Federal Court  Cour fédérale

Date: 20130130

Docket: ITA-7879-11

Citation: 2013 FC 93

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Ottawa, Ontario, January 30, 2013

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

IN THE MATTER OF THE *INCOME TAX ACT*

and

IN THE MATTER OF AN ASSESSMENT OR ASSESSMENTS BY THE MINISTER OF NATIONAL REVENUE UNDER ONE OR MORE OF THE *INCOME TAX ACT*, THE *CANADA PENSION PLAN*, THE *EMPLOYMENT INSURANCE ACT*,

LONDON LIFE INSURANCE COMPANY

Moving Party-Garnishee

and

HER MAJESTY THE QUEEN OF CANADA

Respondent-Judgment Creditor

and

PROJEXIA CONSEILS INC.

Judgment Debtor

REASONS FOR JUDGMENT AND JUDGMENT

[1] London Life, a life insurance company, is appealing against two orders made by Prothonotary Richard Morneau under section 51 of the *Federal Courts Rules*, SOR/98-106 [the Rules], namely, an order dated August 15, 2012, allowing the motion filed by the judgment creditor, Her Majesty the Queen [the respondent], for a final order of garnishment, and a final order of garnishment dated August 24, 2012. The garnishment concerns the surrender value of 11 life insurance policies of which the company Projexia Conseils Inc. [Projexia] is the owner and beneficiary. Projexia did not appear in this matter.

[2] London Life is asking that the two orders be quashed or, in the alternative, that a new order be made such that any amount due will become due when the insured risk materializes or when the judgment debtor, Projexia, requests the surrender value of the policies.

[3] For the reasons that follow, this appeal is dismissed.

Factual background

[4] Projexia was incorporated on September 25, 2002. The company's sole director and shareholder is Sylvie Bologna.

[5] Projexia is the owner and beneficiary of 11 insurance polices underwritten by London Life on the life of Ms. Bologna, as follows:

I. Policy No. 8540527-5, issued on May 28, 1995, with a death benefit of $90,958.53 and a surrender value of $2,622.19;

II. Policy No. 9395052-5, issued on August 24, 1997, with a death benefit of $159,545.58 and a surrender value of $9,074.21;

III. Policy No. 9581633-2, issued on September 15, 1997, with a death benefit of $163,799.44 and a surrender value of $24,189.54;

IV. Policy No. 9707404-5, issued on July 22, 1998, with a death benefit of $98,394.78 and a surrender value of $5,696.70;

V. Policy No. 9707408-2, issued on July 22, 1998, with a death benefit of $73,843.31 and a surrender value of $1,828.97;

VI. Policy No. 9797939-9, issued on March 20, 1999, with a death benefit of $147,811.41 and a surrender value of $6,525.66;

VII. Policy No. B216414-1, issued on October 3, 2002, with a death benefit of $339,887.70 and a surrender value of $10,816.57;

VIII. Policy No. B324863-0, issued on December 2, 2003, with a death benefit of $324,761.30 and a surrender value of $10,126.77;

IX. Policy No. B339599-7, issued on September 9, 2004, with a death benefit of $119,304.18 and a surrender value of $3,267.21;

X. Policy No. B358196-3, issued on May 28, 2004, with a death benefit of $248,754.97 and a surrender value of $6,395.12; and

XI. Policy No. B631301-3, issued on May 28, 2009, with a death benefit of $106,827.14 and a surrender value of $2,634.30.

[6] The insurance contracts stipulate that a request to obtain the surrender value may be made as follows:

> [TRANSLATION]
> Surrender for cash value
>
> Upon written request, London Life shall pay
>
> (a) the surrender value of the contract;
> (b) less any debts.
>
> Payment shall be made within ninety (90) days after all rights under the contract have been surrendered.

[7] Loans or advances are also available upon written request once the accumulated values have reached a certain amount. These loans or advances are subject to annual interest, and any balance due will be deducted from the benefit payable to the beneficiary upon the death of the insured person. In the case at bar, Projexia had received advances at the time the respondent instituted proceedings.

[8] On October 13, 2011, the respondent filed a certificate under section 223 of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) [the ITA]. This certificate states that Projexia owes the respondent the sum of $1,255,298.28 plus interest. According to subsection 223(3) of the Rules, this certificate has the same effect as a judgment obtained in the Court.

[9] The respondent alleges that Projexia has no assets apart from the 11 insurance policies.

[10] On December 1, 2011, upon presentation *ex parte* of a motion record filed by the respondent alleging that the debt set out in the certificate had still not been repaid, Prothonotary Richard Morneau made the following interim order:

> [TRANSLATION]
> It is hereby ordered that any amount owing or that will become owing by the garnishee to the judgment debtor and, more specifically, any amount owing or that will become owing under the life insurance policies with cash surrender value bearing the contract numbers 8540527-5, 9395052-5, 9581633-2, 9707404-5, 9707408-2, 9797939-9, B216414-1, B324863-0, B339599-7, B358196-3 and B631301-3 held by the garnishee in the name and on behalf of the judgment debtor be garnished in satisfaction of and up to the sum of $1,255,298.28, plus interest . . . .

