement under the policy and, as such, the proceeds of the Policy (“the death benefit”) should be divided as follows:*

2.1 37.5% to Lynda Yablon [the 4th Defendant]

2.2 18.75% to Sue Furman [the 6th Defendant]

2.3 18.75% to Cheryl Mondschein [the 7th Defendant]

2.4 25% to Bjorn Aaserod [the 8th Defendant]

3. *An order that the Plaintiff's reasonable costs of, and incidental to, the Summons should be paid from the Death Benefit prior to distribution to the Remaining Beneficiaries.*

The Law

4. GCR O.15, r.16 provides:

No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed.

It is well established that this provides the Court with a wide discretion to grant declaratory relief even though no other relief is sought. However, it is also well established that as a general rule of practice the Court will not exercise this jurisdiction without an examination of the merits of the claim of the party seeking the declaration. In giving his reasons in relation to an application for summary judgment for certain declarations in Argentine Holdings (Cayman) Limited v Buenos Aires Hotel Corporation S.A. & Others [1997] CILR 90 Smellie J (now Smellie CJ) said at page 94:

I also have in mind the rules which advise that declaratory judgments should not ordinarily be given without a due consideration of the merits. These reasons are intended therefore to reflect that consideration of the merits of the case: see Metzger v DHSS [1997] 3 All ER at 451 and Patten v Burke Publishing Co Ltd [[1991] 1 WLR 541] and the notes to O.15, rule 6 (2) of the Rules of the Supreme

Court in the Supreme Court Practice 1997, para 15/16/2 at 252-253 [the then English equivalent of GCR O.15, r.16]

I should mention also the comments of Neuberger J (as he then was) in the English High Court in *The Financial Services Authority v John Edward Rourke (Trading As J.E. Rourke & Co)* [2002] C.P. Rep. 14 when he said [by reference to the present English rule which is the same as GCR O.15, rule 16 for all practical purposes]: when he said:

Accordingly, so far as [the present English Rules] are concerned, the power to make declarations appears to be unfettered. As between the parties in the action, it seems to me that the court can grant a declaration as to their rights, or as to the existence of facts, or as to a principle of law, where those rights, facts or principles have been established to the Court's satisfaction. The Court should not, however, grant any declarations merely because the rights, facts or principles have been established and one party asks for a declaration. The Court has to consider whether, in all the circumstances, it is appropriate to make such an order.

In Patten v Burke Publishing Co Ltd [supra] Millett LJ stated that, in effect, it was the court's duty "to do the fullest justice to the plaintiff to which he is entitled", and he went on to hold that there was no rule of law which prevented a declaration of fraudulent conduct.

In Messier-Dowty v Sabena [2001] 1 All ER 275 the issue was whether a negative declaration should be granted. Lord Wolf said this:

“the deployment of negative declarations should be scrutinized and their use rejected where it would serve no useful purpose.

However, where a negative declaration would help to ensure that the aims of justice are achieved, the courts should not be reluctant to grant such declarations. They can and do assist in achieving justice.....

So in my judgment the development of the use of declaratory relief in relation to commercial disputes should not be constrained by artificial limits wrongly related to jurisdiction. It should instead be kept within proper balance by the exercise of the courts’ discretion”

It seems to me that, when considering whether to grant a declaration or not, the court should take into account justice to the claimant, justice to the defendant, whether the declaration would serve a useful purpose and whether there are any other special reasons why or why not the court should grant the declaration.

5. Accordingly, I must carefully consider the merits of the Insurance Company’s claim for the declarations which it seeks and I must satisfy myself to the requisite standard of proof, namely on a balance of probability, that they are made out. I must then consider whether the declarations would serve a useful purpose and whether there are any relevant special reasons for granting or not granting the declarations. I must also consider whether in all the circumstances it is appropriate to grant the declarations.
6. The only evidence submitted has been by way of three affidavits sworn on behalf of the Insurance Company. The first is the affidavit of Ms Fiona Moseley, of George Town,

