IN THE MATTER OF THE INSURANCE ACT 2010 ("The ACT")

FSD 229 of 2021 (ASJ)

BETWEEN PREMIER ASSURANCE GROUP SPC LTD (IN OFFICIAL LIQUIDATION)

(PLAINTIFF)

AND

1. **PROVIDENCE INSURANCE COMPANY I.I FOR AND ON BEHALF OF PREMIER ASSURANCE SEGREGATED PORTFOLIO PUERTO RICO SAP.**
2. **PREMIER ASSURANCE GROUP LLC**
3. **BOLDER CORPORATE SERVICES (BVI) LIMITED (AS TRUSTEE OF THE PREMIER TRUST)**

(DEFENDANTS)

CORAM: **Hon. Justice Sir Anthony Smellie K.C.**

HEARING: **18, 26 and 27 April 2023**

JUDGMENT: **17 May 2023**

REPRESENTATIONS:

1. **Mr. Robert Levy KC instructed by Mr. Rupert Bell and Ms. Daisy Boulter of Walkers for the Plaintiff.**
2. **Miss Jennifer Colegate and Mr. Ronan O 'Doherty of Collas Crill for the 1st and 2nd Defendants (but not the Third Defendant)**

HEAD NOTE

Segregated Portfolio Company licensed to sell life and health insurance products overseas – significant portion of life insurance business transferred overseas without prior regulatory approval of Cayman Islands Monetary Authority – whether transaction a "transfer" within the meaning of the Insurance Act- whether if so, transfer void for illegality and of no effect.

JUDGMENT

1. This is an application by the Plaintiff acting by its Joint Official Liquidators ("**JOLs**"), Mr Jason Robinson and Mr Jeffrey Stowers. The primary issues raised by their Re-Amended Originating Summons are whether, (i) the purported cancellation or surrender by the First Defendant of insurance policies issued from within the Cayman Islands and the reissuance of matching policies by an affiliate entity the Second Defendant in Puerto Rico, is a "transfer" of such business within the meaning of the Act requiring of prior approval by the Cayman Islands Monetary Authority ("the **Authority**") and (ii) if so, and in the absence of the Authority's approval, whether such transfer is void for illegality and of no effect.

The factual context.

2. The following explanation of the context comes from the evidence of Mr Jason Robinson, in the main from his first of six Affidavits filed in support of the application (**Robinson 1**). References to his other affidavits will also be made numerically. The context is, as set out below, largely uncontroversial but with the areas of controversy identified.

3. The Plaintiff, Premier Assurance Group SPC Ltd. (in Official Liquidation) (the "**Company**") was registered in the Cayman Islands as an exempted segregated portfolio company on 29 June 2012 pursuant to Part XIV the Companies Act (as amended) and, on 4 July 2012, was issued by the Authority with an unrestricted Class 'B' Insurer's Licence under the then enacted Insurance Law (2008 Revision). It was subsequently granted a Class B(iii) Licence (the "**Insurance Licence**") on 20 October 2015 issued pursuant to the Act[1]. As explained in more detail below, the Company was licensed to offer insurance products to a global market (with the exception of the United States of America, the Cayman Islands and the British Virgin Islands ("**BVI**")).

4. By way of summary, these proceedings relate to the purported cancellation or surrender of the interests of 3,221 participants in unit-linked life insurance products (akin to the interests of policy holders or insureds under a "normal" investment life insurance policy) referable to one of the Company's segregated portfolios, Premier Assurance Segregated Portfolio ("**PASP**")[2], to the First Defendant, Providence Insurance Company I.I ("**Providence**") for and on behalf of its protected cell, Premier Assurance Segregated Portfolio Puerto Rico SAP ("**PAPR**") in Puerto Rico, on or around 15 June 2020. This transaction (which, as will be seen, is referred to in correspondence and so for the sake of discussion will be referred to as the "***Purported Transfer***") was effected by the

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[1] Designated by section 4(3)(b)(iii) of the Act as *"(b) class B insurer licence, for the carrying on of insurance business other than domestic business in respect of which-*

(i)....

(ii)....

(iii) fifty per cent or less of the net premiums written will originate from the insurer's related business";

[2] *The other segregated portfolio of the Company being Global Assurance Segregated Portfolio ("GASP") which offered health insurance products to the same global market.*

Third Defendant (the "**Trustee**") purportedly cancelling or surrendering the insurance policies, the transfer of the amount of US$34 million from the Company to an account held by the Second Defendant ("**Premier LLC**") with Insigneo Financial Group or its affiliate ("**Insigneo**") in the United States (which was said to represent part of the surrender value of the policies) and the participants affected (the "**Affected Participants**") being issued with new policies with PAPR.

5. Following a Winding Up Order being made in respect of the Company by this Court on 19 April 2021, the Insurance Licence was revoked by the Authority. Accordingly, the Company now acts by the JOLs.

6. The JOLs previously acted as the Joint Controllers of the Company (the "**Joint Controllers**") following their appointment by the Authority on 14 September 2020. They also previously acted as the Joint Provisional Liquidators of the Company (the "**JPLs**") following their appointment by an earlier Order made by this Court on 27 October 2020.

7. Mr Leonardo Cornide and Mr Jorge Falcon ("**Mr Cornide**" and "**Mr Falcon**" respectively, together, the "**Directors**") are the current directors of the Company and, at all material times, were each 50% ultimate beneficial owners of the Company. The Authority determined that each of the Directors was no longer a fit and proper person to hold the position of director of a licensee pursuant to Section 24(1)(g) of the Act, and accordingly so announced by Public Notice issued on 23 September 2020. This was one of the grounds upon which the Authority appointed the JOLs originally as Joint Controllers of the Company.

8. Mr Javier Jimenez ("**Mr Jimenez**") was the Chief Financial Officer ("**CFO**") of the Company and he became, as discussed below, an important interlocutor with the JOLs in relation to the affairs of the Company.

9. At all material times until 26 May 2021, the Directors were the ultimate beneficial owners of the Company as well as Premier LLC, together with various related entities which performed services

for the Company. The structure chart of the group is presented in evidence as an exhibit to Robinson 1, together with the explanation of the roles of those entities as presented in the Company's Business Plan submitted to the Authority dated 31 July 2020, the date of which itself became of significance, as will be explained below at [84] and following.

10. Until 26 May 2021, as explained in Robinson 1, the JOLs understand that the Directors retained ultimate common control of both the Company and the Defendants as follows:

a. Mr Cornide and Mr Falcon each owned 50% of the shareholding in Beast Capital LLC ("**Beast Capital**");

b. Beast Capital was the sole shareholder and the Manager of Premier LLC;

c. Premier LLC was the sole shareholder of the Company and, as shown in the structure chart, also the holding company of various connected entities which provided services to the Company;

d. PAPR was affiliated with Premier LLC through ultimate common control in PAPR through the ultimate parent, Beast Capital; and

e. The Trustee was the trustee of the Premier Trust, which was established under BVI law pursuant to a Deed of Declaration of Trust on 14 February 2006 (the "**Trust Deed**"). The JOLs' understanding is that the enforcer of the Premier Trust, PA Marketing Ltd.[3] (the "**Enforcer**"), was at all material times also a wholly owned subsidiary of Beast Capital.

11. The Second Defendant, Premier LLC, a Florida Limited Liability Company, is the Company's sole shareholder. Until 26 May 2021, Premier LLC was a wholly owned subsidiary of Beast Capital

[3] It is noted that recently, on 13 January 2023, "PA Marketing Ltd" changed its name to "M1 Marketing Ltd".

and Beast Capital was the sole Manager of Premier LLC. Mr Jimenez was also the CFO of Beast Capital and Premier LLC.

12. As explained at paragraphs 16 to 20 of Robinson 3, there was a change in the ownership and control of Premier LLC on 26 May 2021. Mr Jimenez and Simon Amich are now listed as the Managers of Premier LLC. The Authorised Members of Premier LLC are two trusts:

    a. Paradigm Irrevocable Trust (of which Mr Cornide and his issue fall within the class of beneficiaries); and

    b. Empyrean Irrevocable Trust (of which Mr Falcon and his issue fall within the class of beneficiaries).

13. Copies of the Trust Agreements in respect of the Paradigm Irrevocable Trust and the Empyrean Irrevocable Trust are exhibited to Robinson 2. Each of the Trust Agreements provide that they are governed by the laws of the State of Florida.

14. The Empyrean Irrevocable Trust defines "Primary Beneficiary" as Stephanie C. Falcon (Mr Falcon's wife) and the Paradigm Irrevocable Trust defines "Primary Beneficiary" as Lizette Vasseur Cornide (Mr Cornide's wife). However, notably, each of the dispositive provisions of those trusts provides that (*inter alia*):

    a. During the life of the Primary Beneficiary and the Primary Beneficiary's spouse, the Trustee shall "*pay out of the net income and/or principal of the trust estate to or for the benefit of such one or more of the Primary Beneficiary's spouse* [i.e. Mr Falcon/Mr Cornide] *and Primary Beneficiary's issue*…".

    b. Upon the death of the Primary Beneficiary and the Primary Beneficiary's said spouse [i.e. Mr Falcon/Mr Cornide], the trust estate is allocated to the Primary Beneficiary's issue, per stirpes.

15. The First Defendant, Providence, is a Puerto Rican insurance company acting for and on behalf of its protected cell, PAPR. As already mentioned, the JOLs understand that (at least until the change in ownership of Premier LLC on 26 May 2021) PAPR was affiliated with Premier LLC through ultimate common ownership and/or control of PAPR through the ultimate parent, Beast Capital.

16. At all material times until 29 April 2021, Sable Trust Limited (Company No.1513076) ("**Sable**") was the trustee of the Premier Trust, which was established under the laws of the BVI pursuant to a Deed of Trust on 14 February 2006, a copy of which is exhibited to Robinson 1.