[11] On August 15, 2012, Prothonotary Morneau made a final order of garnishment (*Canada (MRN) c Projexia Consulting Inc*, 2012 CF 996 [August 15 Order]) and gave the respondent until August 22, 2012, to forward to him a draft order that would enshrine the interim order of garnishment (IOG) in a final order of garnishment (FOG). In the August 15 Order, he rejected London Life's three arguments, which are summarized at paragraphs 8 to 10:

(a) The right to surrender is a personal right of the policyholder, and a creditor may not exercise it in place of the policyholder;

(b) For any policy to be surrendered, the policyholder must request it in writing, and so long no such request has been received, London Life does not owe Projexia anything, since there is no debt owing or accruing within the meaning of subparagraph 449(1)(*a*)(i) of the Rules;

(c) Exercising the right to the surrender value has significant financial consequences for both the policyholder and the beneficiary.

[12] Relying on *Perron-Malenfant v Malenfant (Trustee of)*, [1999] 3 SCR 375 [*Malenfant*], he rejected London Life's first argument and concluded that the insurance policies in question and the rights associated with them are not covered by the comprehensive and exhaustive set of rules governing seizability under articles 2457 and 2458 of the *Civil Code of Québec* [CCQ] (para 14 of the Order).

[13] As regards the second argument, Prothonotary Morneau relied on *Canada (MNR) v Steckmar Corp.*, 2004 FC 581 [*Steckmar Corp.*] to conclude that [TRANSLATION] ". . . this Court has recognized in the past that garnishment under Rule 449 is an oblique remedy that allows the respondent to exercise the rights of its debtor, in this case, Projexia" (para 17 of the Order). He also concluded that [TRANSLATION] "in this case, it is irrelevant whether the policyholder, Projexia, made a written request for surrender. The garnishment process allows Her Majesty, as Projexia's creditor, to exercise Projexia's right in this regard for her own benefit" (para 18 of the Order).

[14] Given the exercise of this right to the surrender value through garnishment, Prothonotary Morneau stated that it was unreasonable for London Life to submit that there was no debt "owing or accruing" within the meaning of subparagraph 449(1)(*a*)(i) of the Rules or that the right to surrender is conditional on a written request from Projexia (para 19 of the Order).

[15] Prothonotary Morneau then turned to London Life's argument to the effect that section 449 of the Rules is not the appropriate procedural vehicle for obtaining the cash

surrender value of the insurance policies. Relying on *Malenfant*, London Life submitted that the respondent should have seized the insurance contracts in Projexia's hands and then made a request to surrender in her own name, in accordance with section 428 of the Rules. Prothonotary Morneau rejected this argument at paragraph 23 of the Order:

> [TRANSLATION]
> Although various provisions of the *Civil Code* imply that a life insurance contract is movable property in the hands of the policyholder, these provisions are not in themselves an authority for arguing that one must first seize said contract before even thinking of using the garnishment process under the rules as regards its cash surrender value.

[16] He added that paragraph 57 of *Malenfant*, according to which "the trustee is entitled to seize the policy and exercise the surrender right to obtain its cash surrender value", does not mean that the respondent in the present case should have to [TRANSLATION] "take a step-by-step approach" involving a distinct initial procedure consisting of seizing the insurance policies (para 24 of the Order). Furthermore, section 428 of the Rules did not apply in the present case, since this rule covers a [TRANSLATION] "very specific situation that has nothing to do with the mechanism for seizing the surrender value of a life insurance policy" (para 26 of the Order).

[17] Regarding London Life's third submission, concerning the significant financial consequences of cancelling the policies, Prothonotary Morneau stated that this argument must fail, given that Projexia was both the owner and the beneficiary of the policies, which were its only assets. He added that [TRANSLATION] "[t]his situation is far removed from those the Quebec legislature tried to and intended to protect" (para 20 of the Order).

Issues

[18] In this appeal, London Life raises three issues:

(1) According to *Malenfant*, does the creditor have to seize the insurance policy first before exercising the right to its surrender value?

(2) May subparagraph 449(1)(*a*)(i) of the Rules be relied upon to request payment of the insurance policies' surrender value?

(3) What about the significant consequences of cancelling a life insurance policy and the importance of scrupulously applying the appropriate procedure for enforcing a certificate registered under section 223 of the ITA?

Preliminary remarks

(A) Standing of London Life

[19] As a preliminary remark, the respondent submits that, in the present case, London Life has no legal standing to defend the interests of Projexia or to act in the company's place and stead (*Crown Life Insurance Co v Perras*, [1953] BR 659 [*Crown Life Insurance*]). Moreover, Projexia did not object to the garnishment and did not argue that its creditors could not request payment of the surrender value in its place.

[20] The respondent also submits that the words of Justice Anderson of the Supreme Court of British Columbia in *Bel-Fran Investments Ltd v Pantuity Holdings Ltd*, [1975] BCJ 1150 at paragraph 16 [*Bel-Fran*], apply perfectly to the present case:

> My view is that all the conditions of the term deposit receipt in the case at bar concern only the bank and are mere matters of

> procedure and administration, and are all satisfied by the service of the garnishing order. The bank would be protected by the Court upon any protest by the defendant that payment had been made without personal delivery of the term deposit receipt . . . .

[21] Similarly, the respondent pleads that London Life does not have the legal standing to assert in the place and stead of the insured person, Ms. Bologna, that she would be uninsurable in the future.