Grand Cayman sworn on 17th December 2010 (“the Moseley Affidavit”). Ms Moseley is a Director of the Insurance Company and is clearly very familiar with all the circumstances surrounding the Policy and the issues which have arisen. Her affidavit exhibits not only the Policy itself and two Endorsements, to which I will refer further below, but also the Trust Agreement constituting the trust known as the Jeffery Furman Insurance Trust, as well as a substantial body of correspondence with most of the Defendants. The Moseley Affidavit and the exhibits were served on all Defendants, including, for the avoidance of doubt, the 10th Defendant, to whom I shall refer later. The Insurance Company also submitted two affidavits sworn by Ms Elena Escalante, a legal assistant with the Insurance Company’s attorneys, Solomon Harris, on 9th and 15th November 2011 respectively. They principally exhibited more recent correspondence between Solomon Harris and certain of the Defendants.

7. The only Defendants who appeared at the hearing of the Insurance Company’s Originating Summons on 16th November 2011 were the 7th and 8th Defendants (Ms Mondschein and Mr. Aaserod respectively) who each appeared by their Cayman Islands attorneys. However, as also mentioned above, there is correspondence exhibited to the Moseley Affidavit, including, again for the avoidance of any doubt, correspondence with the 10th Defendant, Mr. Bae, and his sometime attorney in California, Mr. Klink, to which I have thought it appropriate to pay close regard, which I have duly done, in determining whether or not the Insurance Company’s claims are made out.

The Policy and Background

8. The Policy contains, inter alia, the following declarations:
- a. The "Owner" of the Policy is "the Furman Trust, Mr. F.A. Forster, Trustee" with an address in San Francisco, USA
 - b. The "Life Insured" is "Jeffery Furman" with an in address New York, USA
 - c. The "Beneficiary" is "the Furman Trust, Mr. F.A. Forster, Trustee"

The Policy also provides that:

"Beneficiary" means the person to whom the Death Benefit Proceeds are payable upon the death of the Insured. The Owner in the application names the Beneficiary. If changed, the Beneficiary is as shown in the latest change filed and recorded with us. If no Beneficiary survives the Insured, the Owner or the Owners' estate will be the Beneficiary. The interest of any Beneficiary is subject to that of any assignee.

"Insured" means the person upon whose life the Policy is issued.

"Owner" means the owner of the Policy as designated in the application or as subsequently changed. See Sections 2.7 through 2.10 for the rights, privileges and limitations of the Owner.

Section 2 (General Provisions) of the Policy provides as follows:

2.7 The Owner

..... *during the life of the Insured you [the Owner] have all the benefits, rights and privileges under this Policy. These include naming a successor owner, changing the Beneficiary, assigning this Policy, enjoying all Policy benefits, and exercising all Policy options [my emphasis].*

2.8 The Beneficiary

..... *You [the Owner] can name primary and contingent beneficiaries. Your original Beneficiary choice is shown in the attached application. Unless an alternate payment plan, acceptable to us, is chosen, the proceeds payable at the Insured's death will be paid in a lump sum to the primary Beneficiary. If the primary Beneficiary dies before the Insured, the proceeds will be paid to the contingent Beneficiary. If no Beneficiary survives the Insured, the proceeds will be paid to your [the Owner's] estate [my emphasis].*

2.9 Changing the Beneficiary

..... *You [the Owner] may change the Beneficiary during the Insured's lifetime. We do not limit the number of changes that may be made. To make the change, we must receive a completed Change of Beneficiary form and any other forms required by the Home Office.*

The remaining provisions of the Policy do not seem to me to be directly relevant to the issues now arising. I should, however, mention that the original Application Form (issued by Crusader International Insurance Company Ltd) as referred to in Section 2.8 of the Policy states that the "*First Life Assured*" is "*Jeffrey Furman*" and the "Policyholder" is "*F.A. Forster – Trustee the Furman Trust.*" The Application Form also requires the name of the Beneficiary ("*if different from Policyholder*") but nothing has been inserted and accordingly pursuant to the Application Form the Beneficiary was F.A. Forster – Trustee of the Furman Trust. FA Forster ("Mr. Forster") is the 1st Defendant.

