SUPREME COURT OF QUEENSLAND

CITATION:	*Hanson & Anor v Goomboorian Transport Pty Ltd & Ors* [2019] QCA 41
PARTIES:	**In Appeal No 7390 of 2018; Appeal No 9804 of 2018 and Appeal No 9806 of 2018:** **DOROTHY MAUREEN HANSON** (first appellant) **NORMAN RICHARD HANSON** (second appellant) **v** **GOOMBOORIAN TRANSPORT PTY LTD** ACN 011 054 658 (first respondent) **J & M LOGHANDLING PTY LTD** ACN 011 054 667 (second respondent) **BELLING INVESTMENTS PTY LTD** ACN 123 710 734 (third respondent) **GOOMBOORIAN LOGGING PTY LTD** ACN 076 970 995 (fourth respondent) **LITTLE YABBA DROUGHTMASTER STUD PTY LTD** ACN 086 875 845 (fifth respondent) **EMMERDALE FARMING PTY LTD** ACN 151 515 909 (sixth respondent) **JILRAY PTY LTD** ACN 058 181 463 (seventh respondent) **J & M FARMING PTY LTD** ACN 086 991 291 (eighth respondent) **J & M FARMING PTY LTD and LITTLE YABBA DROUGHTMASTER STUD PTY LTD** ABN 89 152 178 639 (ninth respondent) **JOHN GERHARD BELLING** (tenth respondent) **MARLENE ANNE BELLING** (eleventh respondent)
FILE NO/S:	Appeal No 7390 of 2018 Appeal No 9804 of 2018 Appeal No 9806 of 2018 SC No 4392 of 2015

DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeals
ORIGINATING COURT:	Supreme Court at Brisbane – [2018] QSC 135; [2018] QSC 182; [2018] QSC 189 (Bond J)
DELIVERED ON:	12 March 2019
DELIVERED AT:	Brisbane
HEARING DATE:	24 October 2018
JUDGES:	Gotterson and McMurdo JJA and Douglas J
ORDERS:	**1. In CA No 7390 of 2018:** **(a) Appeal allowed.** **(b) Set aside Order 2 made on 12 June 2018 and in lieu thereof substitute the following:** **2. It is declared that the proceeds of the Asteron Life Policy 81318923 were received, and are held, by the appellants as trustees to the following extent only and in the following proportions:** **(a) as to 1/95th, for the tenth respondent;** **(b) as to 2/95^{ths}, for the second and tenth respondents; and** **(c) as to 1/95th, for the third and sixth respondents.** **2. In CA No 9804 of 2018:** **(a) Appeal allowed.** **(b) Set aside Orders 5, 6, 7, 9 and 10 made on 14 August 2018.** **3. In CA No 9806 of 2018:** **(a) Appeal allowed.** **(b) Set aside Orders 1 to 6 made on 14 August 2018.** **4. In each appeal:** **(a) The respondents are to pay the appellants' costs of the appeal on the standard basis.** **(b) Leave granted to the second, third, sixth and tenth respondents to make written submissions as to any further orders they seek for the purpose of securing payment to them of their respective proportionate shares in the proceeds of the policy, such submissions to be filed and served within 14 days of the date of publication of these reasons; the appellants to file and serve any written submissions in response within a further seven**

days.

(c) The parties are directed to make written submissions as to the costs of the proceeding at first instance, such submissions to be filed and served within 14 days of the date of publication of these reasons.

CATCHWORDS: INSURANCE – LIFE INSURANCE – THE POLICY – CONSTRUCTION – where the appellants' daughter took out a Term Life insurance policy naming the appellants as equal beneficiaries – where cover ceased because the appellants' daughter died suddenly – where the appellants' daughter had paid 95 monthly instalments on the policy by the time cover ceased – where the appellants' daughter had been a habitual gambler and had stolen money from the respondents – where the appellants' daughter had paid for four out of the 95 monthly premiums using stolen funds from the second, third, sixth, and tenth respondents – where the learned trial judge found that on the specific terms of the policy cover was provided on a month by month basis – whether the learned trial judge erred in construing the Term Life insurance policy as providing cover on a month by month basis

APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – PROCEDURE – QUEENSLAND – POWERS OF COURT – ORDERS SET ASIDE OR VARIED – EQUITY – TRUSTS AND TRUSTEES – TRACING – TRUST PROPERTY – GENERALLY – where the appellants were each paid just over $713,550 following their daughter's death as the sum insured under the Term Life insurance policy – where the learned trial judge found that the stolen monies which were used to pay for the last premium were monies held on trust by the appellants' daughter for the third and sixth respondents – where the parties agreed that the process of tracing as per *Foskett v McKeown* [2001] 1 AC 102 was to be applied in determining the beneficial ownership of the proceeds paid under the policy on the appellants' daughter's death – where the learned trial judge found that, because cover was provided on a month by month basis under the policy, the third and sixth respondents had a right to any benefits which might flow from the insurance cover of the final premium, including the proceeds which were paid out to the appellants following their daughter's death – where the learned trial judge declared that the proceeds of the policy were received by the appellants as trustees for the third and sixth respondents – whether the orders made by the trial judge ought to be set aside and the Court instead declare that the proceeds of the policy are held by the appellants as trustees for the second, third, tenth and sixth respondents according to their proportion of the policy proceeds that reflects their respective share

Foskett v McKeown [2001] 1 AC 102; [2000] UKHL 29,

considered

COUNSEL: G J Handran, with K Wylie, for the appellants
C C Heyworth-Smith QC, with N H Ferrett, for the respondents

SOLICITORS: Baldwins Lawyers for the appellants
Griffith Hack for the respondents

[1] **GOTTERSON JA:** On 5 May 2015, Mr John Gerhard Belling, Mrs Marlene Anne Belling, and eight companies and one partnership, all associated with the Belling family, commenced a proceeding in the Supreme Court of Queensland. Mr and Mrs Belling were the tenth and eleventh plaintiffs respectively. The family companies carried on a range of forestry trucking, haulage and farming enterprises, two of them as the partners of the partnership. In addition, another of them was a family investment vehicle which also undertook external borrowings for the group. Yet another was trustee of a family trust for superannuation purposes. These companies were the first to eighth plaintiffs. The partnership was the ninth plaintiff.