[22] London Life, on the other hand, argues that it does indeed have an interest in the present case, on the basis that the provisions of the life insurance contracts must be honoured. Any claim in favour of the policyholder or the beneficiary is subordinated to the contractual provisions in the insurance policies. These provisions require that a written request and a waiver form be submitted before London Life pays out the requested sums. In support of its argument, London Life refers the Court to the insurance contracts and to *Malenfant*, *Royal Bank of Canada v North American Life Insurance Co*, [1996] 1 SCR 325 [*Royal Bank*], *National Trust Co v Canada*, [1998] FCJ 968 [*National Trust*], and *DeConinck v Royal Trust Corp of Canada*, [1989] 1 CTC 179 [*DeConinck*].

Analysis

[23] The argument concerning London Life's standing was not made in very precise terms before Prothonotary Morneau. In *Crown Life Insurance*, the debtor held four life insurance policies at the time of the bankruptcy. The trustee claimed the surrender value of the life insurance policies from the insurance company, on the basis that it was part of the bankrupt's assets. The trustee filed a motion in this regard in the Quebec Superior Court. The bankrupt

objected to this, arguing that the surrender value of the insurance policies was a personal right. The Superior Court cancelled the four insurance policies and ordered that the surrender value be paid to the trustee in bankruptcy.

[24] The insurance company appealed against that judgment. However, since the bankrupt was not a party to the appeal, the Court of Appeal considered the decision of the Superior Court and held that there was *res judicata* between the bankrupt and the trustee in bankruptcy. The Court of Appeal concluded that the bankrupt had implicitly consented to the order by not appealing against it. Consequently, the insurance company's appeal was dismissed.

[25] The present case does not involve bankruptcy proceedings. Nevertheless, a certificate was registered under section 223 of the ITA for the sum of $1,255,298.28 plus interest. This certificate has the same force as a judgment of this Court and is therefore enforceable against Projexia. For this reason, the principles laid down by the Quebec Court of Appeal in *Crown Life Insurance* apply in the case at bar.

[26] Whether it is the judgment debtor (Projexia) or the judgment creditor (the respondent) who requests surrender of the insurance policies, for London Life, the outcome is the same; surrender is requested, and the policies are cancelled. London Life therefore cannot submit that it will suffer damage, because in either case, it must pay out the surrender value.

[27] Nor may London Life argue that it has legal standing in the present case because of the advances on the insurance policies that Projexia requested. The 11 life insurance policies contain the following contractual provisions:

> [TRANSLATION]
> Surrender for cash value: Upon written request, London Life shall pay
> - the surrender value of the contract,
> - less any debts.
>
> Debts: The debt on any given date consists of
> - premium advances and cash loans,
> - less any payments made to reduce the debt,
> - plus interest to that date.

[28] Whether London Life pays the insurance policies' surrender value to Projexia or to the respondent, the sum of the debts (which also includes the loans and advances and the interest on them) will be deducted from the insurance policies' surrender value. Thus, London Life does not suffer any damage.

[29] Finally, as regards London Life's written submission that payment of the surrender value will result in the cancellation of the insurance policies, which will have significant financial consequences for the insured person by preventing her from taking out similar insurance policies in the future, the Court is of the opinion that London Life is pleading in another's name and does not have the required standing to make this argument.

[30] This on its own is enough to conclude that this motion should be denied. However, should the Court be in error on this point, it would be appropriate for the Court to continue the analysis and consider the merits of the motion.

(B) Standard applicable to an appeal from a prothonotary's order

[31] The principles that apply when deciding an appeal from a prothonotary's order were laid down in *Canada v Aqua-Gem Investments Ltd* [1993] 2 FC 425 [*Aqua-Gem*], and restated in *Merck & Co Inc v Apotex Inc*, 2003 FCA 488 [*Merck & Co*]. The criteria are set out at paragraph 19 of *Merck & Co*, where Justice Décary, writing on behalf of the Federal Court of Appeal, states as follows:

> . . .
>
> Discretionary orders of prothonotaries ought not be disturbed on appeal to a judge unless:
>
> (a) the questions raised in the motion are vital to the final issue of the case, or
> (b) the orders are clearly wrong, in the sense that the exercise of discretion by the prothonotary was based upon a wrong principle or upon a misapprehension of the facts.

[32] At paragraph 22, Justice Décary explains the significance of the word "vital" used by Justice MacGuigan in *Aqua-Gem*. On this point, Justice Décary adopts the minority reasons of Justice Issac in *Aqua-Gem* (which reasons remained unchallenged by Justice MacGuigan in this regard):

> In my respectful view it cannot reasonably be said that a standard of review which subjects all impugned decisions of prothonotaries to hearings *de novo* regardless of the issues involved in the decision or whether they decide the substantive rights of the parties is consistent with the statutory objective. Such a standard conserves neither "judge power" nor "judge time". In every case, it would oblige the motions judge to re-hear the matter. Furthermore, it would reduce the office of a prothonotary to that of a preliminary "rest stop" along the procedural route to a motions judge. I do not think that Parliament could have intended this result.

[33] Justice Décary went on to state the following at paragraph 23:

> One should not, therefore, come too hastily to the conclusion that a question, however important it might be, is a vital one. Yet one should remain alert that a vital question not be reviewed *de novo* merely because of a natural propensity to defer to prothonotaries in procedural matters.