9. Attached to and forming part of the Policy are two Endorsements. Endorsement No. 1 states that the Policy is issued to: "*the Furman Trust*" and provides for a change of Beneficiary. It states as follows:

Pursuant to Section 2.9 of the policy the Beneficiary is hereby amended to read as follows:

Daedre Furman Irrevocable Trust

All other terms and conditions remain the same.

This Endorsement is signed by Ms Moseley as authorized representative and dated 13th September 2000. This Endorsement was made in response to a letter dated 6th September 2000 from Mr. Forster addressed to Crusader International Group and headed: "*Re: Jeffery Furman Life Insurance Trust*" [my emphasis] The letter reads:

"This is in reference to policy # ALIP 9905-1003 of which I am the trustee.

I hereby exercise my power of discretion as trustee so that the sole Beneficiary of the Life Insurance Policy will be Daedre Furman Irrevocable Trust.

Please confirm your understating of this substitution of beneficiary."

The letter was executed by Mr. Forster and copied inter alia to Mr. Furman.

10. On 15th March 2001 the Insurance Company made a further endorsement to the policy – Endorsement No.2. That also referred to the Policy issued to "the Furman Trust". Under the heading Change of Beneficiary it stated as follows:

Pursuant to Section 2.9 of the policy the Beneficiary is hereby amended to read as follows:

50% of assets to the Jeffery Furman Foundation

and 50 % of assets to be divided as follows:

a. 10% to Sally Furman

b. 30% to Lynda Yablon

c. 10% to Mel Yablon

d. 15% Sue Furman

e. 15% Cheryl Mondschein

f. 20% to Bjorn Asserod

All other terms and conditions remain the same.

Once again the Endorsement was signed by Ms Moseley as authorized representative of the Insurance Company. Endorsement No.2 was made in response to a letter dated 19th December 2000 from Mr. Forster addressed to Ms Moseley headed "*The Furman Trust*". The letter states:

"Dear Mrs. Moseley,

Please change the Beneficiary of the Furman Trust, Policy # ALIP9905-1003

from being the Daedre Furman Irrevocable Trust to:

50% of assets to the Jeffrey Furman Foundation

and

50% of assets to be divided as follows:

a. 10% to Sally Furman

b. 30% to Lynda Yablon

c. 10% to Mel Yablon

d. 15% Sue Furman

e. 15% Cheryl Mondschein

f. 20% to Bjorn Asserod

11. On 17th February 2010 the Insurance Company received by e-mail from Mr. Forster a copy of a letter dated 5th October 2008 from Mr. Furman addressed to the Insurance Company under reference to the "*Furman Trust Policy # ALIP 9905-1003*" which said:

"To Whom It May Concern"

Effective as of today's date, please change the beneficiaries and distribution of funds of the Furman Trust Policy referenced above as follows:

Lynda Yablon \$75,000.00

*4101 N. Ocean Blv.
Apt. D703 Boca Raton, Fl. 33431*

*The remaining balance, including all principal and interest to be split equally
between the following:*

*Judith Douglas
238 N. Dogwood Trail
Kitty Hawk, NC 27949 [the 9th Defendant]*

*Randolph Whitney Bae
417 E. 57th Street – Apt. 27B
New York, NY 1002. [the 10th Defendant]*

The letter was signed by Mr. Furman and a witness with an illegible signature. The e-mail from Mr. Forster to the Insurance Company attaching this letter from Mr. Furman indicates that Mr. Forster had not seen this letter before. The Insurance Company had not seen it before either. The two persons mentioned in the letter apart from Lynda Yablon was mentioned in Endorsement No. 2, were Judith Douglas, (the 9th Defendant) and Mr. Bae (the 10th Defendant).

12. Mr. Furman died on 30th April 2009 and the Insurance Company was notified of that on 18th May 2009. However, certain disputes then arose concerning the issues which are the subject of the declarations which the Insurance Company now seeks to enable it to know to whom the Policy proceeds should be paid and in what proportions.