17. As explained in paragraph 26 of Robinson 2, Sable merged with another BVI company, AMS Trustees Limited ("**AMS**"), effective from 30 April 2021, with AMS being the surviving company. On 19 October 2021, AMS changed its name to Bolder Corporate Services (BVI) Limited ("**Bolder**"). Accordingly, references to the "Trustee" are references to Sable, AMS or Bolder (as applicable).

18. The JOLs understand that the Enforcer of the Premier Trust is also a wholly owned subsidiary of Beast Capital (as shown in the structure chart exhibited to Robinson 1).

19. The significance for present purposes, of the elaborate corporate and trust structures described above, is that those who had been in control of the Company prior to the intervention of the Authority and this Court, are the same as those who retain the ultimate controlling or beneficial interests in the First Defendant, whose protected cell PAPR, is the entity which is said to be the intended recipient of the Purported Transfer and the related funds, as explained further below.

PASP's Life Insurance Products

20. As already mentioned, one of the Company's segregated portfolios is PASP, in respect of which unit-linked life insurance products were offered globally (except for the United States) and sold to markets in the Latin American, Caribbean (except the Cayman Islands and BVI), European and Asian regions. The circumstances in which unit-linked life insurance products were sold to participants of PASP can be summarised as follows:

a. The Trustee (as trustee of the Premier Trust) entered into a Cayman Islands law governed Unit-Linked Life Policy with the Company (on behalf of PASP) with Policy Number 20101118 (the "**Group Policy**" – exhibited to Robinson 1). Pursuant to the Group Policy, the Company agreed to pay death benefits to certain beneficiaries (namely those specified by the insured participants "**Plan Participants**") following the death of the respective Plan Participant.

b. The Plan Participants became enrolled under the Group Policy by entering into an enrollment agreement with the Trustee (the "**Enrollment Agreement**") which was governed by BVI law (see Clause K(19)). Pursuant to Clause K(5) of the Enrollment Agreement, the Plan Participant agreed that the Trustee would purchase one or more policies from the Company with monies received from that Participant and that the Participant would continue to pay premiums due. (In reality, the contractual terms are inconsistent with what actually occurred; the premium was actually paid either directly to the Company (on behalf of PASP) or collected by Lyncpay LLC and then passed on to the Company (again, on behalf of PASP).)

c. Policy certificates were issued to Plan Participants upon the Enrollment Agreement of Participants being accepted in the Group Policy. Thereafter, Plan Participants became entitled to the benefits and coverage of the Group Policy to the extent of the participation provided by their unit-linked policy. Plan Participants were able to request a full or partial surrender of their policy by making a written request to the Company in accordance with Section XI (A) of the Group Policy.

d. As Mr Robinson further explains in Robinson 1, the Directors of the Company (who were, at all material times, in ultimate control of the affairs of the Company, Premier LLC and PAPR) have asserted (and abandoned) a variety of positions in respect of the validity of the Purported Transfer. They initially appeared to accept in their correspondence with the JOLs and the Affected Participants that the Purported Transfer was invalid and that the sums transferred to Insigneo along with Investment Gains (the total sum of which is now the subject of interpleader proceedings in Florida to be discussed below) should be returned to the insolvent estate of the Company.

e. In this regard, Mr Jimenez subsequently agreed in email correspondence with the JOLs on 21 May 2021 to return the funds to the Company but contended that a sum representing

USD 6.9 million ought to be held in the Premier Insigneo Account, pending resolution of a dispute to these sums which were said to represent repayment for payments already made to some Plan Participants in respect of the surrender of their policies. Despite this, as Mr Robinson also explains, Premier LLC failed to return the funds.

The Purported Transfer

21. The Directors, in their earlier responses to the JOLs, alleged that on or around 15 June 2020, the interests of 3,221 participants referable to PASP; ie: the Affected Participants – (a list of the Affected Participants' policy numbers is exhibited to Robinson 2) were (using varying language) "transferred", "migrated", "cancelled", "surrendered" from PASP to PAPR as follows:

a. the Trustee purportedly "cancelled" or "surrendered" the insurance policies of the Affected Participants (the "**Affected Policies**") under the Group Policy (as distinct from cancelling the Group Policy itself as had been suggested);

b. PAPR purported unilaterally to issue replacement insurance policies to the Affected Participants in Puerto Rico (see Mr. Jimenez' answers to the JOLs' questions by email exchanges exhibited to Robinson 1). This was done without the prior consent of the Affected Participants who were only informed of the Purported Transfer of their policies after the event as will be shown below; and

c. the amount of US$34 million was transferred from PASP to an account held by Premier LLC with Insigneo in various tranches between 16 July and 2 September 2020. Additionally, between 9 and 11 September 2020, sums totalling US$2.2 million were paid in two tranches from one of PASP's US bank accounts with Valley National Bank ("**VNB**") to another account in the name of Premier LLC (see paragraph 26 of Robinson 1). As explained in paragraph 28(e) of Robinson 3, documents obtained from Beast Capital's Apollo Bank account show that: (i) on 14 September 2020, Premier LLC transferred US$2.2 million to an account in the name of Beast Capital in two equal tranches; and (ii) on 15 September 2020, Beast Capital then transferred US$2.2 million to personal accounts of Mr Cornide and Mr Falcon.

22. More than two months later, the Trustee passed resolutions dated **28 August 2020** (the "**Trustee Resolutions**") (exhibited to Robinson 1) by which the Trustee purported retrospectively to "*cancel*" the Affected Policies and "*issue new replacement policies*" under PAPR. The Trustee Resolutions incorrectly record that these "*changes*" were being effected "*with the express agreement of the relevant beneficiaries*". In actuality, it appears that Affected Participants were notified of the transfer via a notice posted on the online portal (the "**Portal**") for their accounts on about 25 June 2020 (despite the said notice stating that the policies "*will be transferred on 15 June 2020*"). As Mr Robinson explains (see Robinson 1 at paragraph 89) the "*option*" for the insurance policies of Affected Participants to be migrated to Puerto Rico was presented as a message to such participants on the Portal. However, aside from providing very limited information in respect of the Purported Transfer, the Affected Participants could only view their online accounts to see what was proposed if they selected the one option available on the notice; ie: to "*Agree*" to the Purported Transfer.

23. The Plaintiff contends with obvious force that, in the absence of there being an ability to "disagree", this does not constitute an effective form of consent by the Affected Participants. As Mr Robinson explains at Robinson 1, paragraph 88, the JOLs (as JPLs and Controllers) had received complaints from multiple Affected Participants (or their representatives) that they did not consent to their policies being migrated from PASP to PAPR.

24. The Plaintiff contends that the Purported Transfer required the approval of the Authority pursuant to Sections 8(1)(a) and 31(1) of the Act and hence the first of the two primary issues for resolution, as defined above (and as set out verbatim at [28] below from the JOLs' Re-Amended Originating Summons).

25. The Authority, by letter dated 11 March 2021 addressed to Messrs Stower and Robinson (then as the JPLs) has confirmed that the Company's former directors did not seek or obtain the Authority's approval to effect the Purported Transfer. In its letter the Authority (which is not itself represented

in these proceedings) also expresses the view that the Purported Transfer took place in breach of Section 31 of the Act and that it is " *of no legal effect*" as a matter of Cayman Islands law.

The Insigneo Transferred Funds

26. The US$34 million (which was said to represent part of the cash surrender values of the policies of the Affected Participants[4]) (hereinafter the "**Insigneo Transferred Funds**") was transferred from the Company to an account held in the name of Premier LLC with Insigneo in three tranches between 16 July and 2 September 2020. As explained in paragraph 79 of Robinson 1, Mr Jimenez informed the JOLs via email that these sums were paid to Premier LLC (rather than to PAPR) as a result of a delay in opening a bank account in the name of PAPR in Puerto Rico and that the funds were held on trust by Premier LLC for PAPR. In addition, that the Insigneo Transferred Funds have accrued investment gains totalling US$7,554,527.81 (the "**Investment Gains**") as at 15 March 2021 and these currently remain in the Premier Insigneo Account.

27. In relation to the Insigneo Transferred Funds, and such Investment Gains as have been made thereon, there are currently proceedings in the US Bankruptcy Court for the Southern District of Florida (the "**Florida Court**"), in which the Winding Up proceeding in respect of the Company in this Court was granted recognition as a Foreign Main Proceeding under Chapter 15 of the United States Bankruptcy Code and in which the JOLs therefore serve as Foreign Representatives of the Company. In essence, in those proceedings (the "**Insigneo Interpleader Action**") the Florida Court is asked to determine the rights in the Insigneo Transferred Funds as between the Company and Premier LLC. A Temporary Restraining Order ("TRO") over the Funds is in place and the Florida Court has ordered that the proceedings be abated pending the outcome of these proceedings

[4] *A list of the policy numbers of the Affected Policies is exhibited to Robinson 3 and shows a total cash surrender value of USD43,529,621.*

before this Court. The Florida Court has expressed no view on the issues in the instant proceedings and has not opined on whether these proceedings will be determinative of the claims in the Insigneo Interpleader Action.

The Re-Amended Originating Summons

28. The Plaintiff's Re-Amended Originating Summons seeks declaratory relief in respect of the legal effect (if any) of the Purported Transfer and, in particular, declarations that:

a. *the Purported Transfer constituted:*

i. *a "transfer" within the meaning of Section 31(1) of the Act ; and/or*

ii. *a change in the approved business plan and information supplied in the Company's approved licence application within the meaning of Section 8(1)(a) of the Act; and*

b. *the Purported Transfer (alternatively, the "surrender" of the Affected Policies) was void ab initio, void, voidable and/or otherwise of no legal effect*".

The issues for resolution

29. Against that contextual background, the first issue is whether the Purported Transfer was a "transfer" within the meaning of section 31 of the Act which is set out following:

30. " Section 31:

(1) A transfer or amalgamation of the whole, or any part, of the long term business of any insurer to another insurer shall only be effected in accordance with the approval of the Authority.