[34] In *Peter G White Management Ltd v Canada*, 2007 FC 686 at paragraph 2, Justice Hugessen notes that

> . . . the mere fact that what was sought before the prothonotary might have been determinative of the final issues in the case does not result in the judge hearing the matter entirely *de novo*. A reading of the decisions, and particularly the key decision of the Court of Appeal in the case of *Aqua-Gem* [citation omitted], makes it quite clear that it is not what was sought but what was ordered by the prothonotary which must be determinative of the final issues in order for the judge to be required to undertake *de novo* review. . . . Put briefly, barring extraordinary circumstances, a decision of a prothonotary not to strike out a statement of claim is not determinative of any final issue in the case. In determining the standard of review the focus is on the Order as it was pronounced, not on what it might have been.

[35] Justice Hugessen's interpretation has been followed many times since then (*Ridgeview Restaurant Limited v Canada (Attorney General)*, 2010 FC 506 at paragraphs 20-24).

[36] In the present case, the impugned orders are clearly determinative of any final issue in the case because, unless they were appealed, there would be no further litigation between the parties: London Life would be obliged to pay out the insurance policies' surrender value to the respondent. The Court must therefore conduct an analysis *de novo*.

(1) According to* Malenfant, *does the creditor have to seize the insurance policy first before exercising the right to its surrender value?

Applicant's arguments

[37] London Life first states that the 11 life insurance policies at issue in this case are life insurance contracts within the meaning of articles 2389 and 2393 of the CCQ. These policies are also movable property within the meaning of articles 905 *et seq* of the CCQ. London Life also remitted the life insurance policy to the policyholder in accordance with article 2400 of the CCQ. The policies are therefore not in London Life's possession.

[38] The life insurance policies confer a number of rights, among others, the right to a life insurance benefit, the right to receive advances on the policy, the right to the surrender value and the right to a share of the proceeds. They are incorporeal movable property, as recognized by, among other legislation, the *Regulation respecting the register of personal and movable real rights*, c CCQ, r 8.

[39] London Life argues that its position is not adequately reflected in paragraph 8 of the August 15 Order. London Life's position regarding *Malenfant* is not, in fact, based on the argument that the exercise of the right to surrender is a personal right of the life insurance policyholder, as the Supreme Court has clearly rejected this doctrine.

[40] At paragraph 68 of its written submissions, London Life submits that *Malenfant* lays down the following principles:

[TRANSLATION]

(i) Articles 2457 and 2458 of the CCQ form a comprehensive and exhaustive unseizability code for life insurance policies, such that only those situations contemplated by these two articles render a life insurance policy unseizable;

(ii) Normally, whether a right is a personal one or not may influence the creditor's capacity to seize this right and to enforce it. However, all rights under an insurance policy are seizable; consequently, a life insurance policy that is not covered by articles 2457 and 2458 of the CCQ is seizable, as is the surrender right associated with the policy;

(iii) Carole Malenfant's trustee in bankruptcy was entitled to seize the life insurance policy as well as to seize and subsequently enforce the surrender right associated with it. [Emphasis added by the Court.]

[41] London Life pleads that *Malenfant* brought to light the obligation of the creditor to seize the life insurance policy before exercising the surrender right. See for example paragraph 57 of that decision, where Justice Gonthier writes as follows:

> In conclusion, having regard to their language, their legislative history and their discernible policy justification, I believe that in arts. 2552 and 2554 the Quebec legislature has enacted a comprehensive and exclusive code regarding the unseizability of life insurance contracts, intended by the legislature to supersede more general rules provided elsewhere in the *Civil Code* or existing in the jurisprudence. This exclusive provincial code of unseizability meshes with s. 67(1)(*b*) of the *Bankruptcy Act*. Because the respondent's policy does not qualify under either of the only available exemptions, the trustee is entitled to seize the policy and exercise the surrender right to obtain its cash surrender value. [Emphasis added by London Life.]

[42] London Life goes on to argue that the underlying dispute in *Malenfant* was between Carole Malenfant's trustee in bankruptcy and Carole Malenfant, the bankrupt, in a context in which the seizin of the bankrupt's property had already been transferred to the trustee in accordance with the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [BIA]. Note the following excerpts from paragraphs 4 and 15 of *Malenfant*:

> [4] . . . On April 16, 1993, the appellant trustee in bankruptcy advised the Company that he was exercising the right to surrender the policy on behalf of the respondent, and that the Company should therefore resiliate the policy and pay into the bankruptcy its cash surrender value . . . .
>
> . . .
>
> [15] . . . Article 2554 exempts from seizure the rights of the policyholder and the beneficiary "[a]s long as the designation of a beneficiary as irrevocable subsists". Once again, the respondent's policy does not qualify for the statutory exemption, since the designation of the respondent as beneficiary was never made irrevocable, and does not benefit from the presumption of irrevocability of art. 2547 of the *Civil Code*. Articles 2552 and 2554 therefore do not operate under s. 67(1)(*b*) of the *Bankruptcy Act* to exclude the rights attached to the respondent's life insurance policy from the property that passes to the bankruptcy trustee. [Emphasis added by London Life.]

[43] London Life adds that this reasoning is consistent with the principles laid down in *Royal Bank*, according to which all property (seizable or unseizable) in the bankrupt's patrimony is transferred to the trustee in bankruptcy's possession under the BIA.