The Purported 2008 Substitution of Beneficiaries

13. The first declaration which the Insurance Company seeks, as set out in the Notice of Appointment dated 1st November 2011 is that on a true construction of the Policy the letter from Mr. Furman dated 5th October 2008 does not constitute a valid substitution of

the Beneficiaries of the Policy. In my opinion there is no doubt that this is correct. The Policy expressly states that only the Owner may substitute Beneficiaries and at no time was Mr. Furman the Owner of the Policy. He was the Insured but he had no right to substitute Beneficiaries and his letter of 5th October 2008 purporting to do so was undoubtedly invalid and of no effect. In determining that issue it is, as was submitted on behalf of the Insurance Company, enough that Mr. Furman was not the Owner of the Policy. Accordingly, the substitution of Beneficiaries purportedly made by Mr. Furman was of no effect and therefore Lynda Yablon is not a Beneficiary of the Policy to the extent of \$75,000.00 and Judith Douglas ("Mr. Douglas") and Randolph Whitney Bae (Mr. Bae) are not Beneficiaries of the Policy and nor have they ever been.

The Identity of the Owner

14. However, there has been considerable correspondence; particularly with Mr. Bae and to a lesser extent with Mr. Klink, his lawyer in California, about the true identity of the Owner of the Policy and the Insurance Company itself spent a considerable amount of time attempting to establish that. Although it is not strictly necessary in order to determine the invalidity of Mr. Furman's purported substitution of Beneficiaries, it may be helpful if I nonetheless consider that issue. As already pointed out the Policy declares that the Owner was Mr. Forster as Trustee of "the Furman Trust". That is also the name given for the Policyholder in the Application Form and the name of the trust on the two Endorsements to the Policy. Furthermore it is the name of the trust referred to by Mr. Forster in his letter dated 19th December 2000 to the Insurance Company requesting the change of Beneficiary which resulted in Endorsement No.2. However, in his letter dated

6th September 2000 which resulted in Endorsement No.1 Mr. Forster refers to the “Jeffery Furman Life Insurance Trust”. After Mr. Furman’s death the Insurance Company itself became concerned about the true identity of the trust of which Mr. Forster was the Trustee and which was the Owner of the Policy. Although the Policy referred to the Furman Trust, Mr. Forster’s letter dated 6th September 2000 referred to the Jeffery Furman Life Insurance Trust and the Insurance Company was unable to obtain a copy of any document constituting a trust called “The Furman Trust”. Somewhat surprisingly, it appears that the Insurance Company did not obtain a copy of the relevant trust, which was the policyholder, before issuing the Policy, notwithstanding usual “know your client” practices. When the Insurance Company did eventually obtain a copy of the supposed trust document through Mr. Forster in January 2010 it was a Trust Agreement relating to a trust called the “Jeffery Furman Insurance Trust”. All attempts to obtain a copy of a document relating to a trust called the Furman Trust were unsuccessful and it became apparent that there was no such trust and never had been. At the hearing before me the Insurance Company took the position that the references to the Furman Trust in the Policy documents and in correspondence from Mr. Furman was simply a shorthand for the same trust, which was and is the Jeffrey Furman Insurance Trust. I understand that Mr. Forster is not a lawyer and, although latterly he has not been responsive and so has not confirmed it himself, the likelihood is that he simply used shorthand for the trust established by Mr. Furman of which he was a trustee, namely the Jeffery Furman Insurance Trust.

15. The Trust Agreement establishing the Jeffery Furman Insurance Trust dated 11th December 1998 is between Mr. Furman as the Grantor and Mr. Forster as the Trustee and a copy is exhibited to the Moseley Affidavit which was served on all the Defendants as mentioned above. The Trust Agreement provides that the Trustee is specifically authorized to retain or purchase one or more insurance policies insuring the life of the Grantor [Mr. Furman] as part of the principal of the Trust. It also provides that the Trustee shall have all the rights of the Owner with respect to such Policy and, without the consent or approval of the Grantor, may inter alia exercise any option or privilege granted by any such Life Insurance Policy, including the right to change the Beneficiaries of any such Insurance Policy and to exercised all other rights in respect of such Insurance Policy. The Trustee is also authorized to pay from the income of the Trust or, if necessary the principal of the Trust all premiums payable in respect of such Life Insurance Policy. After the death of the Grantor the Trustee is required to collect the proceeds of any life insurance policies on the Grantor's life and have power to give a full discharge to Insurers issuing such policies with the respect to the Policy proceeds. It is also clear from the Trust Agreement that Daedre's Trust (the subject of Endorsement No.1 to the Policy) was for the benefit of Daedre Furman, Mr. Furman's daughter. It is also clear from the Trust that the individuals named in Endorsement No.2 to the Policy are all (with the exception of Mr. Bjorn Aaserod, who is not named in the Trust Agreement) relatives of Mr. Furman, namely Sally Furman, his mother; Lynda Yablon, his sister; Cheryl Mondschein, his former wife; Sue Furman, another former wife; and Mel Yablon his brother-in-law. Lastly, for completeness, although of no particular relevance for present purposes, the Trust Agreement provides that if Mr. Forster ceases to