[2] The first defendant to the proceeding was the estate of Norma Renee Hanson, deceased, of which Ms Christa Moxey, her sister, was the executor. The second and third defendants were the parents of the deceased, Mrs Dorothy Maureen Hanson and Mr Norman Richard Hanson. It is convenient to refer to the members of the Hanson family as Norma, Dorothy and Norman, as they were in the statement of claim.

The factual background to the litigation

[3] The litigation arose from the following circumstances. Norma commenced employment with the first plaintiff, Goomboorian Transport Pty Ltd, in July 2002 as a receptionist. Her role altered in about December 2007 to that of accounts/office manager. Due to a restructure, on 20 June 2011, the second plaintiff, J & M Loghandling Pty Ltd, became her employer. However, her responsibilities remained unaltered.

[4] In her role as accounts/office manager, Norma managed the accounts of all of the plaintiffs. Her administration tasks included managing the payroll, recording accounting entries in the plaintiffs' MYOB program, paying suppliers and the recording of purchase and sale transactions for equipment and stock. In order to undertake these tasks, she had access to internet and telephone banking.

[5] On 30 October 2006 when she was 23 years of age, Norma took out a Term Life policy of insurance with an insurer, Asteron Life Ltd ("Asteron"). The policy was to expire on 30 October 2082 or when cover ceased. The sum insured initially was $1,000,000. The premium was to be paid by monthly instalments.

[6] The cover ceased when Norma died suddenly on 23 September 2014, aged 31 years. By that time, some 95 monthly instalments had been paid on the policy and the sum insured had increased to slightly in excess of $1,427,000. Dorothy and Norman were nominated as beneficiaries in equal shares in the policy. On 9 February 2015, Asteron paid the sum insured to them. Each received a little over $713,550.

[7] Norma had been an habitual gambler. She lived in Gympie and frequently patronised local licensed clubs and a hotel with gaming facilities. Her habit was a motivation for dishonesty on a large scale towards her employer.

[8] After Norma's death, the Bellings discovered that she had taken advantage of her access to the group's bank accounts. Between 10 July 2006 and 14 October 2014, she transferred a total of $2,805,794.18[1] from those accounts into bank accounts under her control. Some of it was legitimately transferred in order to pay her wages and other employment entitlements. At trial, the learned trial judge found that of the monies transferred, $2,524,073.60 was stolen by Norma.[2] This finding is not challenged on appeal.

[9] His Honour also found that four of the 95 monthly premiums were paid from stolen funds. Significantly, one of the four was the last premium paid. Payment of it was made on 1 September 2014 from funds sourced from the bank accounts of the third and sixth plaintiffs, Belling Investments Pty Ltd and Emmerdale Farming Pty Ltd respectively.[3] The other three premiums were paid on 31 October 2011, 3 January 2012 and 1 March 2013. They were paid from funds stolen from the bank accounts of the tenth plaintiff (31 October 2011), and of the second and tenth plaintiffs (3 January 2012 and 1 March 2013) respectively.[4] There is no challenge to those findings either.

[10] In the proceeding, the plaintiffs claimed an array of declaratory relief including a declaration that the proceeds of the Asteron policy were received by Dorothy and Norman as trustees for the second plaintiff. Other declarations sought related to other property alleged to have been acquired with money sourced from the stolen funds.

The orders made at first instance and the appeals

[11] On 12 June 2018, judgment was given in the proceeding. Amongst the orders made was a declaration that the proceeds of the Asteron policy were received by Dorothy and Norman as trustees for the third and sixth plaintiffs (Order 2). Reasons for judgment were published that day.

[12] Dorothy and Norman filed a notice of appeal against this judgment on 10 July 2018 (CA No 7390 of 2018).[5] The respondents to it are the first to eleventh plaintiffs as the first to eleventh respondents in the same order. The two grounds of appeal are confined to the Asteron policy. By way of relief, the appellants seek an order that Order 2 be set aside and that this Court declare that the proceeds of the policy are held on trust as to 1/95th for the tenth respondent, 2/95^{ths} for the second and tenth respondents and 1/95th for the third and sixth respondents.[6] Orders in favour of the appellants with respect to the costs of the trial and this appeal are also sought.

[13] The orders made on 12 June 2018 made provision for written submissions with respect to, amongst other things, further declarations that might be made concerning property allegedly acquired by Dorothy and Norman from money that they had

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1 Reasons [22].
2 Reasons [28].
3 Reasons [66].
4 Reasons [92]-[94].
5 AB 1 1-5.
6 Appellants' Outline of Submissions ("AOS") at [32].

received and which had been sourced from the stolen funds, and costs. Two sets of orders were made on 14 August 2018. One of them contained declarations in favour of the plaintiffs with respect to Dorothy and Norman's dwelling, their motor vehicle and various deposit accounts held by them (Orders 5, 6, 7, 9 and 10). The other set of orders related to costs (Orders 1-6).

[14] Dorothy and Norman filed two further notices of appeal on 11 September 2018. One of them (CA No 9804 of 2018) relates to the declarations with respect to their property.[7] It seeks an order that Orders 5, 6, 7, 9 and 10 be set aside. The other notice of appeal (CA No 9806 of 2018) concerns the costs order.[8] The order it seeks is that Orders 1-6 be set aside. For both of these notices of appeal, the grounds of appeal substantially are the same two grounds as are set out in the notice of appeal filed on 10 July 2018.