[44] London Life therefore submits at paragraph 74 of its written arguments that the respondent's interpretation of the principles laid down in *Malenfant* are insufficient to dispose of the present dispute, for the following reasons:

[TRANSLATION]

(a) The disposition adopted by the Supreme Court does not provide that the creditor is entitled to garnish the surrender value in the hands of the insurer;

(b) Rather, the disposition adopted by the Supreme Court provides that the creditor is allowed to seize the life insurance policy from the debtor and, once the seizure has been executed, to exercise the surrender right under the life insurance policy in the place and stead of the judgment debtor;

(c) On this last point, we note that the trustee, who had in fact seized the life insurance policy, nevertheless had to make sure that this asset was seizable before it could legitimately exercise the surrender right in favour of the creditors; the Supreme Court therefore held that the trustee had to seize the policy first before claiming the surrender value, the seizure of the asset itself being a mandatory formal requirement;

(d) We would add that the preliminary step of seizing the policy is consistent with the principles laid down in *Royal Bank of Canada*, which states that the trustee (and, therefore, the judgment creditor) must assess the seizability of the asset under provincial legislation before seizing it.

[45] Therefore, the respondent would have to seize the insurance policies first before being able to exercise the surrender right by making a written request on behalf of the policyholders and filling out the waiver form.

Respondent's arguments

[46] The respondent, on the other hand, alleges that garnishment is her only means of seizing the surrender value of a life insurance policy.

[47] First of all, it is incorrect to claim that the creditor, who intends to request the surrender value in the place of the debtor, should first have to obtain a copy of the policy from the debtor, since in so doing, the creditor would have to undertake a step that is not even required of the debtor under the insurance contract. The insured person is under no contractual obligation to give London Life a copy of the policy before requesting that the surrender value be paid out. The creditor should be able to make the request just as the debtor does.

[48] Since the preliminary step advocated by London Life is not required by law, it is hard to imagine that Justice Gonthier**,** in *Malenfant***,** had in mind the physical seizure of a life insurance policy as a precondition for requesting payment of the surrender value, and it would be absurd to interpret that judgment as creating such a requirement.

Analysis

[49] *Malenfant* concerned a bankruptcy, while in the present case, Projexia has not made an assignment of its property or declared bankruptcy. Nevertheless, the certificate under section 223 of the ITA for the sum of $1,255,298.28 plus interest was registered. This certificate is enforceable against Projexia.

[50] However, apart from the surrender value of the 11 life insurance policies described at paragraph 5 of this judgement, Projexia does not have any assets. It is therefore hardly surprising that the respondent wants to obtain the surrender value of these policies.

[51] The parties concede that *Malenfant* settled the issue of the seizability of the surrender value of life insurance policies similar to the ones at issue here. The present case therefore turns on the manner in which the respondent must proceed to obtain the surrender value.

[52] Subsection 224(1) of the ITA, under the marginal note "Garnishment", provides as follows:

Where the Minister has knowledge or suspects that a person is, or will be within one year, liable to make a payment to another person who is liable to make a payment under this Act (in this subsection and subsections 224(1.1) and 224(3) referred to as the "tax debtor"), the Minister may in writing require the person to pay forthwith, where the moneys are immediately payable, and in any other case as and when the moneys become payable, the moneys otherwise payable to the tax debtor in whole or in part to the Receiver General on account of the tax debtor's liability under this Act.	S'il sait ou soupçonne qu'une personne est ou sera, dans les douze mois, tenue de faire un paiement à une autre personne qui, elle-même, est tenue de faire un paiement en vertu de la présente loi […] le ministre peut exiger par écrit de cette personne que les fonds autrement payables au débiteur fiscal soient en totalité ou en partie versés, sans délai si les fonds sont immédiatement payables, sinon au fur et à mesure qu'ils deviennent payables, au receveur général au titre de l'obligation du débiteur fiscal en vertu de la présente loi.

[53] This Court cannot agree with London Life's interpretation of *Malenfant*. To support its claim, London Life relies heavily on the next-to-last sentence of paragraph 57 of that judgment: ". . . the trustee is entitled to seize the policy and exercise the surrender right to obtain its cash surrender value". The Court is of the opinion that the Supreme Court is merely answering the questions that were before it without necessarily establishing a step-by-step procedure. Nowhere in this paragraph (or in its judgment, for that matter) does the Supreme Court state that seizing an insurance policy is a prerequisite for obtaining its surrender value. With respect, the Court finds that imposing such a step-by-step procedure would run counter to the urgency of garnishment. Moreover, in *Malenfant*, the trustee in bankruptcy already had the seizin of the bankrupt's property; why then would the trustee have to seize the insurance policy? This is yet another argument against London Life's thesis.

(2) May subparagraph 449(1)(a)(i) of the Rules be relied upon to request payment of the insurance policies' surrender value?

Applicant's arguments

[54] London Life pleads that subparagraph 449(1)(*a*)(i) of the Rules cannot be relied upon to request payment of the policies' surrender value. According to this provision, three conditions must be met for a garnishment to be enforceable, namely: (i) there must be a debt, (ii) the debt must be owing or accruing and (iii) the debt must be owing or accruing from a third party.