act as Trustee without having appointed a successor, Mr. Graham Taylor [(“Mr. Taylor”, the 2nd Defendant)] shall act as Successor Trustee to fill the vacancy in the office of Trustee. In fact Mr. Forster resigned as trustee on 25th June 2010 and that since then Mr. Taylor has given notice that he is not able to act as successor trustee.

Finally, the Trust Agreement expressly states that all questions pertaining to its validity, construction and administration are to be determined in accordance with the Laws of the State of New York.

16. Other than the reference to the Furman Trust in the Policy documents and in some of the correspondence there is no evidence that Mr. Forster was ever a trustee of any trust of that name or indeed that any such trust has ever existed. There is no evidence that there ever was more than one trust established with the intention that the trustee should enter into an insurance policy on Mr. Furman’s life. Mr. Forster was the trustee at all relevant times of the Jeffery Furman Insurance Trust, the terms of which appear highly likely to relate to the Policy which was entered into by Mr. Forster as a Trustee. I am satisfied in all the circumstances that it is probable, indeed almost certain, that the references to the Furman Trust in the Policy and in some of Mr. Forster’s correspondence is simply shorthand for the Jeffery Furman Insurance Trust and that it was in his capacity as trustee of that Trust that Mr. Forster was the Owner of the Policy at all relevant times. Furthermore, I am also satisfied that the requests by Mr. Forster to substitute Beneficiaries which resulted in Endorsement No. 1 and Endorsement No. 2 were made by him in his capacity as trustee of that trust and were validly and properly made in the

circumstances. I consider that the true Owner of the Policy was Mr. Forster in his capacity as trustee of the Jeffery Furman Insurance Trust.

The Effect of the Death or Dissolution of a Beneficiary

17. The next declaration which the Insurance Company seeks is that on a true construction of the Policy, upon the death or dissolution of any Beneficiary that Beneficiary's entitlement in respect of the Policy proceeds is to be divided amongst the remaining Beneficiaries in the same percentages as their original entitlement under the Policy.

18. The first Beneficiary named in Endorsement No.2 was the Jeffery Furman Foundation. In April 2010 the Insurance Company received from Mr. Bae a Certificate of Dissolution of the Jeffrey Furman Foundation filed with the Secretary of State for Delaware on 15th June 2007. Accordingly, the evidence is that the Jeffrey Furman Foundation was dissolved on that date, which was prior to the date of Mr. Furman's death. Furthermore, the third person named in Endorsement No. 2, Mr. Mel Yablon, Mr. Furman's son-in-law, died on 11th October 2003 and the first person named in Endorsement No.2, Ms Sally Furman, Mr. Furman's mother, died on 23rd September 2007. Accordingly both Mr. Mel Yablon and Ms Sally Furman predeceased Mr. Furman. Ms. Lynda Yablon, the second person named in Endorsement 2, Mr. Furman's sister, is named as the 3rd Defendant in these proceedings in her capacity as Executor of the Estate of Ms Sally Furman and as 5th Defendant in her capacity as Executor of the Estate of Mr. Mel Yabalon, as well as in her individual capacity as 4th Defendant.