[15] Since both grounds of appeal concern the policy, I propose first to identify provisions of the policy that are relevant to determination of these grounds. Following that, I shall refer to aspects of the reasoning of the learned trial judge that informed the decision that he made concerning beneficial ownership of the policy.

The policy

[16] Asteron wrote a single-page letter to Norma on 31 October 2006.[9] It requested her to "refer to the schedule and policy document for full details of your cover and the valuable features and benefits your policy provides". The schedule and policy document were attached to the letter.

[17] A column on the right hand side of the letter stated the number that had been assigned to the policy and that Norma was both the policy owner and the insured person. It listed as important dates: the policy commencement date as 30 October 2006; the policy anniversary as 30 October each year; and the policy issue date as 31 October 2006.

[18] The schedule[10] to which the letter referred was a three-page document. The information which I have outlined was replicated in a column on the right hand side of the first page of the schedule, with the addition of Norma's date of birth and a notation that she was a non-smoker. At the foot of the column there was a reference to "Special Conditions (see over)".

[19] The first page of the schedule identified the following benefits and features of the policy in tabular form:

- Stepped Premium
- Funeral Advancement Benefit
- Automatic Increase Benefit
- Special Events Increase Benefit.

[20] Below that table was a "Benefit Table". It described the cover as "Term Life cover". Also, it stated that the sum insured was $1,000,000; that the expiry date

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7 AB 1 6-10.
8 AB 1 11-15.
9 AB 2 168.
10 AB 2 169-171.

was 30 October 2082; and that the monthly premium was $37.61 which was to be paid by debit to Norma's bank account with the Westpac Bank branch at Gympie.

[21] The Special Conditions were set out on the second page of the schedule. None of them is relevant for present purposes. The third page of the schedule was concerned with nominated beneficiaries. It contained a table which listed Dorothy and Norman as the nominated beneficiaries and set out their respective portions of the sum insured as 50 per cent each. As well, it identified their relationships to Norma and stated their dates of birth. This page also contained a statement that "in the event of the death of the insured person while the policy is current and before the expiry date specified in the schedule", Asteron would pay each nominated beneficiary the proportion of the insured sum allocated to that individual.

[22] The policy document consisted of some 32 printed pages containing nine sections.[11] These sections set out the terms and conditions of the policy. By clause 1.6, Asteron undertook to pay any benefit payable on the insured's death in accordance with any valid nomination that had been made.

[23] Clause 2.2 in section 2 was headed "Paying for this policy". It stated:

> "To start and retain the cover provided under this policy, the premiums payable must be paid to us, as provided in section 8".

[24] Pursuant to clause 3.2 in section 3, Asteron undertook that, unless otherwise expressly stated in the policy, it would continue the policy until cover ended if the premiums were paid in accordance with section 8 regardless of the number of claims made or changes in the insured's health, occupation or pastimes.

[25] Section 4 was headed "When cover begins and ends". Relevantly, it provided:

> "This policy commences on the *commencement date,* subject to our receipt of the first premium.
>
> Cover for death and *terminal illness* will end on the earliest of:
>
> - date we receive the Policy Owner's written request to cancel this policy*;
> - the date of cancellation of this policy for non-payment of the premium (please refer to section 8.6)*;
> - the date of full payment of the *sum insured* for Life Cover*;
> - the date of reduction of the *sum insured* for Life Cover to nil following a payment made for *terminal illness,* the Total and Permanent Disablement Option where the schedule states 'single payout' or 'single payout: no buy back' applies, or the Cancer Cover Option (if applicable)*;
> - the *expiry date* for Life Cover*; and
> - the date of your death.

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11 AB 2 172-202.

> * If you are entitled to the Loyalty Funeral Benefit after having already met the eligibility criteria (refer to section 5.8), you will still be entitled to the Loyalty Funeral Benefit after this event."

(the italicised terms were terms defined in Section 10).

[26] Section 5 outlined the benefits available under the Life Cover policy. By clause 5.1, which was headed "Death Benefit", Asteron agreed to pay the sum insured for Life Cover "if you die while covered under this policy" less any payments that it had made for certain specific purposes including payment of the Funeral Advancement Benefit. It is of significance that the term "sum insured" was defined in section 10 to mean the amount stated in the schedule or adjusted in accordance with the terms and conditions of the policy or by agreement between the policy owner and Asteron.

[27] Clause 5.4 related to the Automatic Increase Benefit. As its name suggests, this benefit applied unless the insured elected to decline it. The provisions in it that are relevant for present purposes, were as follows:

> "While this policy is in force, on each anniversary of the *commencement date*, we will offer to increase the *sum insured* for:
>
> ➢ Life Cover; …
>
> without any account being taken of your *sum insured,* your age or any changes to your health, occupation or pastimes.
>
> The increase in the *sum insured* offered to you will be the greater of the *indexation factor* and 5%.
>
> Premiums will be increased to reflect the increased *sum insured*."

It was pursuant to the operation of this section that the sum insured under Norma's policy was increased annually. However, it is not clear from the record that this was the sole cause of the increase in the sum insured to a little more than $1,427,000.

[28] The Funeral Advancement Benefit and the Special Events Increase Benefit, both of which applied to Norma's policy, were the subject of clauses 5.7 and 5.6 respectively. It is unnecessary to refer to their terms.

[29] By virtue of clause 7.1, Asteron would not pay a death benefit if death was caused directly or indirectly by an intentional self-inflicted wound within 13 months of the commencement date. A like limitation applied to an increase in the sum insured for an increase that came into effect within such a 13 month period.