(2) An application for approval under subsection (1) shall be accompanied by -

a. a statement as to the solvency of the transferee;

b. a certified copy of the agreement under which the transfer is to be effected;

c. a report on the terms of the proposed transfer, prepared by a competent professional person approved by the Authority; and

d. satisfactory proof that sufficient notice of the proposed transfer has been served on each policyholder affected and that the notice has been published in local media at least thirty days before the application to the Authority is made.

(3) The Authority may approve the proposed transfer as presented or subject to such terms and conditions as it sees fit, having regard to the rights and interests of all policyholders affected by the transfer and all the circumstances of the case.

(4) The Authority may impose conditions on applicants under this section and in particular –

(a) for the transfer from the transferor to the transferee of the whole or any part of the undertaking concerned and of any property or liabilities of the transferor concerned;

(b) for the allotment or appropriation by the transferee of any shares, debentures, policies or other similar interests in the transferee which under the scheme are to be allotted or appropriated to or for any other person;

(c) for the transfer of property or liabilities whether or not the transferor concerned otherwise has the capacity to effect the transfer in question;

(d) in relation to property held by the transferor as trustee;

(e) in relation to future or contingent rights or liabilities of the transferor; and

(f) for securing the effective transfer to the transferee of any property or liabilities, that is the subject of the transfer, situated in or governed by the law of any jurisdiction outside of the Islands.

(5) In this section -

"liabilities" includes duties;
"property" includes property, rights and powers of any description;
"transferee" means the insurer to whom the long term business of the transferor is transferred; and
"transferor" means the insurers (sic) whose long term business is transferred under subsection (1)."

"*Long term business*" is defined in Section 2(1) of the Act[5]. It is clear and undisputed, given that they were policies of insurance on human life, that the Affected Policies, the subject of the Purported Transfer, were long term business as so defined.

31. Before turning to the exercise of interpretation of the Act (sections 31 and 8 in particular), it is important to emphasise that the Directors had themselves acknowledged that the Purported Transfer constituted a "*transfer*".

32. As Mr. Robinson notes in paragraph 105 of Robinson 1 (and elsewhere), the notice sent to the Affected Participants on 25 June 2020 stated that their policies "*will be transferred*" and the Memorandum from Premier Trust entitled "*Benefits of Puerto Rico Jurisdiction*" and dated 25 June 2020, explained that "*we transferred a block of policies from Cayman Islands to Puerto Rico*" [emphases added].

33. However, as Mr. Robinson explains in paragraph 106 of Robinson 1: once the JOLs (in their former status as JPLs or Controllers) became involved in correspondence with the Directors, the Directors ceased referring to the Purported Transfer as a "*transfer*" and chose to adopt the word "*migration*" in its place.

34. Furthermore, as the Plaintiff submits, not only does the language used by the actual participants indicate that they believed a "*transfer*" to have occurred, but also, as already mentioned, they appear to have accepted that the Purported Transfer was invalid. In this regard, and in implicitly so acknowledging, Mr. Jimenez informed the JPLs that there was no objection to US$34 million from the Premier Insigneo Account being repaid to the Company (see Robinson 1 at paragraph 107). In similar vein, as revealed in notices sent from Premier Trust to an Affected Participant (which was

[5] *As subsequently amended by Act 5 of 2022 but in terms inconsequential for present purposes.*

in turn forwarded by email to the then JPLs), it was acknowledged that the "*migration*" of policies had not been ratified by the JPLs and the Authority and as a consequence, surrender values would need to be returned to the JPLs' firm KPMG, on behalf of the Company (see Robinson 1 at paragraph 107).

35. The Directors' position subsequently changed. On 15 March 2021, the JPLs (through their United States Counsel Baker& McKenzie LLP "**Baker**") wrote to Insigneo (copying, inter alia, U.S. Counsel for Beast Capital and the Directors) to inform Insigneo that the Authority had confirmed on 11 March 2021 that the Purported Transfer took place without the Authority's approval in violation of section 31 of the Act and that the JPLs' appointment had been recognised by the U.S Bankruptcy Court. In that letter, Baker further demanded turnover of the Transferred Insigneo Funds, Investment Gains and all interest accrued on such funds.

36. However, contrary to the Directors' previous communications, Cayman Islands attorneys Campbells, in a response by letter dated 7 April 2021 (apparently sent on behalf of the Directors[6]), disputed that the Purported Transfer constituted a "transfer" within the meaning of section 31 of the Act or that the Authority's approval was required in respect of the Purported Transfer. Campbells asserted that the Purported Transfer did not constitute a transfer on the basis that the Trustee had resolved on 28 August 2020 to " i) *cancel the insurance policy held in favour of PASP* [(ie: by definition the Group Policy)] ... *and (ii) issue a new policy in relation to health and life insurance for the benefit of PASPR.*" Campbells further denied that the Purported Transfer was void *ab initio* on the basis that there is no express provision in the Act to that effect.

[6] *The letter did not confirm for whom Campbells were acting and, in particular, whether it was also written on behalf of other related entities, such as PAPR itself, Beast Capital and Premier LLC.*

37. Following further exchanges in which the JOLs notified their intention to seek appropriate declaratory relief from this Court, the Directors agreed to return the Insigneo Transferred Funds and Investment Gains but then contended, as indicated above, that a sum of USD 6.9 million should be held in the Premier Insigneo Account on the basis that PAPR had an alternative claim to those sums as a number of the Affected Participants had surrendered their policies with PAPR and that PAPR had paid those Affected Participants surrender values to that amount.

38. As also further explained at Robinson 1 [113] – [116], while the JOLs have not accepted that the alleged sum could properly be withheld, in his email dated 21 May 2021, Mr Jimenez confirmed that the amount of USD 41,463,758 .61, less USD6,996,395.09 with a net transfer amount of USD 34,467,363.58 , would be remitted to the Company's account. An Excel spreadsheet noting those PAPR policies said to have been surrendered was enclosed. On 24 May 2021, Campbells also sent an email to Walkers (the JOLs' Cayman Attorneys) stating that it was understood that the Directors had agreed to the transfer of USD34, 467,363.58 "*as soon as possible*", with further correspondence to follow in respect of the balance. However, as Robinson 1 explains at [116], despite this agreement and the JOLs having sent payment instructions for the Directors to authorize transfer of USD34,467,363.58 on 24 May 2021, the Directors failed to provide their signed consent to such transfer.

39. Against that background, it must be said that the Directors' may be regarded as having conceded that a transfer took place within the meaning of the Act and, at best, as vascillating about its efficacy and validity.

40. However, the arguments before me came to be joined not with the Directors in person but with the First and Second Defendants who, having at the eleventh hour decided to participate in these proceedings, were granted an adjournment on 18 April 2023 (the first day set for the hearing), to allow for submissions on their behalf by Collas Crill whom they instructed to acknowledge service

of the proceedings[7]. Late Acknowledgements of Service were allowed to be filed on the 18 April and full written submissions were required of the First and Second Defendants and filed by Ms Colgate and Mr ODoherty on 24 April before the resumption of the hearing on 26 April. The oral arguments were heard on the 26 and 27 April.

41. The First and Second Defendants submitted that the transaction in question was a "*cancellation*" of business written from within the Cayman Islands and a new insurance policy taken out with PAPR. That it was not a transaction by way of "*transfer*" falling within the terms of section 31 of the Act, properly construed. This cancellation they at first submitted, was effected by way of a surrender by the Trustee of the Group Policy, exercising its powers under Section IX (C) of the Trust Deed and so did not require the prior consent of the Plan Participants. Nor, they submitted, was there even an obligation on PASP and/or the Trustee to notify the Participants of the Surrender in advance of the Group Policy being surrendered. The fact that such notification occurred retrospectively via a notice posted on the Participants' online portal for their accounts is therefore irrelevant. Accordingly, that the Plaintiff's contention that "*in the absence of their being an ability to disagree, this does not constitute an effective form of consent*", is also irrelevant.

42. I must however, here comment on the inconsistencies appearing even within the submissions of counsel for the First and Second Defendants. In their written submissions at [10], they at first submitted, that "*The Trustee, having purchased the Group Policy pursuant to its powers under the Trust Deed, was afforded wide ranging powers to deal with that insurance policy under section IX of the Trust Deed. Those powers included the power of the Trustee "to surrender the policy wholly or any part or any bonus attaching to the policy for its case (sic) surrender value. Accordingly,*

[7] *Service of the Re-Amended Originating Summons having been effected on the First, Second and Third Defendants respectively on 1 June 2022, 19 May 2022 and 18 May 2022 – see Robinson 6 at [22] to [26].*

the Surrender was effected by the Trustee exercising its power under Section IX (C) of the Trust Deed to surrender the Group Policy." [emphasis added].

43. However (in response to a request from the Court for clarification and by way of their explanation of how the Enrollment Agreements operated), a Note was submitted by counsel for the First and Second Defendants on 28 April which, at [3] states as follows: "*The Plan Participants were able to participate in the Group Policy by entering into the Enrollment Agreement. On doing so, each Plan Participant acknowledged that the Trustee would administer the Plan*[8] *in accordance with the terms of the Trust Deed and the Enrollment Agreement. Upon acceptance into the Group Policy, Plan Participants were issued a policy certificate by the Company. Plan Participants could surrender their policy at any time by making a written request. Further, pursuant to Section IX (c) of the Trust Deed, the Trustee was permitted to surrender any insurance policy (or any part thereof) which comprised the Trust Fund. The First and Second Defendants' submission, ... is that the Trustee exercised the right to surrender the Plan Participants' policies, not the Group Policy. The First and Second Defendants do not contend that the Group Policy was cancelled by the Trustee, as more than 70% of PASP's life insurance business remained in the Cayman Islands and was attributable to the Group Policy".* [emphases added].