19. Counsel for the Insurance Company contended that on the death or dissolution of any Beneficiary prior to the death of the insured, the pre-deceased Beneficiary's share of the Policy proceeds reverts to the general pool of Policy proceeds and thus increases the amount to be shared by the surviving beneficiaries in the same percentages as their original entitlement. Consequently the share of the Jeffery Furman Foundation, the share of Ms Sally Furman and the share of Mr. Mel Yablon are in effect to be apportioned between the surviving Beneficiaries, namely Ms Lynda Yablon, Ms Sue Furman, Ms Cheryl Mondschein and Mr. Bjorn Aaserod.
20. There is nothing in the Policy which provides that on the death of a Beneficiary prior to the death of the Insured the pre-deceased Beneficiary's interest is to pass to his or her estate. Nor is there any suggestion to that effect in either Endorsement. In my opinion if that was the intention it would and should have been clearly expressed in the Policy or Endorsements. But in fact the Endorsements, apart from changing the Beneficiaries, state that all other terms and conditions of the Policy should remain the same. The definition of Beneficiary in the Policy, which I have already set out above, says nothing about the estate of a Beneficiary who does not survive the Insured becoming the Beneficiary. On the contrary, the provision of the Policy that if no Beneficiary survives the Insured, the Owner or the Owner's estate will be the Beneficiary is, in my view, consistent with a Beneficiary who pre-deceases the Insured simply being removed from the list of Beneficiaries. Similarly, Provision 2.8 of the Policy, as also quoted above, in providing that if the primary Beneficiary dies before the Insured, the proceeds will be paid to the

contingent Beneficiary makes it clear that if the primary Beneficiary pre-deceases the Insured his share of the proceeds does not pass to his estate. In fact in the present case the Owner did not name primary and contingent Beneficiaries but that itself is nothing to the point. Again, Provision 2.8 repeats the provision that if no Beneficiaries survive the Insured the insurance proceeds will be paid to [the Owner's] estate. This analysis of the position was also supported by counsel for Ms Mondschein (the 7th Defendant) and by counsel for Mr. Aaserod (the 8th Defendant).

21. In my Judgment therefore the share of a Beneficiary who predeceases the Insured (or ceases to exist prior to the death of the Insured) ceases to be a Beneficiary and the share of such predeceased or dissolved Beneficiary reverts to the general pool of policy proceeds and is to be distributed amongst the remaining Beneficiaries in the same percentages as their original entitlement.

The Defendants' Position

22. As I have explained, the only two Defendants who appeared at the hearing were the 7th Defendant, Ms Mondschein, and the 8th Defendant, Mr. Aaserod, who both appeared by their respective counsel. They are both surviving Beneficiaries named in Endorsement No.2. They both supported the Insurance Company's position and consented to the declarations which it seeks.
23. Ms Lynda Yablon, the 4th Defendant in her personal capacity and the 3rd and 5th Defendants in her representative capacity on behalf of the estates of the deceased

Beneficiaries named in Endorsement No. 2, Ms Sally Furman and Mr. Mel Yablon, did not appear. However, she wrote to the Insurance Company on 13th November 2011 saying she agreed to the orders being sought by the Insurance Company.

24. The 6th Defendant, Ms Sue Furman, who is also a surviving Beneficiary named in Endorsement No. 2, was served with the proceedings but has not acknowledged service and did not appear, nor has she communicated with the Insurance Company. It is accordingly to be assumed that she is simply willing to abide by the Judgment of the court.
25. The 9th Defendant, Ms Douglas, who was named in the purported substitution of Beneficiaries by Mr. Furman in his letter dated 5th October 2008, was duly served with the proceedings but has not acknowledged service and did not appear at the hearing. However, she has claimed in previous correspondence with the Insurance Company both herself and, in effect, through Mr. Bae, the 10th Defendant, that she is a Beneficiary of the Policy proceeds as a result of Mr. Furman's letter.
26. The principal opposition to the declarations which the Insurance Company seeks has come from the 10th Defendant, Mr. Bae. Mr. Bae is the executor or administrator of Mr. Furman's estate, appointed in New York, although he has never applied for his appointment to be re-sealed in this jurisdiction. Mr. Bae is, of course, named, along with Ms Douglas, as a substitute Beneficiary in Mr. Furman's letter dated 5th October 2008. However, although he belatedly acknowledged service of these proceedings, he did not

appear at the hearing. He did write a letter by e-mail dated 11th November 2011, to the Court (although it was not received prior to the Hearing), copied inter alia by e-mail to the Insurance Company and to each of the attorneys who appeared for Ms Mondschein, the 7th Defendant and for Mr. Aaserod, the 8th Defendant, setting out his position, which was essentially the same as that taken by him (and Mr. Klink) in previous correspondence by the Insurance Company and its lawyers.