[30] Section 8, which was referred to in clause 2.2, was also headed "Paying for this policy". It contained the following relevant provisions:

> "8.1 Payment of premiums
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> The Policy Owner must pay premiums on a monthly, quarterly, half-yearly or yearly basis. The payment frequency applying when this policy starts is shown in the schedule. The Policy Owner may select one of the other available payment frequencies listed above, or payment method, if premium payments are up to date, by providing a written request to us (please refer to section 1.4 for our contact details).

The amount of premium varies depending on the payment frequency chosen. For example, the premium for paying yearly in advance is less than a year's premium paid on a monthly basis.

The Policy Owner must pay premiums in advance on or before the due date. The due date is:

- the same date in the month the premium is payable as the *commencement date;* or
- if the *commencement date* is the 29th, 30th or 31st, and there is no such date in the month the premium is payable, the due date is the last day of that month.

If we have been asked to debit premium payments from a bank account or credit card, we will do this on a business day. As this may not always be the due date, the Policy Owner should maintain sufficient credit on the business day before and after the due date.

8.2 Premium options

8.2.1 Stepped premiums

If the schedule states that stepped premiums apply, we will recalculate the policy premium on each anniversary of the *commencement date* and notify the Policy Owner of the new policy premium. We will base the new policy premium on;

- our standard stepped premium rates for Life Cover applying at the time of recalculation:
- our premium discounts in accordance with section 8.8;
- your sex, occupation, smoking status and any agreed premium loading factors at the *commencement date;*
- the then *sum insured;* and
- your age on your next birthday on or after the recalculation….

8.6 We may cancel this policy if the premium is not paid

If a premium payable under this policy is not paid, we will send the Policy Owner a notice at the address last notified to us by the Policy Owner specifying a date on which all cover will cease if the payment is not made. If we have not received the payment by that date we may cancel this policy by giving written notice of cancellation to the Policy Owner at the last known address. In some cases we will also send these notices to you (please refer to section 1.5).

We may (but are not obliged to) reinstate this policy within 12 months of cancellation if the Policy Owner asks us to, in writing, and

> complies with any terms we impose. If we determine to reinstate this policy, we will confirm the reinstatement and any further terms in writing to the Policy Owner."

The reasons at first instance

[31] The learned primary judge noted that it was uncontroversial between the parties before him that the stolen monies from which the last premium was paid were monies held on trust by Norma for the third and sixth plaintiffs, and that the process of tracing as described in the decision of the House of Lords in *Foskett v McKeown*[12] was to be applied in determining beneficial ownership of the proceeds paid under the policy on Norma's death.[13]

[32] In *Foskett*, certain property investors had entrusted money to an associate for a property development. The development did not proceed. The associate used some of the money to pay two annual premiums, for 1989 and 1990 respectively, on a life policy for £1 million which he took out in 1986. In 1989, he divested himself of the beneficial interest in the policy, appointing it to be held by trustees principally for the benefit of his three children. He committed suicide in 1991. The insurer paid the £1 million to the trustees of the policy as the death benefit due under it.

[33] The trial judge in *Foskett* held that the property investors were entitled to 53.46 per cent of the proceeds of the policy as representing the extent to which their money had contributed to the investment value of the policy at death. On appeal,[14] it was held that the use of the investors' money to pay the premiums could not give them an equitable interest in the death benefit or a share in the proceeds of the policy proportionate to the premiums paid with their money. They were limited to a restitutionary charge over the proceeds of the policy to the extent that their money could be traced into the premiums, together with interest.

[34] The matter progressed to the House of Lords. The property investors' appeals succeeded by majority. They obtained a declaration that they were entitled to share in the proceeds of the policy in accordance with the proportion of premiums paid out of their money. Lord Millett, with whom Lords Browne-Wilkinson and Steyn agreed, held that where a trustee wrongly has used trust money to provide part of the cost of acquiring an asset, the beneficiary is entitled, "at his option", either to claim a proportionate share of the asset or to enforce a lien upon it to secure his personal claim against the trustee for the amount of the misapplied money.[15] Since the property investors were able to trace the money their associate had held on trust for them through the premiums into the policy proceeds and since the associate's children were volunteers and had not themselves contributed to the premiums, the investors were entitled to the declaration that was made.

[35] In the present case, the learned primary judge noted that the parties differed as to how the law as explained by the majority in *Foskett*, was to be applied in the case before him.[16] His Honour summarised the rival contentions as follows:

> "[70] Ms Hanson's parents contended that the present policy was acquired by the payment of all 95 premiums, so that at most

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12 [2001] 1 AC 102.
13 Reasons [68].
14 At [1998] Ch 265.
15 At 131.
16 Reasons [68].

> the plaintiff was entitled to a proportionate share of the death benefit, the appropriate proportion being determined either by the number of premiums paid with trust monies as against the total number of premiums paid, or by the sum of all of the premiums paid with trust monies as against the sum of all premiums paid.
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> [71] The plaintiffs, on the other hand, contended that the asset concerned was insurance cover for the month of September 2014, and that insurance cover was acquired by the payment of the premium which was paid in advance for that month; that premium was paid entirely from trust monies; and, accordingly, the entitlement is to 100% of that asset (and 100% of the proceeds which derived from it)."