44. Thus, it is conflictingly explained on behalf of the First and Second Defendants (and in contrast with what the Directors first contended through Campbells, their Cayman Islands attorneys (as set out at [36] above)) that the Trustee (who has not chosen to join in these proceedings) purports to have exercised a contractual right to surrender the policies of Plan Participants in question as the means by which those policies were discontinued as part of the business of the Company referable

[8] Defined at s. 1. 2(d) on page 213 as "*the scheme whereby the Trustees purchase policies for the benefit of the beneficiaries with monies received from the Plan Participant(s) [as set out in the Second Schedule to the Trust].*

to PASP and were purportedly reissued or were to be reissued by PARP, while also contending that it was the Group Policy which was surrendered.

45. It is also against this uncertain background, that the First and Second Defendants nonetheless submit at [30]-[31] of their written submissions: "*that while the Act does not define "transfer", it is clear that a transfer for the purposes of the Act requires that there be both a transferee and a transferor such that the transaction envisaged for the purposes of section 31 involves counterparties between whom the long-term business (written in or from within the jurisdiction) passes. The passing of business by way of transfer would necessarily involve the divestment of the legal and/or beneficial interest in long-term business of the transferor to the transferee. To that end, a transfer may be direct but must nonetheless involve the transfer of legal rights in the relevant property, such that the property and the legal or equitable interests are transferred from one party to the other*".

46. This, the argument continues, "*fundamentally differs from the Surrender, which was a surrender of the Group Policy by the policyholder under the Act. The Act does not include a definition of "surrender" but the term itself means, in respect of an insurance policy, "to end an insurance policy early, before its original end date"*[9]*. Whereas a transfer involves the continuation of an asset and legal interests in that asset or property, the hallmark of a surrender is that rights and interests in an asset or property are brought to an end. In the present case, the Trustee surrendered the Group Policy which brought its insurance business within the Cayman Islands to an end. This step was consistent with the Company's business plan submitted to the Authority indicating that it planned to shift its business from the Cayman Islands*". [emphases added]

47. While it was not necessary for me to pronounce upon what powers the Trustee purported to exercise to effect the Purported Transfer, this argument further compounds the uncertainty surrounding the transaction as it also runs counter (as shown above) to the Note submitted by counsel on behalf of the First and Second defendants themselves.

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[9] *Citing https://dictionary.cambridge.org/dictionary/english/surrender?q=surrender.*

48. Moreover, as Robinson 1 further explains at [21], the explanation first given on behalf of the Directors was that on or around 15 June 2020, not the entire Group Policy, but the interests of 3221 Plan Participants (out of a total of 10485 Participants) referable to PASP were purportedly transferred from PASP to PAPR. The Purported Transfer was purportedly effected by the Trustee surrendering the Affected Participants' insurance policies with the Company (on behalf of PASP), and those affected Participants subsequently being issued with new interests in PAPR. The insurance policies held by the Affected Participants had the aforementioned cash surrender value of USD43,529,621.

49. According to Mr Jimenez in his explanation given in an email response to questions from the JOLs dated 16 November 2020, the transaction was such that:

> *"The plan being migrated to the new jurisdiction is in essence duplicated, including credit for all prior payments and increases in values as well as all prior charges and fees as entity. Once completed, the old plan was then cancelled at the net "CASH VALUE". The cash value was then transferred or set up to be transferred*[10] *to the new entity. The migration resulted in a zero asset/liability transaction where the liability transferred (CASH Surrender Value) was accompanied by Cash and/or receivable. No surrender fees assessed to the participant."* [emphases added].

50. As there explained by Mr Jimenez, the plan was "*duplicated*", the old plan cancelled and the cash surrender values "*transferred*", albeit indirectly because, remarkably, PAPR did not then even have a bank account. The notion that the Company was terminating by cancellation or surrender, its long-term business in Cayman and starting anew in Puerto Rico was not then the explanation given.

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[10] *This latter proposition because as also remarkably came to light, the "new entity" (presumably PARP) did not yet have a bank account.*

51. However, as already mentioned, I need not decide upon which, if any, of the varying explanations of how the Purported Transfer was effected is true. Whatever the means by which those responsible purported to effect the transaction, to the extent that the regulatory regime of the Act is engaged, it will be the substantive impact upon the rights of Plan Participants with which the regime will be concerned. Indeed, the vacillating and inconsistent explanations given by the Directors, Mr Jimenez and the Second and Third Defendants for the transaction; are themselves clear manifestation of its potential mischief,ie: the vulnerability to which Plan Participants would be exposed if the transaction were not regarded as a transfer within the meaning of the Act and covered by its regulatory reach. And without passing upon the *bona fides* of those behind the transaction or the propriety of the transaction itself, it is clear that the Affected Participants, not having been consulted nor consented beforehand, had no direct involvement in the transaction nor any immediate recourse to ensure the protection of their interests.

52. It is against all that background that one turns to seek the meaning of the Act. And whatever one might make of the actions or purported actions of the Directors, the Trustee and First and Second Defendants, as Mr Levy K.C. submitted, the word "*transfer*" has a readily understood meaning in every day parlance, ie: "*to move from one place to another*", a meaning very similar to "*migrate*" in its every day usage.

53. Indeed, the Oxford English Dictionary defines transfer as both a verb and a noun.

a. As a verb the definitions include:

"*transitive*. To convey or take from one place, person, etc. to another; to transmit, transport; to give or hand over from one to another.

b. As a noun, the definitions include:

"*Law*. Conveyance from one person to another of property, *spec.* of shares or stock.

"The act of transferring or fact of being transferred; conveyance or removal from one place, person, etc. to another; transference; transmission."

54. Further assistance may be gleaned from the case law. In ***Executors of the Estate of David Fasken v Minister of National Revenue*** [1948] Ex .C. R. 580, David Fasken made provision by way of trust for his wife to receive payments from income to the trust derived from the repayment of a large debt owed to him by a company. The Exchequer Court of Canada when deciding whether benefits received by way of the payments under the trust amounted to a transfer of property from husband to wife for tax purposes held, inter alia, that "*the word "transfer", as used in [the Tax legislation] is not a term of art and has not a technical meaning. It is not necessary to a transfer of property from husband to wife that it should be made in any particular form or that it should be made directly. All that is required is that the husband should so deal with the property as to divest himself of it and vest it in his wife, that is to say, pass the property from himself to her. The means by which he accomplishes this result, whether direct or circuitous, may properly be called a transfer".*

55. In ***Lyle & Scott Ltd v Sott's Trustees, Same v British Investment Trust Ltd*** [1959] A.C. 763, the House of Lords ascribed a similarly unrestricted non-technical meaning to the word "*transfer*" in deciding whether a shareholder, in purporting to sell his shares to an outsider in breach of the pre-emption rights of fellow shareholders, had acted in breach of the articles of the company. In one of the three unanimous judgments, Lord Reid declared as follows (at page 777-788):

"*I have come to the conclusion without difficulty that on their own admissions the respondents are in breach of article 9. The purpose of the article is plain: to prevent sales of shares to strangers so long as other members of the company are willing to buy them at a price prescribed by the article. And this is a perfectly legitimate restriction in a private company. But the respondents argue that, whatever may have been the intention, the terms of the article are such that it has only very limited application. They say that "transfer" and "transferring" only apply to a complete transfer of the ownership of shares by acceptance and registration of deeds of transfer, and that a shareholder who agrees to sell his shares is quite entitled to do so and to receive the price and vote as the purchaser wishes so long as he is not desirous of having a transfer registered.*

I see no reason for reading the article in that limited way. Transferring a share involves a series of steps, first an agreement to sell, then the execution of a deed of transfer and finally the registration of the transfer. The word transfer can mean the whole of those steps. Moreover, the ordinary meaning of "transfer" is simply to hand over or part with something, and a shareholder who agrees to sell is parting with something. The context must determine in what sense the word is used."

56. In ***Hurst v Crampton Bros Ltd*** [2002] EWHC 1375(Ch) Jacob J decided to similar effect, - following among other cases, ***Lyle v Scott*** (above)- that a transfer of shares in violation of pre-emption rights of other shareholders, had taken place once the deed of transfer was signed over to the transferee although it had not been registered.

57. When the context of the dispute here is considered, acceptance of the various relabelings of the transaction without recognizing its practical effect upon the interests of the Affected Participants would, in my view, be to allow mere semantics to triumph over substance. I therefore endorse the following submissions of Mr Levy K.C.: "*Obviously, if the Affected Policies had been directly transferred or assigned by PASP to PAPR there would have been a transfer within the meaning of the Act (which.. would have had to comply strictly with the provisions of Section 31). It would be a bizarre, and non-purposive, construction of the Act if the effect of the "no transfer without the Authority's approval" provision of this piece of inter alia consumer protection legislation in a regulated market, could be overcome by means of a "cancellation" by the (authorised) insurer, and re-grant by a foreign, unauthorised entity. If that is the true construction then the provision has no teeth and affords no protection whatsoever; an insurer could simply cancel all its policies, hand over the funds to an unregulated, foreign, third party, who then issues ([or indeed as I would add even fails to issue]) similar policies - all without the prior oversight or approval of the Authority, notice to affected parties and proof of solvency of the transferee*".

58. In the present context of the Act, where the word "*transfer*" is not defined, let alone ascribed a narrow technical meaning, I can see no reason why it should not be ascribed an equally broad and purposeful meaning as ascribed in the cases cited, or indeed, as the ordinary usage of the word conveys. The broad tenor of the dicta from the cases also suggests support for the notion that a "*transfer*" includes an indirect disposition by way of cancellation by X and re-grant by Y, such as is proposed by the First and Second Defendants to define the Purported Transfer from PASP to PAPR.