27. In his letter Mr. Bae claims that he has been denied copies of relevant documentation relating to this matter. However, the evidence does not bear out that complaint. In particular, once he had acknowledged service of the proceedings, Mr. Bae was served with the Mosley Affidavit and exhibits. The exhibits included copies of the Policy, the Endorsements, all relevant correspondence up until that time and a copy of the Jeffery Furman Insurance Trust Agreement. I therefore do not accept Mr. Bae's allegation in that regard. Mr. Bae also takes the position that first and foremost the true Owner of the Policy must be determined. In fact, as explained above, that is not necessary in order to determine, as I have, that Mr. Furman's letter dated 5th October 2008 was not and could not be a valid and effective substitution of Beneficiaries because Mr. Furman was never the Owner of the Policy. That decision really puts an end to Mr. Bae's possible interest in the issue relating to the interest of pre-deceasing Beneficiaries which, as far as he is concerned is entirely hypothetical. However, in any event, I do not consider that there is any merit in the points he seeks to make in that regard and in particular the proposition he makes with regard to the Furman Foundation, which was clearly

dissolved prior to the death of Mr. Furman and is therefore in no different position from a Beneficiary who is an individual who pre-deceases Mr. Furman.

28. Mr. Bae's letter concludes in effect with a plea to the other parties to the proceedings to resolve the issues in dispute but in fact he has not raised any contentious issues of merit. He contends that the Policy proceeds should be used to fund Mr. Furman's estate. However, he rightly acknowledges that Mr. Furman (and his estate) was never a Beneficiary of the Policy. Furthermore, there is no indication in Mr. Furman's letter dated 5th October 2008 that the purported substitution of Mr. Bae as a Beneficiary related other than to Mr. Bae in his personal capacity. Even if Mr. Bae was correct that in the case of a Beneficiary who pre-deceases Mr. Furman such Beneficiary's share of the insurance proceeds passes to his estate, that would simply mean that if Mr. Bae predeceased Mr. Furman, Mr. Bae's share would pass to Mr. Bae's estate, not to Mr. Furman's estate. That is clearly inconsistent with what Mr. Bae is contending for in his letter.

29. I do not find that there is anything in Mr. Bae's letter, or indeed in his contentions in his earlier correspondence or that of his lawyer Mr. Klink, which detracts from the position taken by the Insurance Company and their proposals for payment of the Insurance Proceeds based on their understanding of the terms of the Policy documents.

Conclusions

30. Accordingly, I am satisfied of the merits of the Insurance Company's interpretation of the Policy in light of the relevant surrounding circumstances and I am satisfied to the

requisite degree that its claims are properly made out. I also consider that in the circumstances the declarations which the Insurance Company seeks would clearly service a useful purpose because they would enable the Insurance Company to pay out the insurance proceeds to the Beneficiaries who are entitled to them and in the correct proportions. I am of the opinion that in all the circumstances it is appropriate to grant the declarations sought and that there are no special reasons why I should not do so. I therefore make the declarations which the Insurance Company seeks.

31. I also order that the Insurance Company should have its costs of and incidental to these proceedings out of the insurance proceeds before they are distributed, such costs to be taxed on an indemnity basis if not agreed by counsel for the 7th and 8th Defendants. Since the 7th and 8th Defendants have taken the trouble to and incurred the expense of instructing counsel to appear on their respective behalves, I also order that the 7th Defendant should have her costs out of the insurance proceeds in the same way as the Insurance Company also to be taxed on an indemnity basis if not agreed with the Insurance Company and with the 8th Defendant and similarly the 8th Defendant should have his costs on an indemnity basis to be taxed if not agreed with the Insurance Company and the 7th Defendant.

8th December 2011



**The Hon. Justice Angus Foster
Judge of the of Grand Court
Financial Service Division**