[55] In the present case, Projexia does not have a debt owing or accruing from London Life, and London Life did not owe Projexia anything at the time of the garnishment. To obtain the

surrender value, the respondent must seize the life insurance policies as stated above and then make a written request to the applicant.

[56] London Life pleads that the proceeds of a life insurance policy, unlike a bank account, do not create a "debtor-creditor" relationship between the parties (*Maritime Life Assurance Co v Canada*, [1997] 3 CTC 2561 [*Maritime Life Assurance Co*] at paragraph 7). Similar distinctions were made in *Delaire v Delaire* [1996] SJ 514 (in the matter of a trust company administering an RRSP and its beneficiary), and the same reasoning was applied in *Re Bliss, Kirsh and Doyle et al*, [1983] OJ 3247.

[57] Therefore, absent a seizure of the insurance policies allowing the creditor to request the surrender value from the insurer, the insurer has no obligation to pay, in the absence of a debt owing. To find otherwise would be inconsistent with the contractual rules governing life insurance policies.

[58] London Life cites *Choken v Lake St Martin Indian Band*, 2004 FCA 248, at paragraphs 20 and 22:

> [20] It is fair to say that the words "a debt owing or accruing" mean, in the context of garnishment proceedings, a sum of money which is now payable or will become payable in the future by reason of an existing and certain obligation and which is or will become recoverable in an action . . . .
>
> . . .
>
> [22] . . . [F]or a debt to exist, the creditor must "have the legal right to unconditional payment."

[59] Author David Norwood expresses a similar view (Norwood, David and Wier, John P, *Norwood On Life Insurance Law*, 3d ed, Toronto, Carswell, 2002):

> Garnishment is clearly not available to force surrender of an in-force policy since there is no enforceable debt currently due and owing from the insurer where the insured himself has not demanded surrender. There is no debit *in praesenti* to surrender . . . . The forced pay-out of money in a current bank account in a bank may be argued to be in nature of performance of the essence of the banking contract, whereas surrender of a life insurance policy is cancellation of the contract and its insurance benefits upon the happening of the event insured against The insurer may pay a cash surrender value for this release, but forcing surrender would destroy the basic purpose of the contract.

[60] London Life submits that there is no debt here because the surrender right was not exercised in accordance with the contractual provisions of the insurance policies and that the insured person is not deceased. Therefore, there is no "creditor" or "debtor" (*Maritime Life Assurance Co* at para 16). The surrender value of a life insurance policy is not a payable debt; therefore, there is no obligation on the part of the insurer to pay out the surrender value unless the policyholder has requested it (*Bank of Nova Scotia v Robson*, [1987] OJ 1693); *National Trust*; *DeConinck* at para 14).

[61] London Life goes on to state that the appropriate remedy is seizure in execution under articles 580 *et seq* of the *Code of Civil Procedure* (CCP). According to subsections 56(3) and (4) of the *Federal Courts Act*, RSC 1985, c F-7, as well as section 448 of the Rules, provincial law applies to the execution of orders of this Court and to the execution of certificates registered under section 223 of the ITA (see *Newcourt Financial Ltd v Canada*, 2004 FCA 91; *Canada v Piccott*, 2004 FCA 291; *Canada (MNR) v National Bank of Canada*, 2004 FCA 92).

Respondent's arguments

[62] London Life admits at paragraphs 46 to 48 of its written submissions that it will become indebted to the policyholder once the policyholder has sent it a written request. The respondent submits that a garnishment under the Rules is equivalent to a demand by a judgment debtor, according to *Canada c Bidner*, [1984] ACF 1114 [*Bidner*], in which Justice Hugessen writes, [TRANSLATION] "We are all of the view that the Trial Division erred in law in finding that a debt payable on demand was a conditional debt. On the contrary, a debt payable on demand is one which is immediately due, and service of the garnishment in the case at bar operated as a demand" (emphasis added by the respondent).

[63] The Alberta Court of Appeal came to the same conclusion regarding the effect of garnishment demands made by the Canada Revenue Agency. In *Hutterian Brethen Church et al v Provincial Treasurer of Alberta et al*, 80 DTC 6228, that Court explains that a garnishment demand issued in accordance with subsection 224(1) of the ITA has the same effect as a depositor's request to withdraw monies held by the bank in term deposit certificates. The same is true for a non-transferable term deposit receipt, according to *Bel-Fran*, above at para 21.

[64] London Life relies on author David Norwood to support its argument to the effect that it is not a debtor of Projexia. However, the author himself notes at page 356 of the work cited above that *Malenfant* made surrender value seizable in Quebec:

> But in the process, the Court's overthrow of the "personal right" doctrine seems to have exposed an unprotected beneficiary in Quebec to attack by ordinary creditors where the doctrine has long been recognized as a shield barring exigibility.

[65] In any event, the interpretation that London Life proposes at paragraph 91 of its written submissions for the words "debt owing or accruing" in section 449 of the Rules was rejected in *In Re Gero* (1979), 79 DTC 5228 [*In Re Gero*]. Justice Walsh of this Court held as follows:

> On a strict interpretation of Rule 2300 of the Rules of this Court it is arguable that these sums are not debts 'owing or accruing' to the judgment debtor unless and until he requests the trust companies to make payment to him, but it would be contrary to the whole principle of garnishment proceedings to adopt such an interpretation and hence provide a means for an individual to shelter his assets from seizure by his creditors.