59. I therefore have no hesitation in holding that the Purported Transfer was a "*transfer*" within the meaning of section 31 of the Act, in that, however described (whether as a "*cancellation*" or "*surrender*" of the Plan Participants' policies or the Group Policy and the "*reissuance*" of policies), as described by the Directors (who were responsible for the transaction) it certainly involved removal of the long term business of the Company (referable to PASP) comprised in the policies of the Affected Participants, from the Company within the jurisdiction of the Cayman Islands to PAPR in Puerto Rico.

60. That however, was not to be the end of the contest in this matter. It emerged for the first time in the arguments, that it was also being contended that as PAPR was not an insurer licensed by the Authority, it was not an "*insurer*" within the meaning of section 31 of the Act and so the Authority's approval for the transfer of the Company's long-term business to it, was not required in any event. The argument revolves around the general definition of "*insurer*" in section 2 of the Act; ie: " *Insurer" means a person who is (a) licensed under section 4(3)(a), (b), (c) or (d) to carry on insurance business; or* (b) [not relevant for present purposes]."

61. The First and Second Defendants also refer to the definition of "*licensee*", which under section 2 of the Act " *means the holder of a valid licence granted under section 4*". They argue that the

Authority by virtue of the general scheme of the Act, exercises a supervisory role only in respect of "*licensees*" as defined by the Act and who seek to transact insurance business in or from within the Cayman Islands and so, as PAPR is not a licensee or insurer within the meaning of section 2, a transfer to it is not caught by section 31.

62. Further, from [20] and [21] of their written submissions: "*that on the basis that the purpose of the Act is to regulate the insurance market as it operates within and through the jurisdiction, it necessarily follows that the Act is not intended to regulate the conduct of insurance business which is neither written in nor from within the jurisdiction, nor insurers who write insurance business outside the Cayman Islands. Importantly when adopting a purposive interpretation of the Act it is necessary to ensure the interpretation does not go beyond what is necessary to give effect to the ascertained legislative intention. In particular, the intention of the Act is to regulate the insurance business conducted within the jurisdiction, but it would be an overly broad and arguably unworkable reading of the Act to suggest that it was intended to prevent insurance business leaving the jurisdiction without the prior approval of the Authority*."

The purpose of the Act

63. Thus explained, the arguments invited a more in-depth examination of the purpose of the Act. Yet there can be little doubt: its purpose is as clearly explained above at [57] above by Mr Levy and as I expand here - the proper regulation of the business of insurance carried on in or from within the Cayman Islands in the public interest and for the protection of consumers - the insured - who engage in insurance business with persons who are licensed as insurers, of any class, under the Act. The regulatory reach of the Act must also be taken as intended to be effective in the context of the relationships it seeks to regulate - contractual relationships of *uberrima fides*, or utmost good faith, based upon trust and confidence and by which consumers not only from within Cayman but also from abroad, part with significant sums of money by payment of premiums remitted to the Cayman Islands, in return for the assumption of important risks and obligations on the part of insurers. It is

with such considerations in mind that Parliament, by the Act, vests very wide duties and powers in the Authority for the regulation of insurers and the protection of consumers.

64. As set out above at [30], section 31 of the Act describes in detail, the many considerations to be weighed by the Authority in deciding specifically, whether or not to approve a transfer of insurance business. Section 22 also gives a broader list of the Authority's more general duties. They include (as I summarise below) the duty to:

(a) maintain a general review of insurance business in the Islands;

(b) from time to time examine by way of scrutiny of regular returns, on-site inspections or auditors' reports or in such other manner as the Authority may determine, the affairs or business of any licensee, for the purpose of satisfying itself that the Act or regulations made under it or the Proceeds of Crime Act, are being complied with and that the licensee is carrying on business in a fit and proper manner;

(c) examine the annual returns (including audited financial statements, an actuarial valuation of assets and liabilities and certification of solvency) submitted to the Authority as required by section 9 of the Act;

(d) and examine and make determinations with respect, inter alia, to proposals for the revocation of licences in circumstances specified by the Act (eg: under section 25 for misrepresentation of different kinds), and with respect to cases of suspected insolvency; and to give directions to cease and desist from a certain course of conduct of business or to suspend or revoke a licence for any of several reasons specified in the Act (section 24 (1)).

65. The powers and duties of the Authority which relate specifically to the regulation of a Class B insurer like the Company, are particularly telling in the present context of the issues raised in these proceedings.

66. Section 8 of the Act (which will also be examined below for the purposes of paragraph 1(b) of the JOLs' Re-Amended Originating Summons) provides that:

> *(1) A licensee*
>
> *(a) shall carry on business only in accordance with the information given in its approved licence application and business plan and shall seek the prior approval of the Authority for any change to the approved business plan or in the information supplied in the application;*
>
> *(b) shall not, without the prior written approval of the Authority –*
>
> *(i) open outside the Islands a subsidiary, branch, agency or representative office or change its name; or*
>
> *(ii) ...*
>
> *(c) That is required to have a place of business in the Islands shall maintain in the Islands such resources, including staff and facilities, books and records as the Authority may consider appropriate, having regard to the nature and scale of business."* [emphases added]

67. By section 8(4), (which also speaks more specifically to the kind of business undertaken by the Company):

> *" A Class B insurer that is established as a segregated portfolio company under Part XIV of the Companies Act (2010 Revision) shall, in respect of each segregated portfolio –*
>
> *(a) maintain the prescribed margin of solvency;*
>
> *(b) unless waived by the Authority, comply with section 9(1)(a) and (c); [ie: inter alia, for the submission of annual returns, actuarial valuations and certification of solvency] and*
>
> *(c) cause each submission under paragraph (b) to be prepared using the same financial year end."*

68. By section 8(2), an insurer (including as we have seen from section 8(4), a Class B iii insurer like the Company) shall continue to meet various prudential requirements, such as margins of solvency and, in particular for present purposes, by section 8(2)(e), an insurer shall "*where it is a member of an insurance group, inform the Authority of any activity or transaction undertaken or proposed by another member of the group that could reasonably be expected to have a material effect on the insurer.*" [emphasis added]

69. Finally for present purposes, by section 2 of the Act, "*insurance group*" means "*a group that includes an insurer's subsidiaries, holding company, companies related to the insurer through common ownership or control or which have a majority of common senior management or directors*". [emphasis added]

70. When the foregoing provisions are viewed together, it is plain that the Act contemplates oversight by the Authority of dealings between a licensee and related entities, whether located within the Islands or - as is the case here between the Company and PAPR, through Providence the First Defendant – located overseas. This is not to be confused with any notion of regulation or oversight of the overseas entity itself. Rather, it is a matter of the proper regulation of the licensed insurer itself that its dealings with an overseas related entity which might impact its business for which it is licensed by the Authority, that the Authority should have oversight.

71. The First and Second Defendants' contention would negate the purpose of the legislative scheme. It would, for instance, mean that although the Company was licensed by the Authority to underwrite unit-linked life insurance business from within the Cayman Islands with plan participants around the globe, and so invite them to remit and accept the payment of their premiums here and become obliged, in good faith to manage and invest them prudentially for the benefit of participants, the Authority could no longer oversee the fulfilment of those obligations once the Company, entirely unilaterally - without either the approval of the Authority or participants, and whether acting in

good faith or not - chose to remove the business (partially or entirely) and the concomitant assets and liabilities, from the Cayman Islands.

72. That would be an utterly absurd consequence of the construction of a legislative scheme which is designed for the protection of consumers of insurance products offered by insurers in or from within the Cayman Islands and the protection of the public interest in maintaining high regulatory standards.

73. It is an old canon of statutory construction, dealt with at length in ***Bennion on Statutory Interpretation***, 8th Edn. Ch. 13 that in seeking the meaning of legislation, "*the court seeks to avoid a construction that produces an absurd result, since this is unlikely to have been intended by the legislature*" (see section 13.1(1)). The principle against absurd construction means that the Court will avoid a construction that is unworkable or achieves an impracticable result (see for example ***Bennion*** paragraph 13.3 and the examples cited therein). Likewise, the Courts will lean against a result which is anomalous or illogical (again, see ***Bennion*** at section 13.5 and its examples).

74. Such difficulty as is presented, arises from the fact that section 2 of the Act appears exhaustively to state that *"insurer" means a person licensed under section 4(3)(a),(b), (c) or (d) to carry on insurance business*" [emphasis added] and, as ***Bennion*** also recognises (at Ch. 18 section 18.2), an exhaustive definition provides a comprehensive description of everything that is covered by the defined term and displaces any other meaning that the term would otherwise have. It would therefore seem propositionally illogical to hold that section 31 (1) is not limited by the section 2 definition of "*insurer*" where section 31(1) states that: "*A transfer or amalgamation of the whole, or any part of the long term business of any insurer to another insurer shall only be effected in accordance with the approval of the Authority*". [emphasis added].

75. However, the authors of ***Bennion***, in their admirable codification of the multitudinous rules of construction, also recognise, at Ch. 18, section 18.8, yet another rule, supported by the several cases there cited[11]: "*A statutory definition does not apply if the contrary intention appears, regardless of whether the definition includes express provision to that effect.*"

76. A contrary intention appears clearly, as we have seen, from the legislative scheme read as a whole, including the obvious aim at the oversight of business between licensees and others within the same group as the licensee, whether located in the Cayman Islands or overseas – see the discussion on section 8(2) above.

77. One is therefore compelled to the conclusion, in keeping with the modern approach of seeking not merely the literal but the purposive meaning of the Act and one which avoids absurdity and the perpetuation of the mischiefs intended to be defeated[12], that the expression "*another insurer*" (which if taken as a distinct term as it appears in section 31 (1) of the Act is itself undefined) must be taken as meaning any other insurer, whether licensed by the Authority to operate in or from within the Cayman Islands or operating elsewhere.

