IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0056 OF 1996
(High Court Civil Action No. HBC0047 of 1994)

BETWEEN:

THE COLONIAL MUTUAL LIFE ASSURANCE SOCIETY LIMITED

APPELLANT

-and-

PRABHA SHANDIL

RESPONDENT

Mr. S. Parshotam for the Appellant
Mr. R. Chand for the Respondent

Date and Place of Hearing : 22 August 1997, Suva
Date of Delivery of Judgment : 27 August 1997

JUDGMENT OF THE COURT

On 1 January 1985 Atma Prasad Shandil (aka Satendra Prasad) took out a small life insurance with the appellant insurance company. The sum insured was payable on 1 January 1996 or on the earlier death of Atma Prasad Shandil and, by a special provision incorporated in the policy, the policy holder nominated his daughter, Lalita Chand, as the beneficiary.

Atma Prasad Shandil died on 7 October 1992 and, as far as the appellant insurance company was aware, the insured sum became payable on that date to the

nominated beneficiary. They had no record of any change or cancellation of the nomination and it is agreed no notice of any such alteration had been given.

However, on 9 August 1992, shortly before his death, Atma Prasad Shandil had executed a will which included the provision:-

"7. I GIVE my life insurance cover policy with Colonial Mutual Life Insurance Company Limited together with all benefits accrued therewith to my grandson SHALENDRA PRASAD SHANDIL absolutely."

Following representations by Lalita Chand, the appellant advertised that the policy was lost as a first step to the issue of a special policy under section 75 but, on 21 December 1992, the solicitors for the respondent wrote and advised the appellants that they had the original policy. The respondent was married to the son of Atma Prasad Shandil and he had been appointed executor but he also died less than two months after his father. The respondent was executrix of her husband's will and so became executrix of Atma Prasad Shandil's will also. She appears in these proceedings as next friend of the policy holder's grandson and beneficiary, Shalendra Prasad Shandil, under clause 7 of his will quoted above.

Following further correspondence, her solicitor notified the appellants of the bequest by a copy letter dated 19 January 1993 in the following terms :

" We advise that the deceased as per his will gave his life insurance policy with Colonial Mutual Life Assurance with all benefits therein to his grandson SHALENDRA PRASAD SHANDIL absolutely. Thus we submit that this is his last will and testament in regards to the policy and we are of the view that this intention

and gift of his supercedes any nomination made by him regarding the policy in favour of whosoever concerned."

They then invited the appellant's views. On 18 March 1993 the insurance company replied with the opinion that the original nominee should still receive payment.

Prior to that, on 2 February 1993, it appears the solicitors for the respondent had drawn up both an originating summons and ex parte application for an interim order restraining the appellant from paying the sum insured. However, the court stamp on the documents show they were filed on 2 February 1994. We are not aware whether the year 1993 was a typographical error or whether there was a delay of a year before the documents were filed with the court. Whichever was the position, the application for an interim order was not heard until 27 May 1994 – almost three months after the application was filed. Curiously, in view of that delay, it was still heard ex parte and an injunction granted. Despite the usual order that a copy of the order and the documents be served within a week, it is agreed they were never served on the appellant or Lalita Chand as second defendant. Notwithstanding, judgment was given to the respondent on 26 August 1994 in default of appearance ordering the appellant to pay the monies under the policy to the plaintiffs within fourteen days.

There appears to be no dispute that the first notification the appellant received of the proceedings was service of that judgment. On 7 March 1995, the appellants filed a summons to set aside and, on 28 July 1995, it was set aside. Five weeks later, notice of hearing of the original originating summons was filed and it was heard on 15 August

1996. There appears to have been some confusion as to the nature of those proceedings. Judgment was reserved to 27 August 1996 and headed "Interlocutory Judgment". The first paragraph states it is an application to set aside the judgment of 26 August 1994 which had, of course, already been set aside. However the whole tenor of the judgment and the conclusions of the learned judge although not expressed as orders, suggest it was a final judgment on the originating summons and, indeed, on 13 November 1996, a judgment was drawn up in those terms by the appellant's solicitors and sealed in the High Court.

