7 pages.

1992 : (57)

In the matter of
Michael Vaughan Nield, "en désastre".
The Representation of the Viscount.

At the request of a Member of the Bar, the attached Judgment which was delivered by the Deputy Bailiff, as he then was, in the Royal Court on 25 April, 1983, is being circulated to subscribers.

ROYAL COURT
(Samedi Division)

25th April, 1983

Before: The Deputy Bailiff, sitting alone by virtue of the Provisions of Rule 3/6 of the Royal Court Rules, 1982.

In the matter of Michael Vaughan Nield, *en désastre;* the Representation of the Viscount.

National Westminster Bank Limited, joined.

Advocate R.G. Day for the Viscount.

Advocate H.J. Cridland for the Bank.

JUDGMENT

DEPUTY BAILIFF: The need for deciding this issue in future has been resolved by recent legislation, the Security Interest (Jersey) Law, 1982, but that doesn't mean to say that the principles which have been canvassed before me were not, until the passing of that legislation, of great importance. This is an application for the determination of two issues: first, what is the proper law governing four documents described therein as "legal mortgages", and which contain a clause, (clause 7), which reads as follows:- *"this mortgage shall be governed by English Law";* and secondly, whatever may be the proper law of the contract, whether it is English law or Jersey law, has there been, by the means of those documents, four valid assignments of life insurance policies by the person named therein? The short history of the matters before me is as follows: each of the policies were effected before the 4th November, 1977, by Mr. Malcolm Vaughn Nield. On the 4th, he executed the four

documents I have referred to and purported to create four "legal mortgages" in favour of the National Westminster Bank. Each of the documents which purported to create the "legal mortgage" is headed in the top left hand corner, *"NWB 1021 (Jersey) Legal Mortgage of Life Policy by Person or Company"*. That leads me to suppose that it is a standard form used in the United Kingdom but referred to in the heading as being suitable for use in Jersey. There is nothing that I can find in it which is particularly applicable to Jersey, except the claim in the heading. On the 25th July, Mr. Nield's assets were declared *en désastre*. The bank now claims the surrender values of the policies. The Viscount claims those surrender values for the benefit of the general creditors.

The law of Jersey does not permit the hypothecation of movables and therefore it cannot be said that, *prima facie,* the four transactions, if they are legal mortgages as understood in English Law, can be valid according to Jersey law. I have been asked, however, by Mr. Cridland to look at the wider effect of the documents, and to say that, whatever the wording was in each one and in whatever way it is couched, they are no more than an assignment properly executed and lawful, and known to the law of Jersey. I am not prepared to go as far as that. I have no doubt that the intention both of Mr. Nield and the bank was to create what it purported to do, if it could, that is to say a "legal mortgage" as known to the law of England. Indeed it would be absurd to put in clause 7: *"this mortgage shall be governed by English law"* if the form of the document was something unkown to English law. Furthermore it is my belief that the proper purpose of all four documents, was to allow the bank to obtain a preferential claim to the assets of Mr. Nield if by mis-chance he were to fall on ill times and his assets were to be declared *en désastre*. I hasten to say, as Mr. Da was at pains to point out, and as the Court accepts, th documents were not an attempt to achieve a fraudulent preferenc in favour of the bank. Indeed the dates between the signing c

the document and the unfortunate financial collapse of Mr. Nield's affairs speak for themselves.

I was referred to a number of authorities as regards the issue of the proper law of the contract and by Mr. Day in particular, to the tenth edition of Cheshire on Private International Law at page 201. There the learned author, after discussing Vita Food Products Inc. -v- Unus Shipping Co. [1939] A.C. (P.C.) 277, and a Privy Council case which therefore carries great weight in this Court, nevertheless drew attention to certain limitations which were to be found in the case itself. That case, although it has been criticised in subsequent decisions, but not in the Privy Council, is, as I have said, one which is to be preferred to other authorities unless there are reasons to the contrary. That case is an authority for the proposition, in general terms, that the parties to a contract are able to choose the law governing that contract. However, that choice is limited as the Vita Food case shows in two ways. First, there is a limitation on the freedom of choice, that is to say the parties' choice must be *bona fide* and legal, and secondly there should be no reason for avoiding the choice on the grounds of public policy. If the Royal Court is to be asked to declare a choice of law in a deed which may be English, and then for reasons of public policy, not to implement it, I would not be prepared to go as far as that unless it were clear to me that it would be right to do so. But it is the question that *"bona fide"* should be interpreted in the widest possible sense that concerns me. The learned author of Cheshire says at page 201, ***"That the statement of the claim must be bona fide and legal is not free from ambiguity".*** What he presumably means is that the parties cannot pretend to contract under one law in order to validate an agreement that clearly has it's closest connection with another law and under which the agreement would not be valid. It seems to me that as regards the policies themselves, two of them are specifically stated to be governed by the law of Jersey, one of them refers to the payment of premiums in Jersey and one is silent;

nevertheless, all four have a firm connection with Jersey, inasmuch as the person who insured his life and took out the policy lived in Jersey and the contract was actually concluded in Jersey with English companies who were trading here. As regards the "legal mortgages", I cannot find that they are so closely allied with the United Kingdom, that it would be right for me to hold that the proper law governing those documents should be English. In my view the closest connection with these contracts is this Island and its laws. That being so I have been asked to rule on behalf of the Viscount in the representation as to validity of the agreement. I find they are not valid according to the law of Jersey, inasmuch as they purport to create a hypothecation of meubles which is contrary to Article 3 of the Loi (1880) sur la Propriété Foncière. Secondly, even if that were not so, I am not satisfied that they are an assignment in the ordinary sense as understood in Jersey law. They do not categorically transfer to the bank the choses in action with a re-transfer clause - which is customary in proper assignments - for it to transfer the assignment back after re-payment. The form is quite clear, it purports to be a "legal mortgage". There is no such thing known to Jersey law. It therefore follows that I should direct that the assets (or surrender values) be paid to the Viscount for the general benefit of the creditors. As regards the question of costs, I think it is right and proper that the bank should pay the costs.

I'm grateful to counsel for helping me in this matter and had the Security Interest (Jersey) Law, 1982 not been passed I might well have delivered a much longer and much more detailed judgment, but I don't think it is necessary for me to do more than consider the actual documents before me.

Authorities

Loi (1880) sur la Propriété Foncière.

Security Interest (Jersey) Law, 1982.

Cheshire: "Private International Law": p.201.

Vita Food Products Inc. -v- Unus Shipping Co. [1939] A.C. 270.