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[11] *Including longstanding decisions of high authority from Meux v Jacobs (1875) LR 7 HL 481 (dictum of Lord Selborne at 493-495) and Robinson v Local Board of Barton-Eccles, Winton and Morton (1883) 8 App Cas 798 (dictum of Lord Selbourne at 801) There, in considering whether the word "street" as defined in an interpretation clause included new streets or only old streets, stated: "An interpretation clause of this kind is not meant to prevent the word receiving its ordinary, popular, and natural sense whenever that would be properly applicable. I look upon this portion of the interpretation clause as meaning nothing more nor less than this, that the provisions contained in the Act as to streets, whether new streets or old streets, shall, unless there be something in the subject-matter and the context to the contrary, be read as applicable to these different things."*

[12] *See again* ***Bennion,*** *Ch 12 , at sections 12.2 and 12.5; Ch 13, sections 13.1 and 13.8 and as the principles are helpfully summarised in the dicta of Mangatal J in* ***BDO Cayman & Others v Governor in Cabinet*** *[2018] (1) CILR 457 (at [123] –[130]).*

78. The narrower meaning contended for by the First and Second Defendants would allow for transfers to entities purporting to carry on insurance business overseas but which meet no capitalisation or other regulatory requirements and operate in places which impose no proper regulatory oversight and which are run by persons who need not be fit and proper persons as contemplated by the Act. The argument, on the facts of this case, would place the highly questionable transaction[13] of the Purported Transfer entirely beyond the regulatory reach of the Act and oversight of the Authority, to the potential detriment of the Affected Participants who would have no recourse under Cayman law and no clear recourse available to them anywhere else[14].

79. I accept the Plaintiff's submissions that such consequences Parliament could not have intended given that the Act (like its predecessors), is designed to ensure a properly regulated insurance market for the protection of insureds (or potential insureds), other market participants, and in keeping with the reputation of the Islands as a safe and secure environment for business generally (and insurance business in particular).

80. I therefore find that not only was the Purported Transfer, a transfer within the meaning of section 31(1) of the Act of " *the whole or any apart of the long-term business of (the Company)*", it also

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[13] *Yet another illustration of this is the fact that the Group Policy does not contain any terms entitling the Trustee to surrender the investment plans or the Group policy itself. The surrender provisions in the Group Policy only refer to a participant being able to request a surrender in writing to the Plaintiff and in those circumstances, the Plaintiff's liability will cease: see section XI (Surrender Provisions) of the Group Policy.*

[14] *I note, for the sake of completeness, that I was invited by the First and Second Defendants to have recourse to the Hansard minutes of the proceedings when the Bill for the Act was debated. This was on the basis that the meaning of section 31(1) of the Act was unclear and ambiguous. Although I read the minutes and considered the arguments, I declined the invitation to take the comments from the debate into account. In my view, they did not meet the threshold test famously laid down by the House of Lords in* ***Pepper (Inspector of Taxes) v Hart*** *[1993] AC 593.*

involved another insurer and so required the prior approval of the Authority. This was even more so precisely because that other insurer operates or purports to operate overseas.

81. The consequences of the Authority's approval not having been sought or obtained as required by section 31, will be considered after I deal with the issues whether the requirements of section 8 of the Act were also breached.

Scope of application of Section 8(1) of the Act

82. Section 8(1)(a) of the Act, pursuant to which, in the alternative, the Plaintiff seeks a declaration under paragraph 1(b) of its Re-Amended Originating Summons in respect of the Purported Transfer provides that:

> *"A licensee*
>
> (a) *Shall carry on business only in accordance with the information given in its approved licence application and business plan and shall seek the prior written approval of the Authority for any change to the approved business plan or in the information supplied in the application*"

83. Thus, as the Plaintiffs submit, the business (and the manner of carrying it on) explained in the business plan (as well as the information supplied in the application for a licence) are plainly of the utmost importance; any variation requiring of the Authority's prior written approval. It follows that there can be no change without a request from the licensee (which may, depending on the nature of the proposed change, be followed by consultations with/requisitions from, the Authority), and the Authority's subsequent approval.

84. The Company's most recent "3 Year Business Plan", dated 31 July 2020, (the Business Plan) is exhibited to Robinson 1. It makes no mention of the Purported Transfer, despite it post-dating, on the narrative of events set out above, many of the important events relevant thereto. Absent evidence from the Defendants to the contrary, as the Plaintiffs submit, it is realistic, and fair, to

proceed on the basis that the Purported Transfer was not conceived and put into effect within a day, or even a week.[15] It must have been in contemplation for months at least. The documentation relating to the Purported Transfer is presumably, voluminous, and it would be surprising if it was not the subject of some thought, and planning, at and around the time that the 48-page Business Plan was being drafted and approved internally.

85. The Business Plan does refer, without any degree of specificity, to the possibility of a "shift" away from a Cayman Islands jurisdiction. Thus, at page 37 (exhibited to Robinson 1) it says:

> "*Forecast for PASP*
> *The forecast for PASP clearly denotes the shift away from a [sic] Cayman Islands Jurisdiction. According to the information being received from the distribution network, clients have express [sic] interest in alternate jurisdictions. We expect the business in Cayman Islands to be significantly reduced within a period of 3-5 years.*"

86. Even if the Business Plan had been more accurate, and referred to a reduction in Cayman Islands business as already being underway or that steps had already been put in motion and explained what those steps were, it is not disputed that the prior written approval of the Authority had not been sought nor obtained.

87. Furthermore, there is a real possibility as the Plaintiff submits, that to the extent that the Business Plan did not represent the facts known to the relevant players at the time it was presented to the Authority, then an offence under Section 37 (1) of the Act was committed. That subsection provides that: "*A licensee, applicant for a licence, or any director or officer of a licensee or of an applicant shall not knowingly or wilfully supply false or misleading information to the Authority*".

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[15] It is noted that, in his email to the JOLs dated 2 October 2020 [at exhibits to Robinson 1 pages **336-337]**, Mr Jimenez stated that: "*Discussions between the directors regarding the decision* [to stop writing policies in PASP] *have been ongoing since prior to the establishment of the new jurisdiction in Puerto Rico. During the 3rd quarter of 2019, the decision to seek alternative jurisdictions was initiated...A decision was reached at or near the middle of the 1st Quarter with a target date of 4/1/2020. Due to several reasons, notwithstanding technology, accounting, marketing, etc. the target date was postponed and a final date was July 31, 2020.*"

On the face of things, the Business Plan must have been misleading in expressing an expectation that the business in the Cayman Islands might be significantly reduced within a period of three to five years, when in actuality it has been revealed that the process of the Purported Transfer of the PASP portfolio to Puerto Rico already was underway before the Business Plan, on its face dated July 31, 2020, was presented to the Authority.

88. The First and Second Defendants do not accept any of this. They refer at [12] of their written submissions, to the policy documents governing the Company's unit-linked life insurance products as having been available to the Authority from the time of the grant of the Company's licence in 2015. It is apparent from that documentation they submit, that the Authority would have been aware of the Trustee's power to surrender the Group Policy, which they assert here (again in contrast to their final submissions as set out above where they assert that it was the policies of the participants which were surrendered). They submit further that no material changes were made to any of the policy documents (ie: the Group Policy, the Trust Deed or the Enrollment Agreement) from the date of the grant of licence. This argument is developed at [38] of the submission : that the Authority can be taken to have scrutinised the Company's business plan and policy documents and made enquiries regarding the sale and operation of the Company's life insurance products, before deciding to grant the Company a Class B (iii) licence under section 4 (3)(b)(iii) of the Act. Further, that it can be inferred that the Authority were satisfied that the business plan and policy documents were in order and continued to hold this view as they approved the Company's licence renewal in the years following the initial grant in 2015. And, finally, that it is clear that the Trustee, in its capacity as "policyholder" under the Act, effected the Surrender in accordance with the policy documents. All of this documentation was available to the Authority so, they say, it is unclear to the First and Second Defendants how the valid exercise by the Trustee of its power to surrender the policy of insurance can amount to a breach of section 8(1)(a) as contended by the Plaintiff. The argument continues that the completion of the Surrender does not in any way undermine or

contradict the stated intention in the Company's Business Plan, albeit exact dates are not provided – that "*the business in the Cayman Islands (will) be significantly reduced within a period of 3-5 years*." The fact that 3221, or circa 30% of the Company's 10,485 participants took up new plans with PAPR in June 2020 simply reflects what was stated in the Business Plan. And although after the Surrender 7,624 policies comprising circa 70% of PASP's business in the Cayman Islands remained in the jurisdiction, there is no evidence to suggest that the remainder of PASP's business would not have been withdrawn from the Cayman Islands within the three to five year estimate in the Business Plan.

89. These are patently unacceptable arguments if, for no other reason than that the Trustee and Directors themselves, let alone the Authority, have been uncertain about the basis for the Purported Transfer (as shown above) and that the Business Plan was itself not submitted to the Authority until July 2020, fully one month after the Purported Transfer had taken place (and some 5 years after the time required by section 4(2) for presentation of a business plan, being the time when the application for the licence was submitted).

90. Moreover, returning to Section 8(1)(a) of the Act, and adopting the language of that section, I agree with the Plaintiffs that it is plain that the licensee has not carried on insurance business ***only*** in accordance with the information given in its approved licence application and business plan (being only such as appeared from the information given in its application). No specific business plan was approved at the time of the grant of the licence which referenced only the business for which it was sought and granted - that of a Class B (iii) insurer for the underwriting of insurance from and within the Cayman Islands. Further, those then in charge of the Company did not seek (or obtain) the prior written approval of the Authority for any change to the approved business plan (which approval would have had to have been retrospective having regard to the date of filing of the Business Plan) or in the information supplied in its application. The Business Plan made a vague reference to a

potential "*shift*" away from the Cayman Islands in the future, a reference which could not be regarded as an appropriate disclosure of the transfer of 30% of PASP's business to Puerto Rico, already then underway. It follows that the Purported Transfer constituted an unauthorised change in the Company's approved business plan and the information supplied in its approved licence within the meaning of Section 8(1)(a) of the Act. The Plaintiff is therefore entitled to the declaratory relief sought in paragraph 1(b) of its Re-Amended Originating Summons in relation to Section 8(1)(a).