[36] The learned primary judge thought that there was "something to be said for both arguments" in terms of causation[17] but then put causation to one side. His Honour proceeded to cite the following passage from the speech of Lord Millett in order to define the overriding issue before him as "one of attribution not causation":

> "The question is not whether the same death benefit would have been payable if the last premium or last few premiums had not been paid. It is whether the death benefit is attributable to all the premiums or only to some of them. The answer is the death benefit is attributable to all of them because it represents the proceeds of realizing the policy, and the policy in turn represents the product of all the premiums."[18]

[37] His Honour then posed for himself the question: how does one go about the process of attribution? His answer was that the focus is upon "identification of the nature of the asset, and its cost".[19]

[38] This answer was informed by the following analysis undertaken by his Honour of what had been said by Lords Millett and Browne-Wilkinson in *Foskett*:

> "[75] It is evident that Lord Millett regarded it to be critical to appreciate the nature of the asset into which the plaintiffs contend the ability to trace. In circumstances of tracing into proceeds of an insurance policy, he regarded it as critical to appreciate that the plaintiffs trace first into the policy and thence into the proceeds.[20] The "policy" was a short-hand description for the asset into which the misappropriated funds could be traced. He wrote:[21]
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> > The word "policy" is here used to describe the bundle of rights to which the policyholder is entitled in return for the premiums. These rights, which may be very complex, together constitute a chose in action, viz, the

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17 Reasons [72].
18 At 137, cited at Reasons [73].
19 Reasons [74].
20 At 134.
21 At 134.

> right to payment of a debt payable on a future event and contingent upon the continued payment of further premiums until the happening of the event. That chose in action represents the traceable proceeds of the premiums; its current value fluctuates from time to time.

[76] One needs, accordingly, to examine the nature of the contract which gave rise to the chose in action.

[77] In *Foskett v McKeown* the insurance policy under consideration was a whole life insurance policy which also had the additional feature of a particular investment content. The policy provided that, in consideration of the first premium and of the further premiums payable under the policy, a specified death benefit was to be paid on the insured's death, namely whichever was greater of £1,000,000 and the aggregate value of units notionally allocated to the policy. The policy provided for those units to be allocated on receipt of each premium, and that units were to be cancelled each year in order to meet the cost of the life cover for that year. The surrender value of the policy was the aggregate value of the uncancelled units from time to time.

[78] Lord Browne-Wilkinson noted that (emphasis added):[22]

> **Although primarily a whole-life policy assuring the sum assured of £1m, the policy had an additional feature, viz, a notional investment content** which served three purposes. First, it determined the surrender value of the policy. Second, it determined the alternative calculation of the death benefit if the value of the notionally allocated units exceeded the sum assured of £1m. Third, the investment element was used to pay for the cost of life cover after the payment of the second premium in November 1987.

[79] Lord Millett wrote (bold emphasis added):[23]

> In the case of **an ordinary whole life policy the insurance company undertakes to pay a stated sum on the death of the assured in return for fixed annual premiums payable throughout his life. Such a policy is an entire contract, not a contract for a year with a right of renewal. It is not a series of single premium policies for one year term assurance. It is not like an indemnity policy where each premium buys cover for a year after which the policyholder must renew or the cover expires.** The fact that the policy will lapse if the premiums are not paid makes no difference. The amounts of the annual premiums and of the sum assured are fixed in advance at the outset and assume the payment of annual premiums throughout the term of the

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22 At 106.

23 At 133.

> policy. The relationship between them is based on the life expectancy of the assured and the rates of interest available on long term government securities at the inception of the policy.
>
> In the present case the benefits specified in the policy are expressed to be payable "in consideration of the payment of the first premium already made and of the further premiums payable". The premiums are stated to be "£10,220 payable at annual intervals from 6 November 1985 throughout the lifetime of the life assured".
>
> It is beyond argument that the death benefit of £1m. paid on Mr Murphy's death was paid in consideration for *all* the premiums which had been paid before that date, including those paid with the plaintiffs' money, and not just some of them. Part of that sum, therefore, represented the traceable proceeds of the plaintiffs' money."

[39] Next, the learned primary judge referred to the approach consistently taken in the United States that whole of life policies should be regarded as indivisible, citing from the majority opinion expressed in 1876 in *New York Life Ins. Co v Statham*.[24] His Honour noted that that case had been cited with approval in Australia by Starke J in *Willis v The Commonwealth*.[25] However, he went on to observe that the Appellate Court of Connecticut had noted relatively recently that there are substantial differences between different types of life insurance policies and had appeared to countenance that all life insurances policies might not necessarily be regarded in the same way as in *New York Life v Statham*.[26]

[40] His Honour then moved to consider the arguments before him and reason to a conclusion. He did so in the following way:

> "[83] The plaintiffs in the present case point out that the present insurance policy was very different to that which was dealt with in *Foskett v McKeown* (and, it would follow from that submission, to the whole life policy discussed in *New York Life Ins. Co. v Statham)*. That submission may be accepted. There was no aspect of investment involved. There was no surrender value. There was no statement that the benefits payable were in consideration of the first premium and all other premiums payable. Premiums were not level for the whole of the life of the policy, but were re-evaluated, at least by reference to some risk factors, on an annual basis. The policy was, as the policy schedule stated, a "term life policy" which provided a benefit described as "term life cover". Term life insurance is life insurance which pays a benefit in the event of the death of the insured during a specified term. In this case, clause 2.2 was explicit: "To start and retain the cover provided under this policy, the premiums payable must be paid to us, as provided

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24 93 U.S. 24, at Reasons [80].

25 (1946) 73 CLR 105 at 115; at Reasons [81].

26 Reasons [82], citing *Fradianni v Protective Life Ins. Co*. 145 Conn. App. 90 (2013).

in section 8." Section 8, when read with the schedule, obliged the payment of premiums monthly in advance. In a very real sense, and consistently with the wording of clause 2.2, the consideration for the retention of cover for any particular month was the payment in advance of the premium for that month. The plaintiffs suggest the tracing rules apply for the cover obtained for any particular month in the same way that they would if trust monies were used to purchase a winning lottery ticket.