[66] Garnishment is a special form of oblique action that allows the creditor, under article 1627 of the CCQ, to exercise rights and actions of the debtor (*Steckmar Corp.*, above, para 13, at paras 33-35 and 38). In the present case, all of the conditions for an oblique action have been met, and Projexia is evidently still neglecting to require payment of the surrender value even though it is its only asset.

[67] Furthermore, London Life's argument to the effect that a written request is necessary for the surrender value to be considered to be a debt amounts to cancelling out the effect of *Malenfant*. It would be surprising, to say the least, if Justice Gonthier had intended that the effect of his decision could be sidestepped by requiring a "written request" that only the debtor may make. In this regard, he stresses the importance of the surrender value twice, at paragraphs 39, 41 and 51:

> [39] . . . For a creditor, the most valuable right in his debtor's in-force life insurance policy is the right to surrender the policy for its cash surrender value. In this case, for example, that value amounted to $84,900. Indeed, it is the only right in an in-force life insurance policy that has the potential to create an immediate realization of value for the seizing creditor . . . (emphasis added by the respondent).

> . . .
>
> [41] . . . [T]he right to surrender, as we have seen, is the principal component of the life insurance contract that is being protected by these provisions. . . . The legislature chose to protect two particular classes of policies from seizure because it perceived a significant threat to these, namely the threat that creditors, to whom the right to surrender a life insurance policy was otherwise generally available, could terminate a policy by exercising the right.
>
> . . .
>
> [51] Against this background, it defies common sense to assume that the legislator wished to remain silent, in its exemption provisions, on the most important value of a life insurance policy for creditors—the cash surrender value. . . . It makes much more sense to conclude that the legislator wanted this value to be available to creditors, unless the policies themselves were exempt. [Emphasis added by the respondent.]

[68] The respondent adds that with a simple contractual clause, an insurance company could immunize itself from the *Malenfant* principles regarding the seizability of the surrender value of insurance policies. The respondent also rejects the proposition that she would have to fill out the waiver form required by London Life to collect on the debt.

[69] In *Robitaille v Hins-Dion*, [1979] 1 SCR 359 [*Robitaille*], the Supreme Court had to determine whether Ms. Robitaille could avail herself of an exemption-from-seizure clause in a life insurance policy payable to the beneficiaries. At paragraph 7, Justice Pigeon writes the following on behalf of the Court:

> In this Court counsel for the respondent contended that effect should be given to the exemption from seizure clause even towards the insured and his estate, because this would not be prohibited. He cited no authority in support of this submission which is quite simply untenable. It is quite clear that one cannot by a contract protect one's property from seizure by one's creditors except under

> a special enactment such as in the *Supplemental Pension Plans Act* (S.Q. 1965, c. 25, s. 31).

[70] Garnishment is the appropriate procedural vehicle, given the nature of the dispute (Charles Belleau, "L'exécution forcée des jugements", (2011) *Collections de droit 2011-2012*, École du Barreau du Québec, Vol 2). Garnishment allows a debtor's right to be exercised and implemented for the benefit of the creditor.

Analysis

[71] This Court is of the opinion that subparagraph 449(1)(*a*)(i) of the Rules, that is, garnishment, applies in this case and that the conditions set out under that provision have been met, for the following reasons.

[72] First, the Court agrees with Prothonotary Morneau that garnishment is the appropriate procedural vehicle in the present case, as amply demonstrated in his decision in *Steckmar Corp*. Article 569 of the CCP, too, sets out the difference between garnishment and seizure in execution:

> 569**.** A creditor may seize and sell the movable property of his debtor which is in the possession of the latter, that in his own possession and that in the possession of third parties who consent thereto.
>
> He may, in all cases, seize by garnishment in the hands of a third party sums and effects due or belonging to the debtor.
>
> He may also seize in execution the immovable property in the possession of the debtor.

[73] This article expressly provides that the respondent may garnish in the hands of London Life the sums belonging to Projexia.

[74] Article 1627 of the CCQ provides that "[a] creditor whose claim is certain, liquid and exigible may exercise the rights and actions belonging to the debtor, in the debtor's name, where the debtor refuses or neglects to exercise them to the prejudice of the creditor". Here, at the time of the garnishment, Projexia had still not exercised its rights to obtain the surrender value and thereby pay off the $1,255,298.28 debt owing to the respondent. The respondent was therefore entitled to do so in Projexia's name (*Malenfant* at para 57).

[75] In serving the garnishment demand on London Life, the respondent prevented Projexia from exercising this right itself, which would have allowed Projexia to shelter the surrender value of its various life insurance policies from its creditors (*Robitaille*; *In Re Gero*). The Court therefore finds that garnishment is a form of "oblique action" (see on this point *Steckmar Corp.* at paras 33-40).

[76] London Life correctly pointed out to the Court that in *Canada (MNR)* v *Steckmar Corp.*, [2004] FC 1568 (i.e., the appeal decision affirming Prothonotary Morneau's order dated April 19, 2004, in *Steckmar Corp.*), at paragraph 30, "[t]he parties were agreed in saying that this was a term obligation. The garnishee acknowledged its debt to the debtor, but the term itself was in dispute, that is, exactly when the obligation became payable".