Effect of failure to comply with the Act.

91. What then is the effect of the Purported Transfer in light of my findings of the failure to seek the Authority's approval under section 31 of the Act and/or the failure to carry on business in keeping with section 8(1)(a) only in accordance with the Business Plan and information supplied in the Company's approved licence?

92. On each of these issues, I am persuaded also by the Plaintiff's helpful submissions which I set out and analyse following, along with those of the First and Second Defendants.

Section 31

93. Section 31 of the Act does not explain the consequences of its breach. But it is plainly intended as a blanket prohibition on a transfer of the whole or any part of a licensee's long term business without the approval of the Authority; it expressly provides that such "*shall only be effected in accordance with*" the Authority's approval (and then, only following the submission of the material mandated by Section 31(2)) (above). The provision does not contemplate relevant transfers in any other way, and it would be an odd construction to read the section regardless, as if it ended with the words "*provided always that if no approval is sought, or is sought and denied, the transfer may go ahead and is effective*." Such a construction would denude the provision of any commercial (or regulatory/protective) force or sense, and would be contrary to the important powers afforded to the Authority to oversee, control and regulate the market and individual players. It would also plainly be contrary to the interests (and the protection) of policy holders.

94. I expand below upon my reasons for accepting that submission.

95. Given that Section 31 of the Act does not explain the consequences of a breach, the Court is obliged to determine the effect of non-compliant transactions. This is the central question on the Re-Amended Originating Summons. There is a wealth of learning and authority on the question of whether, when a legislative provision imposes a procedural or other requirement in connection with the doing of anything prescribed, but does not spell out the consequences of the breach, the failure to comply invalidates the thing done. The law is summarised, with numerous examples, in ***Bennion***, Ch. 9.

96. As ***Bennion*** explains at Section 9.5(2) "*in ascertaining the effect of a failure to comply, it is necessary to determine whether the legislature can fairly be taken to have intended non-compliance to result in total invalidity*". The learned authors continue by explaining that older cases that applied a distinction between mandatory and directory requirements (the former found in the cases as indicating an intention that failure to comply invalidates the action in question) are not relevant unless they specifically addressed the question of legislative intention as to the consequences of non-compliance. Thus, in the English case of ***R v Soneji*** [2006] AC 340, Lord Steyn opined at [23] that:

> "*… the rigid mandatory and directory distinction, and its many artificial refinements, have outlived their usefulness ..... the emphasis ought to be on the consequences of non-compliance, and posing the question whether Parliament can fairly be taken to have intended total invalidity.*"

97. An illustration of the required approach comes from ***R v Soneji*** itself, a case which concerned the validity of confiscation orders made under the Criminal Justice Act 1988. In breach of section 72A of that Act, the court had postponed the determination of issues relating to the making of confiscation orders for more than six months after conviction without having decided that there

were exceptional circumstances justifying it doing so. The House of Lords held that the breach of section 72A did not invalidate the confiscation orders. Lord Steyn noted that there were other ways of enforcing the time limit imposed by Parliament (eg the abuse of process jurisdiction), and that any prejudice arising from a postponement beyond the six month time limit was "*decisively outweighed by the countervailing public interest in not allowing a convicted offender to escape confiscation for what were no more than bona fide errors in the judicial process.*"

98. In ***Osman and another v Natt and another*** [2015] 1 WLR 1536 , Sir Terence Etherton C on behalf of the Court of Appeal explained at page 1542 [25] (following and applying, ***R v Soneji*** *which had in turn approved of dicta to similar effect from the High Court of Australia in* ***Project Blue Sky Inc v Australian Broadcasting Authority (1998***) 194 CLR 355 [93]) that:

> " *... the characterization of the statutory provisions as either mandatory or directory really does no more than state a conclusion as to the consequence of non-compliance rather than assist in determining what consequence the legislature intended. The modern approach is to determine the consequence of non-compliance as an ordinary issue of statutory interpretation, applying all the usual principles of statutory interpretation. It invariably involves, therefore, among other things according to the context, an assessment of the purpose and importance of the requirement in the context of the statutory scheme as a whole.*"

99. The case concerned the validity of a tenants' notice seeking to exercise the right, pursuant to the Leasehold Reform, Housing and Urban Development Act 1993, to acquire the freehold in the tenanted real property by way of collective enfranchisement (that is to say, as Etherton C explained at [17] - the right to have the freehold of the premises acquired on behalf of the qualifying tenants by a person appointed by them for that purpose and at a price in accordance with Schedule 6 of the 1993 Act).

100. The notice did not comply with a provision of the 1993 Act which provided that it had to state the full names of all qualifying tenants of flats in the premises, together with details of their leases etc. The Court of Appeal held, *inter alia*, that the failure to comply with the relevant provision resulted in the total invalidity of the notice because the matters with which it was concerned went to the very heart of the right to collective enfranchisement.

101. Applying the modern approach from the cases cited to the facts of the instant case, the relevant approval process is laid down in Section 31 of the Act itself (as set out at [30] above) and requires the submission of material to the Authority, seeking pre-approval, to enable the Authority to satisfy itself of very important matters, namely: (a) that the transferee is solvent, (b) the terms of the proposed transfer, (c) that a report on the proposed transaction from a person nominated by the Authority has been prepared, and (d) that all policy holders have been served with notice of the proposed transaction and that the "world at large" has been notified by advertisement at least 30 days in advance of the transaction.

102. Those are critical safeguards that were imposed during the legislative process. The Plaintiff suggests and I accept that they form a vital element of the statutory scheme of oversight and regulation of the insurance market in the interests of the protection of the reputation of the jurisdiction itself, the market, and, equally importantly, consumers. Such requirements, together with those of Sections 31(3) and (4), cannot be regarded as being of secondary importance. Accordingly, I find that these considerations clearly indicate that invalidity is the consequence of a purported transfer of business in breach of Section 31.

103. Another "notice" case is instructive on the facts of this case. ***Elim Court RTM Co Ltd v Avon Freeholds Ltd*** [2018] QB 571 concerned an attempt by tenants of a block of flats to acquire the right to manage their building. The landlord alleged that the relevant notices served on it failed to comply with various statutory requirements. Holding the notices valid, Lewison LJ said (at [52]):

> "The intention of the legislature as to the consequences of non-compliance with the statutory procedures (where not expressly stated in the statute) is to be ascertained in the light of the statutory scheme as a whole… *One useful pointer is whether the information required is particularised in the statute as opposed to being required by general provisions of the statute. In the latter case the information is also likely to be viewed as of secondary importance. Another is whether the information is required by the statute itself or by subordinate legislation. In the latter case the information is likely to be viewed as of secondary importance. In this connection it must not be forgotten that while the substantive provisions of a bill may be debated clause by clause, a draft statutory instrument is not subject to any detailed Parliamentary scrutiny. It is either accepted or rejected as a whole. A third is whether the server of the notice may immediately serve another one if the impugned notice is invalid. If he can, that is a pointer towards invalidity*."

104. In the present case, the information is required by Section 31 itself, indicative therefore of the paramount importance and strictness of the requirements. And this view of the requirements is consistent with a policy of providing certainty with respect to the property interests to be affected by a transfer of business – the very antithesis of what transpired in this case.

105. In ***Osman v Natt*** **at [37]**, Etherton C, stated that where the Act specifically provides that certain breaches do not result in invalidity, then it might be assumed that the legislative intention is that others do. In respect of the Act, there are two provisions (neither of which apply in this case) which expressly address whether certain breaches are void. Thus, Section 5 (which was introduced by the 2010 Revision) provides that an insurance contract, transaction, obligation, or instrument entered into by any person "*shall not be rendered void or unenforceable*" merely because they were entered into by unlicensed persons in contravention of Section 3(1) of the Act (2010 Revision). The purpose of this provision was to overrule previous authorities to the effect that insurance policies issued by an unlicensed person in contravention of the Act were illegal and void (see ***J.D.Brandon and K.A. Brandon v Proprietors, Strata Plan No. 30*** [1994-95 CILR 464] at pages 467, lines 30-33 in which Schofield J stated that this seemed to have been settled in England following the

decision, albeit *obiter*, of the English Court of Appeal in ***Phoenix General Ins. Co. of Greece S.A. v Halvanon Ins. Co. Ltd*** [1988] Q.B. 216.

106. Reference was also made to Ramsay-Hale CJ's recent judgment in ***Hawkins v Abarbanel Ltd*** (16 December 2022) GC 178 of 2018 (unreported). That case concerned whether a loan was void on the basis that the defendant was carrying on business as a moneylender when it was not licenced to do so in breach of the Local Companies Control Act (2007 Revision) ("**LCCA**") or the Trade and Business Licensing Act (2007 Revision) ("**TBLA**"). Ultimately the Court held that the loans were not void because section 23 of the LLCA contained an express saving provision that: "*no business transaction shall be void or voidable by reason only that, at the relevant time, any party thereto is in breach of this Law*".

107. That decision, to the extent that it is based upon the saving provision of section 23 of the LLCA, recognises the same public policy considerations as section 5(2) of the Act, in not rendering void or unenforceable private contracts freely entered into at arms length between parties having capacity to contract, simply on the basis that one party is not licensed for the purposes. Those are of course, entirely different considerations from those which inform the policy of section 31 of the Act, where there is a breach of its prohibition against the transfer of insurance business without the approval of the Authority (and on the facts of this case, without the consent of the Affected Participants whose interests are impacted).

108. The second provision is Section 15(2) of the Act[16] which provides that, except with the written consent of the Authority, any distribution, dealing or undertaking entered into in contravention of the requirements in sub-paragraphs (a)-(b) of Section 15(2) in respect of the holding of trust funds,

[16] *Which applies to an external insurer that carries out domestic business, and so not in respect of the Company.*

shall be void. To the extent that guidance can be taken from this provision, it does, as the Plaintiff submits, emphasise the importance of protecting funds held by an insurer in respect of insurance business for the benefit of policyholders and so, in the absence of any provision to the contrary, indicates a legislative intention that an unauthorised transfer of insurance business involving funds held for the benefit of policyholders should be invalid.