[84] In my view the plaintiffs correctly contend that on the specific terms of this policy, cover was provided on a month by month basis by paying the monthly premiums in advance as required. The cover commenced on 30 October 2006, the payment for which was received by the insurer on 31 October 2006. That payment ensured cover until 30 November 2006. The cover for the period up to 30 November 2006 was attributable to that first payment. That process of payment in advance, securing cover for the following month continued on a month by month basis until Ms Hanson died. The amount of the cover varied over time, with the occurrence of other events for which the policy provided.[27] The cost to the insured of insurance cover for any particular month, was the payment in advance of the premium for that month. In the present case, the insured met the cost for the month in which she died entirely out of an asset she held on trust for the third and sixth plaintiffs. The fact that Ms Hanson had insurance cover for the month she died was attributable, as the plaintiffs contend, to the payment which was made in advance for that month.

[85] To put it another way, the right to any benefits which might flow from the insurance cover for September 2014 – which, to my mind, was the chose in action concerned – was an asset the retention of which was attributable to the fact that Ms Hanson stole money from the third and sixth plaintiffs and used it to pay the premium which ensured its retention. The point might have been more obvious if the payment was made in response to a notice from the insurer threatening cancellation, but there is no difference in kind between that scenario and what actually happened. In my view, that chose in action should properly be regarded as representing the property of the particular plaintiffs whose monies had been taken and used to pay the premium. So may the proceeds of the chose in action, namely the proceeds which were paid out to Ms Hanson's parents on Ms Hanson's death. They took those proceeds as volunteers.

[86] The plaintiffs are entitled to the declaration they seek, namely that the proceeds of the Asteron term life policy 81318923

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27 That is the reason why, by the time of Ms Hanson's final premium payment, the sum insured had increased from the initial sum of $1,000,000.

were received by Ms Hanson's parents as trustees for the third and sixth plaintiffs."

The grounds of appeal

[41] The grounds of appeal stated in the notice of appeal filed on 10 July 2018 are:

> "1. The learned trial judge erred in law in applying an improper construction of the Asteron Term Life policy (No. 81318923) (the Policy) to the facts, namely at [53], [54], [61], [66] and [92]-[94] of his Honour's reasons for decision.
>
> 2. The learned trial judge erred in applying the wrong legal principle to those facts."[28]

Appellants' submissions

[42] The appellants challenge the adoption by the learned primary judge of insurance cover for the month of September 2014 as the relevant chose in action for present purposes. Their case is that the interrelated rights and privileges conferred by the policy define the cover it provided. Such rights and privileges constituted, as a bundle, the relevant chose in action.[29] They submit that it was erroneous for his Honour to have viewed the cover provided by the policy as a series of separate monthly covers. Such a characterisation is inconsistent with the terms of the policy.[30]

[43] The appellants argue that payment of the first premium was a condition precedent to the coming into existence of the policy. Cover under the policy was to continue until the expiry date, subject to compliance with its terms. Payment of the further premiums maintained the cover; it precluded the taking of steps by Asteron to end the policy. Maintenance of the cover permitted the sum insured to increase according to the terms of the policy to the amount that was paid on Norma's death. Thus, all premiums that were paid contributed to the existence of cover and its amount at the date of death.[31]

[44] Further, the appellants submit that the differences between the subject policy and the policy under consideration in *Foskett* identified by his Honour in paragraph 83 of the Reasons do not justify a different conclusion as to the relevant chose in action. Nor do they justify a conclusion that cover was on a month to month basis.[32]

Respondents' submissions

[45] The respondents submit that, consistently with clause 5.1 of the policy terms and conditions, the relevant chose in action was cover at the time of Norma's death. The existence of such cover was the criterion for payment of the Death Benefit.[33]

[46] The respondents argue that clause 8.1 indicated clearly that cover was purchased each month by payment of a premium monthly in advance. The expression "in advance", they contend, meant in advance of the cover that was being purchased.[34]

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28 AB 1 3.
29 AOS at [16].
30 Ibid at [16], [20].
31 Ibid at [18], [19].
32 AOS at [22]-[28].
33 Respondents' Outline of Submissions ("ROS") at [9], [10].
34 Ibid at [11], [12].

Further, clause 8.6 reinforced the concept of successive monthly covers in providing that a failure to pay one premium was enough to trigger the cancellation process under the policy.[35]

[47] The respondents contend that the appellants have confused causation with attribution in focusing upon the role that premiums played in improving the benefit over time.[36] They submit that the reasoning of the learned primary judge was correct and that his Honour's differentiation of the policy in *Foskett* was a valid basis for coming to the different conclusion that he did.[37]

Discussion

[48] I have gained much assistance in deciding these appeals from a number of observations made by Lord Millett in *Foskett* on the process of tracing, its rules, and how it is applied, particularly with regard to tracing to the proceeds of a life insurance policy. As noted, the learned trial judge cited Lord Millett's description of the process of tracing at paragraph 67 in his reasons.

[49] A little later, Lord Millett proceeded to set out "the basic principles" under the heading "The tracing rules". His Lordship spoke first of "the simplest case" where a trustee wrongfully misappropriates trust property and uses it for his own benefit. The wronged beneficiary may select between two options, both proprietary in nature: to assert beneficial ownership of the traceable proceeds, or to bring a personal claim for breach of trust and enforce an equitable lien or charge on the traceable proceeds to secure restoration of the trust fund.[38]

[50] As to the "more complicated case where there is a mixed substitution", Lord Millett stated the basic rule to be:

> "Where a trustee wrongfully uses trust money to provide part of the cost of acquiring an asset, the beneficiary is entitled *at his option* either to claim a proportionate share of the asset or to enforce a lien upon it to secure his personal claim against the trustee for the amount of the misapplied money. It does not matter whether the trustee mixed the trust money with his own in a single fund before using it to acquire the asset, or made separate payments (whether simultaneously or sequentially) out of the differently owned funds to acquire a single asset."[39]

[51] His Lordship then turned to consider insurance policies. The observations that he made first on this subject were set out by the learned primary judge at paragraph 79 of his reasons set out above. Lord Millett continued:

> "It is, however, of critical importance in the present case to appreciate that the plaintiffs do not trace the premiums directly into the insurance money. They trace them first into the policy and thence into the proceeds of the policy. It is essential not to elide the two steps. In this context, of course, the word "policy" does not mean the contract of insurance. You do not trace the payment of a premium

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35 Ibid at [13], [14].
36 Ibid at [5].
37 Ibid at [31]-[33].
38 At 130.
39 At 131.