It is from that judgment this appeal lies on the following grounds:

"1. That the Learned Judge erred in law in wrongly interpreting the provisions of Section 83(2) and the definition of "policy holder" in Section 2 of the Insurance Act when he held:

(a) That the definition of "policy holder" in Section 2 of the Insurance Act extends to include the policy holder's successors;

(b) That such successors may give notice to the Appellant of any changes to the person nominated as a beneficiary to a life policy under Section 83(2) of the Insurance Act, after the death of the policy holder;

(c) That notice by such successor, namely the Plaintiff, to the Appellant of the change in the beneficiary nominated by the deceased as shown in his will dated 9 August 1992, constituted sufficient notification to the Appellant under Section 83(2) of the Insurance Act.

2. That the Learned Judge erred in law in directing the Appellant to pay the proceeds of the said life policy to the 1st Plaintiff when the provisions of Section 83(2) do not support a direction."

Section 83 of the Insurance Act, Cap.217, provides:

"83.-(1) The holder of a policy of ordinary life insurance may, when effecting the policy or at any time before the money secured thereby becomes payable, nominate a person or persons to whom it shall be paid in the event of his death:

Provided that, where any nominee is a minor, it shall be lawful for the policy holder to appoint in the prescribed manner any person to receive the money in the event of his death during the minority of the nominee.

(2) A nomination under subsection (1) shall-

(a) be incorporated into the text of the policy; or

(b) be made by an endorsement on the policy; in which case written notice thereof shall be communicated to the insurer who shall record it in the register maintained under section 49(1)(a).

Before the money secured by the policy becomes payable a nomination may be cancelled or changed at any time by another endorsement or by a will of the policy holder; and, unless written notice of a cancellation or change has been given by the policy holder to the insurer, the insurer shall not be liable for any payment under the policy made to a nominee mentioned in the text of the policy or in the register of the insurer.

(3) The insurer shall acknowledge in writing to the policy holder that it has registered a nomination or a cancellation or change thereof, and may charge a fee not exceeding ten dollars for such registration.

(4) A transfer or assignment of a policy made in accordance with section 77 shall cancel a nomination:

Provided that the assignment of a policy to the insurer, in consideration of a loan granted by the insurer on the security of the policy for less than its surrender value, or its re-assignment on repayment of such a loan, shall not cancel a nomination, but shall only affect the rights of the nominee to the extend of the insurer's interest in the policy.

(5) Where the nominee survives or, if there is more than one nominee, one or more of the nominees survive, the person whose life is assured, the money secured by the policy shall be payable to him or to such survivor or survivors (as the case may be).

(6) Where the money secured by a policy becomes payable during the lifetime of the person whose life is assured or where the nominee dies or, if there is more than one nominee, all the nominees dies before that time, the money secured by the policy shall be payable to the policy holder or his estate, as the case may be."

It is accepted by both sides that a nomination made under this section may be changed by another endorsement or by a will of the policy holder. The appellant suggests that such a change will only be effective if it has been passed by the policy holder to the insurer by written notice before the money secured by the policy becomes payable. We do not accept that is the effect of section 83 (2).

The subsection allows a change to or cancellation of a nomination at any time before the money becomes payable. By subsection (1), a person may only be nominated to receive the money secured in the event of the policy holder's death. In the present case the life insured and the policy holder were the same person and the money became payable on his death and, of course, the change was made before the money became payable.