109. The Second and Third Defendants unsurprisingly, contend for a different outcome than the invalidity of the Purported Transfer. First, they say that it is unclear how and on what basis the Court could determine that, if the "Surrender" is deemed a surrender and not a transfer (as they contend), such Surrender could be deemed void ab initio. However, on the basis of my finding that by whatever name called the Purported Transfer was a transfer within the meaning of section 31 of the Act and was unauthorised, this argument is unsustainable.

110. Their further response is that the Act is designated as a "regulatory law" within the meaning of the Monetary Authority Act 2020, (the "**MA Act**") the parent Act of the Authority, and the MA Act vests the Authority with only "monetary and regulatory" functions, as stated in section 6 (1)(b)(i) "*to regulate and supervise financial services business carried on in or from within the Islands in accordance with this (Act) and the regulatory laws*". Thus, the argument goes, the requirements set out in section 31(1) and 8(1)(a) of the Act are imposed by the Authority but the wider regulatory context needs to be considered on evaluating the consequences for a breach of those provisions.

111. Accordingly, that contraventions of the regulatory regime set down by the Act are sanctioned by the Authority through the framework of sanctions set out in sections 22-24 of the Act and those sanctions relate to the revocation, suspension or limitation of licences issued by the Authority pursuant to the Act. The reliefs specified within the Act at no point contemplates, they submit, that an act done in contravention of the legislation shall render the act null and void unless specified as in the case of section 15(2). More broadly, the argument continues, in connection with the

regulation and supervision of the Act, Part VIA of the MA Act confers on the Authority the "*power to impose an administrative fine on a person who breaches a provision prescribed in ...a regulatory law.*" Furthermore, the level of fine which may be imposed is provided for in section 42B of the MA Act, and that where the Act contemplates that a breach of a provision shall result in a nullity, it expressly so provides (citing section 15(2)) and therefore the general scheme of the Act indicates that where such an outcome is intended, the Act expressly so provides. The fact that the Act does not so provide in respect of a breach of section 31(1) or 8(1)(a), indicates that that will amount to a breach which is properly censured by the Authority imposing a fine or other penalty.

112. Support for this argument was sought from the decision of the English Court of Appeal in ***Hughes & Ors v Asset Managers Plc*** [1994] CLC 556. There it was held that discretionary investment agreements entered into between certain investors and an investment management company were not void notwithstanding that the director of the company who did the dealing, did not have at the material time, in contravention of the Prevention of Fraud (Investments) Act 1958, an appropriate licence, and so was prohibited from dealing in the securities in question. In upholding the decision at first instance against a finding of nullity, Saville LJ on behalf of the Court of Appeal, in construing the legislative intention stated as follows:

> *"I readily accept that the purpose of the Act was to protect the investing public by imposing criminal sanctions on those who, as principals or agents, engaged in or in the business of dealing in securities without being duly licensed. Parliament clearly intended to provide the investing public with the safeguard of the approval and licensing of professional dealers by the Board of Trade. However, I can see no basis in either the words the legislature has used or the type of prohibition under discussion, or in consideration of public policy (including the mischief against which this part of the Act was directed), for the assertion that Parliament must be taken to have intended that such protection required (over and above criminal sanctions) that any deals effected through the agency of unlicensed persons should automatically be struck down and rendered ineffective. On the contrary, it seems to me that not only is there really no good reason why Parliament should*

have taken up this stance, but good reason why Parliament should have held the contrary view.

In this connection it must be remembered (as Kerr LJ pointed out in Phoenix General Insurance Co of Greece SA v Hahamon Insurance Co Ltd [1988] QB 216 at pp 273-275) that rendering transactions void affects both the guilty and the innocent parties. The latter, just as much as the former, cannot enforce a void bargain or obtain damages for its breach.." [emphasis added].

113. This is compelling reasoning and further explains what must be regarded as the similar rationales behind section 5(2) of the Act and section 23 of the LCCA, the latter as found in ***Hawkins*** (above), viz: there is no reason why Parliament should be taken as intending that "*deals effected through the agency of unlicensed persons should automatically be struck down and rendered ineffective*" but very good reasons, in the interests of innocent counter-parties, why they should not.

114. Although pre-dating both ***R v Soneji*** and ***Osman v Natt*** (both above) Saville LJ's dictum also provides a helpful practical illustration of the modern approach to construction of regulatory legislation which does not prescribe the consequences for breach of its provisions. But I do not consider that his dictum supports the arguments of the First and Second Defendants on the antithetical facts of the present case. Here, the imposition of a prescribed penalty such as a fine, while it would, if it were collectible (itself a doubtful proposition depending as it would upon extraterritorial enforcement), increase the public coffers, would be an entirely ineffectual remedy for the Affected Participants. The purpose of the Act is not merely to swell the public coffers. A fine without more would leave the transaction of the Purported Transfer intact and the recovery of Affected Participants' investments at the mercy of those who have acted in breach of the Act.

115. Consistent with Saville LJ's approach, in light of "*the type of prohibition under discussion, or in considerations of public policy (including the mischief against which this part of the Act was directed)*" Parliament, in my view, could not have intended such an uncertain outcome.

116. Moreover, as Mr Levy submits, the fact that the Act contains certain provisions expressly dealing with invalidity, and that Section 31 does not state that transfers in breach will be void, is not, to my mind, a matter of great importance. There is no one canon of construction that trumps all others; in keeping with the modern approach, the Court has to construe the Act as a whole, taking account of the wider context. The fact that Parliament did not expressly state that the consequences of a wholesale transfer of long term business would be the invalidity of the transfer is just one factor to be taken into account in the Court's construction. When weighed in the balance of competing factors – especially the need for the insurance market to be regulated, the need to protect policy holders, the reputation of the jurisdiction as a safe and trustworthy environment, the presumption against absurd constructions or constructions that result in unworkable or impracticable ends, I am compelled to the conclusion that transfers in breach of Section 31 are void *ab initio.* The declaration which I therefore grant to that effect will operate to render the Purported Transfer a nullity, effect a return to the *status quo ante* and the entitlement in the insolvent estate of the Company to the return of the entirety of the Insigneo Transferred Funds, including the Investment Gains, for return to the Affected Participants within the context of the liquidation.

Section 8

117. As regards the failure to carry on business in accordance with the Business Plan (the point on Section 8 of the Act), in reality this becomes academic in light of my conclusions on Section 31.

118. At first glance, the arguments set out above in relation to Section 31 would appear to apply equally in relation to situations where, as in this case it is fair to say, business is not carried out at all or substantially, in accordance with the information contained in a licensee's approved licence application and/or its business plan. It is self-evident that in a market regulated for consumer (policy holder) protection, and jurisdictional reputation, regulated players may only carry out business in accordance with the very documents provided as part of their approval process.

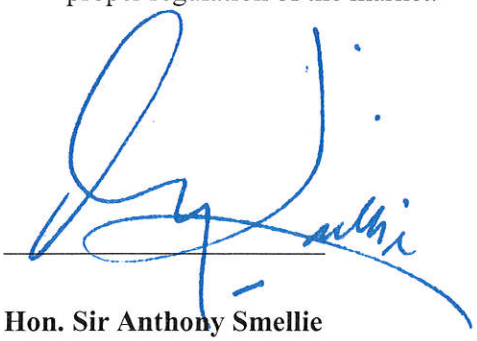
119. But the Plaintiff does not suggest, and I think correctly, that the validity argument is as forceful in relation to failure to comply with Section 8 as it is for Section 31. That is for a few reasons; first, Section 31 is very specific in its reference to a transfer of "*the whole or any part of the long term business*." As against that, the information in an approved licence or a business plan is of exceptionally wide scope and it is accepted that it might be considered odd that a failure to carry out business in accordance with a statement in a relatively innocuous backwater of a business plan might attract the consequence that a transaction is void or voidable.

120. Similarly, the Plaintiff acknowledges – in deference to the dicta from ***Elim Court*** per Lewison LJ (above), - that the information to be provided in a business plan is not prescribed by the Act itself; rather it is contained in Regulations made by the Governor in Cabinet under Section 40 of the Act, and which are found in the Insurance (Applications and Fees) Regulations 2012, regulation 3 of which mandates (by reference to Schedule 1 thereto) the information to be provided on an application for a licence under the Act, as well as the contents of a business plan.

121. However, given the centrality of the approval process itself to the regulation of the insurance industry, I feel obliged to add the following observations in agreement with the Plaintiff, albeit without finally deciding the point as there is no need to do so. The notion that a licensee can conduct itself in a manner that is the complete opposite of, or not at all in keeping with, its approved licence application or business plan indicates, to my mind, that the legislature intended that a transaction involving the potential negation of its approved licence such as the Purported Transfer (as distinct from say a transaction involving the underwriting of individual policies while so operating in breach of section 8) would be void. Any other conclusion would strongly arguably be to the clear and obvious detriment of the market, participants generally, policy holders, and the reputation of the Islands.

Conclusion

122. In the result, the Plaintiff is entitled to the relief sought in the Re-Amended Originating Summons. When construing the Act, and in addressing the issue posed by Lord Steyn in ***Soneji***, namely "*whether Parliament can fairly be taken to have intended total invalidity*", I am firmly of the view that the answer is "yes". The transaction involved in the Purported Transfer, by whatever name called, is void and of no effect. Such a construction of the Act is the only one, as I have explained above, which affords certainty to those affected by the Purported Transfer and the only one that fully protects the regulated insurance market and the public interests in the Cayman Islands in the proper regulation of the market.



Hon. Sir Anthony Smellie
Judge of the Grand Court
17 May 2023