> into the insurance contract any more than you trace a payment into a bank account into the banking contract. The word "policy" is here used to describe the bundle of rights to which the policyholder is entitled in return for the premiums. These rights, which may be very complex, together constitute a chose in action, viz, the right to payment of a debt payable on a future event and contingent upon the continued payment of further premiums until the happening of the event. That chose in action represents the traceable proceeds of the premiums; its current value fluctuates from time to time. When the policy matures, the insurance money represents the traceable proceeds of the policy and hence indirectly of the premiums.
>
> It follows that, if a claimant can show that premiums were paid with his money, he can claim a proportionate share of the policy. His interest arises by reason of and immediately upon the payment of the premiums, and the extent of his share is ascertainable at once. He does not have to wait until the policy matures in order to claim his property. His share in the policy and its proceeds may increase or decrease as further premiums are paid; but it is not affected by the realisation of the policy. His share remains the same whether the policy is sold or surrendered or held until maturity; these are merely different methods of realising the policy. They may affect the amount of the proceeds received on realisation but they cannot affect the extent of his share in the proceeds."[40]

[52] Lord Millett addressed the reasoning of the members of the Court of Appeal. In the course of so doing, he said:

> "In my opinion there is no reason to differentiate between the first premium or premiums and later premiums. Such a distinction is not based on any principle. Why should the policy belong to the party who paid the first premium, without which there would have been no policy, rather than to the party who paid the last premium, without which it would normally have lapsed? Moreover, any such distinction would lead to the most capricious results. If only four annual premiums are paid, why should it matter whether A paid the first two premiums and B the second two, or B paid the first two and A the second two, or they each paid half of each of the four premiums?"[41]

[53] In a criticism of the approach taken by Hobhouse LJ, Lord Millett emphasised that the question was one of "attribution not causation". He did so in the terms set out by the learned primary judge at paragraph 73 of his reasons also set out above.

[54] According to Lord Millett's analysis, premiums are traced into the policy, that is to say, the bundle of rights to which the policyholder is entitled in return for the premiums. Those rights, which his Lordship noted may be "very complex", constitute a chose in action which he summarised as the right to payment of a debt payable on a future event and contingent upon the continued payment of further premiums until the happening of the event.

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40 At 134.

41 At 137.

[55] Under the policy issued by Asteron, the right to be paid was conferred by clause 5.1. It was a right to have Asteron pay the sum insured, less certain payments that had been made, if the insured died while covered under the policy. The content of this right was, of course, dependent on other provisions of the policy, notably for present purposes, those relevant to the nature of the cover and to the amount of the sum insured.

[56] There are a number of provisions in the policy document which informed the nature of the cover or covers given under it. Clause 2.2 stipulated that in order to start and retain **the cover**, the premiums payable must be paid as provided in section 8. Pursuant to section 4, **cover** "commences on the commencement date", 30 October 2006, "and will end on the earliest" of the dates set out in the section, namely date of cancellation for non-payment, date of payment in full of the sum insured, date of reduction of the sum insured to nil, the expiry date or date of the insured's death.

[57] These provisions, in my view, characterise the cover provided by the policy as singular in nature. It was a cover that, subject to payment of the first premium, began on the commencement date and, subject to payment of premiums, continued until the earliest of the dates specified in section 4 occurred. Specifically, it was not a series of sequential covers in which each cover was for a month, or a year.

[58] I am unable to accept the respondents' contention that the requirement in clause 8.1 that the premiums must be paid in advance on or before the due date contradicted the characterisation I favour. This requirement did no more than fix the date by which each premium had to be paid. It did not imply, much less state, that cover expired on each due date, to be renewed for the next month upon payment of a further premium. Indeed, such an implication would have been inconsistent with clause 8.6 pursuant to which cover would continue beyond the due date for payment of a premium that was not paid.

[59] The sum insured was defined as the amount stated in the schedule or adjusted in accordance with the terms and conditions of the policy. A significant provision for adjustment was the Automatic Increase Benefit contained in clause 5.4. Under that provision, the sum insured would increase annually on the anniversary of the commencement date, unless declined by the insured. Thus, where the policy had been on foot for more than one year, the sum insured payable under clause 5.1 would be an amount that depended upon, and reflected, the fact that cover had been retained by payment of premiums during each year that elapsed until cover ended.

[60] Both the singular nature of the cover and the dependency of the amount of the sum insured upon continuity in payment of the premiums, are factors which strongly favour attribution of the right to have Asteron pay the insured sum to all of the monthly premiums that were paid. To adopt the language of clause 2.2, it was the payment of these premiums which together caused cover to start and to be retained from that point until the date of Norma's death.

[61] To my mind, there are difficulties in attributing this right solely to the final monthly premium that was paid. To attribute in that way would require identification of a chose in action that arose upon payment of the final premium. Had the policy provided for successive monthly covers, the identification of such a chose in action would have been open. But, by virtue of the clauses to which I have referred, the cover was singular.

[62] For these reasons, I am unable to agree with the conclusion of the learned primary judge that the proceeds of the policy are attributable to the premium paid on 1st September 2014 only. I would attribute them to all of the premiums paid.