[77] Despite this distinction raised by London Life, the Court finds that the conditions set out in subparagraph 449(1)(*a*)(i) of the Rules have been met in this case.

[78] Subjecting the respondent's garnishment rights to contractual provisions, as London Life argues, is unacceptable according to *Robitaille* at para 7:

> . . . It is quite clear that one cannot by a contract protect one's property from seizure by one's creditors except under a special enactment such as in the *Supplemental Pension Plans Act* (S.Q. 1965, c. 25, s. 31).

[79] The Court finds that the respondent is correct in relying on *Bidner*, according to which service of the garnishment demand on London Life in this case is equivalent to a request to obtain the surrender value of the life insurance policies. *Bidner* recognizes that [TRANSLATION] "a debt payable on demand is one which is immediately due". For these reasons, the garnishment is justified.

(3) What about the significant consequences of cancelling a life insurance policy and the importance of scrupulously applying the appropriate procedure for enforcing a certificate registered under section 223 of the ITA?

Applicant's submissions

[80] London Life challenges Prothonotary Morneau's conclusion at paragraph 20 of the August 15 Order that [TRANSLATION] "the fact that the surrender results in the cancellation of the policies does not hold up as an argument in the present case". London Life also disagrees with paragraph 24 of the August 15 Order, which states that the exemption from garnishment provided under paragraph 449(1)(*a*) of the Rules is merely [TRANSLATION] "a step-by-step approach" (see paras 113-114 of London Life's written submissions).

[81] London Life also submits that the right to garnish the surrender value of a life insurance policy has considerable financial and practical consequences, and for this reason, in addition to the importance allotted to the applicable case law principles and statutory provisions in this case, this Court should give special attention to these practical and financial consequences.

[82] At paragraph 117 of its written submissions, London Life notes the following consequences:

> [TRANSLATION]
>
> (a) In demanding to be paid the surrender value, the policyholder, among other things, relieves the insurer of its obligation to pay out a death benefit and thus deprives the beneficiary or the beneficiary's estate of important financial protection;
>
> (b) The cancellation of the policy therefore affects a third party to the contract, namely, the beneficiary—or, in the absence of a designated beneficiary, the policyholder's estate—who is deprived of the potential right to receive a death benefit when the risk materializes;
>
> (c) Such an eventuality usually also entails the possibility that the insured person will no longer be insurable because of his or her age or health, such that the policyholder could be denied a new policy to replace the one resiliated after the surrender value has been paid out;

(d) In the present case, London Life, which paid the policyholder advances on the policy, is currently owed interest on these advances. This interest will cease to accrue once the surrender value has been reimbursed.

[83] As an illustration of this, London Life submits that in his reasons for judgment in *Maritime Life Assurance Co*, Justice Bowie took into account the adverse financial consequences of the payment of the surrender value of an annuity issued by an insurer, for both the creditor and the beneficiary. The surrender request would have cancelled the annuity contract at issue.

[84] The situation is the same here: paying out the surrender value of the life insurance policy will result in its cancellation. The payout would therefore permanently deprive the policyholder of other benefits provided under the life insurance policy, which the policyholder would no longer be able to exercise. This demonstrates the importance of scrupulously applying the appropriate procedure for enforcing the certificate registered under section 223 of the ITA.

[85] Finally, London Life pleads that the respondent's motion for a final order of garnishment and the orders made in this matter by Prothonotary Morneau on the basis of this motion are unfounded in fact and in law.

Analysis

[86] In its oral arguments, London Life made little mention of the consequences alleged in paragraph 117 of its written submissions mentioned above. The Court does not agree with these arguments because, with the exception of subparagraph (d), London Life is pleading on behalf of a third party, namely, Projexia, the beneficiary and owner of the life insurance policies. As regards paragraph 117, subparagraph (d), London Life will be able to deduct the advances, loans and interest paid to Projexia from the sums its will have to pay to the respondent.

[87] London Life submitted at the hearing that if this appeal is dismissed, the consequences for the life insurance industry in Quebec will be disastrous, in that all life insurance policies will have to be reviewed and amended. The Court is of the opinion that this argument does not bar the respondent from using garnishment to recover its debt from Projexia.

[88] Finally, the Court agrees with the respondent and confirms the orders of Prothonotary Morneau dated August 15 and 24, 2012.

[90] The parties agreed that a sum of $2,500 as costs, plus disbursements, would be awarded to the successful party.

JUDGMENT

THE COURT ORDERS that

1. This appeal be dismissed.

2. The applicant shall pay the respondent the sum of $2,500 as costs, plus disbursements.

"Michel Beaudry"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	ITA-7879-11
STYLE OF CAUSE:	ITA v. PROJEXIA CONSEILS INC.
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	January 24, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	BEAUDRY J.
DATED:	January 30, 2013

APPEARANCES:

Louis Sébastien Dominique Castagne	FOR THE JUDGMENT CREDITOR
Denis A. Lapierre Isabelle N. Tremblay	FOR THE GARNISHEE, LONDON LIFE

SOLICITORS OF RECORD:

William F. Pentney Deputy Attorney General of Canada Montreal, Quebec	FOR THE JUDGMENT CREDITOR
Sweibel Novek LLP Montréal, Quebec	FOR THE GARNISHEE, LONDON LIFE