Disposition

[63] Consistently with these reasons, the appeals should be allowed. Order 2 made on 12 June 2018 in CA No 7390 of 2018 should be set aside. The declaration proposed by the appellants should be made in substitution for it. As well, Orders 5, 6, 7, 9 and 10 made on 14 August 2018 in CA No 9804 of 2018 and Orders 1 to 6 made on the same date in CA No 9806 of 2018 should be set aside.

[64] Leave should be granted to the second, third, sixth and tenth respondents to make written submissions as to any further orders they seek for the purpose of securing payment to them of their respective proportionate shares in the proceeds of the policy, with provision for the appellants to make written submissions in response.

[65] Finally, since the appellants have succeeded before this Court, there should be an order for costs of the appeal in their favour on the standard basis. The parties should be invited to make written submissions as to the costs of the proceeding at first instance.

Orders

[66] I would propose the following orders:

1. In CA No 7390 of 2018:
   (a) Appeal allowed.
   (b) Set aside Order 2 made on 12 June 2018 and in lieu thereof substitute the following:
   2. It is declared that the proceeds of the Asteron Life Policy 81318923 were received, and are held, by the appellants as trustees to the following extent only and in the following proportions:
      (a) as to 1/95th, for the tenth respondent;
      (b) as to 2/95ths, for the second and tenth respondents; and
      (c) as to 1/95th, for the third and sixth respondents.
2. In CA No 9804 of 2018:
   (a) Appeal allowed.
   (b) Set aside Orders 5, 6, 7, 9 and 10 made on 14 August 2018.
3. In CA No 9806 of 2018:
   (a) Appeal allowed.
   (b) Set aside Orders 1 to 6 made on 14 August 2018.
4. In each appeal,

(a) The respondents are to pay the appellants' costs of the appeal on the standard basis.

(b) Leave granted to the second, third, sixth and tenth respondents to make written submissions as to any further orders they seek for the purpose of securing payment to them of their respective proportionate shares in the proceeds of the policy, such submissions to be filed and served within 14 days of the date of publication of these reasons; the appellants to file and serve any written submissions in response within a further seven days.

(c) The parties are directed to make written submissions as to the costs of the proceeding at first instance, such submissions to be filed and served within 14 days of the date of publication of these reasons.

[67] **McMURDO JA:** I agree with the reasons of Gotterson JA and with the orders which he proposes.

[68] The policy document described this as a "Term Life policy". The effect of the primary judge's reasoning was that it provided not for one policy, but instead for a series of policies, each for a term of one month. In that way, the proceeds of sale were held to be attributable to a chose in action which was entirely attributable to the use of the money of the third and sixth plaintiffs. In my respectful view, that reasoning is inconsistent with the provisions of the policy document.

[69] By clause 4 of the conditions, it was agreed that "[t]his policy" would commence on the "commencement date" (specified as 30 October 2006) and would end on the earliest of alternative dates, of which the relevant date became the date of Norma's death (23 September 2014).

[70] By clause 8.1, the Policy Owner was to pay premiums on a monthly, quarterly, half-yearly or yearly basis, as the Policy Owner selected. But the document did not provide for distinct policies of life insurance, for successive terms corresponding with the payments. And it did not provide for any renewal of the policy (monthly, quarterly, half-yearly or yearly), to be effected either by the payment of the premium or otherwise. Instead, the one policy was to continue, subject to its cancellation by the Policy Owner upon her written request, its cancellation by the insurer for non-payment of the premium, or one of the other events specified in clause 4.

[71] The monthly payment, for which the property of the third and sixth respondents was used, was due on 30 August 2014. The policy continued to exist before the premium was paid two days later. Had it not been paid, still the policy would have continued until the insurer had elected to cancel the policy, having given a notice warning that it would do so. Consequently, the insurer's obligation to pay the sum insured could have existed although this monthly premium remained unpaid. The chose in action, from which the proceeds of the policy were derived, was not attributable to this payment alone, but instead it was attributable to the 95 payments which had been made from October 2006.

[72] **DOUGLAS J:** I agree with the reasons of and orders proposed by Gotterson JA. In particular I agree that the policy's provisions discussed by his Honour characterise the cover provided as singular in nature and show that the amount of the sum insured depends on continuity in payment of the premiums pursuant to cl 2.2 to "start and retain the cover provided under this policy".

[73] The passages relied on by Gotterson JA in Lord Millett's speech in *Foskett v McKeown*[42] dealing with tracing into the proceeds of insurance policies are also consistent with what was said by Professor Lionel Smith in his work, *The Law of Tracing*[43] when he discussed tracing into the proceeds of non-indemnity insurance policies such as life policies. The learned author said:

> "A defining feature of indemnity insurance is that it requires proof of loss. Non-indemnity insurance, by contrast, requires only the occurrence of an insured event, and the proceeds thereby generated are not quantified by loss but by prior agreement. This type of insurance is therefore a type of gamble, and the proceeds appear to be the traceable product of the premiums alone. If the value being traced has provided a part of the premiums, then the proceeds are the product of a mixed substitution. Suppose that £500 of the plaintiff's value is traced into the payment of premiums, and the insured paid £1,500 of his own in premiums. The proceeds of the policy would be traceably the plaintiff's, as to £500 or one-quarter of their value. The question of which of these methods will be used to quantify the plaintiff's contribution to the proceeds has been addressed; but generally this is a situation where the plaintiff will prefer to quantify her contribution by share, rather than amount."

[74] There is no discussion of possible differences between whole of life policies and term policies in the work, which preceded and was referred to in *Foskett v McKeown*, but, for the reasons I have expressed, I do not regard this term policy as materially different from a whole of life policy for these purposes.

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42 *Foskett v McKeown* [2001] 1 AC 102, 133-134 discussed above at [37], [51]-[52].

43 Lionel D Smith, *The Law of Tracing* (OUP, 1997) at pp 235-236.