Subsection (2) prescribes how a nomination should be recorded and allows for a change or cancellation of the nomination. There is no specific provision for notification of such a change or cancellation. Clearly it is always better to be able to give the insurer notice of such change but we cannot read the subsection as imposing any such obligation nor that it is required before the change becomes effective. The last part of the second paragraph of subsection 2 is a protective provision to cover an insurer which, in good faith and unaware there has been a change or cancellation of the nomination because it has not been notified prior to the death of the policy holder, pays out to a nominee mentioned in the policy itself or in the register of issued policies. That is clearly the purpose of that part of the section and, with respect, it is good sense. The very nature of a testamentary disposition means it is often made at a stage where it would be impossible to communicate such a change before the testator's death but he intends it to take effect. Similarly, many people making a will have good reasons to keep those provisions secret until after their death.

Two ways are allowed by which a previously made nomination may be changed or cancelled; by an endorsement of the policy or by will. The essential differences between the two were clearly in the mind of the drafter of the Act. Thus, when made by an endorsement, subsection (2)(b) requires written notice to the insurer and entry by the insurer in the register of issued policies. There is no such requirement for a change or cancellation by will of the policy holder.

The appellant points out that subsection (3) obliges the insurer to give written acknowledgement to the policy holder that any change has been registered. That, counsel suggests, supports his contention such a change must be notified to the insurer. That would appear to be correct. Where there has been registration of a change, it should be acknowledged to the policy holder but, as we have already pointed out, there is no requirement to notify a change by a will before the death of the policy holder and so, in most such cases where the policy holder and the life insured are the same person, the insurer will not have been notified before the money becomes payable.

As we have already mentioned, the section differentiates between the life insured and the policy holder. In the present case they are one and the same but that may not always be so. It must also be borne in mind that a nomination under section 83 is of a person who will receive the money only if the policy holder dies. If the policy holder is still alive when the life insured dies or if the policy becomes payable at the completion of its term and whilst the policy holder is alive, the nomination has no effect. Subsection (6), for example, envisages such a situation.

The question that needs to be answered in such a situation and in the present case is, whether, on the death of the policy holder, the definition in s.2 of "policy holder" extends to his successors and, if so, who becomes the policy holder for the purpose of reporting any change or cancellation of a nomination on the death of the original policy holder?

Policy holder is defined in section 2 of the Act:

"Policy holder means the person who for the time being is the legal holder of the policy ...."

It is clear that, in the present case, the physical holder of the policy at the time it became payable was the executor. Counsel for the respondent has suggested that the policy and the benefit under it forms part of the deceased's estate. Had the policy holder made no nomination under the policy, that would have been the case but, in any case where a nomination has been made before the money becomes payable and, as here, the policy holder and the life insured is one and the same, the money becomes payable at the moment of the policy holder's death. It is his death that activates the nominee's entitlement to the money and it is never, therefore, part of the deceased's property.

That is not to say that the executor has no part in the matter. His duty includes the implementation of the provisions of the will and, where the bequests include a change or cancellation of an earlier nomination under a policy of life insurance, it must be the duty

of the executor to notify the insurer and the beneficiary. In most cases he will have physical custody of the policy as part of the deceased's property and he also should declare that fact to the insurers. On receipt of notice from the executor, the insurance company would be wise to notify any person their records show has been named in the policy or on an endorsement and hold payment until the identity of the final nominee is established.

From the judgment in the court below, it appears the appellant has already paid the money under the policy to the second defendant despite the clear advice from the respondent's solicitors that there had been a change by the will of the policy holder and, possibly, despite an order by the court restraining it.

On the death of the original policy holder, the legal holder of the policy is the nominee. The learned judge quoted from Halsbury's Laws, Fourth Edition, Vol.50 para 201 "the will or testament is the declaration ... of the intention of the person making it with regard to matters which he wishes to take effect on or after his death". The testamentary provision in this case gave the life policy to the grandson together with all benefits. At the moment of his death the benefit of the policy became payable to the nominee. He became the legal holder of the policy also. It is he who inherits the right to take legal action to secure the contract. As far as the executor is concerned the nominee is the beneficiary named in the will and he should be informed. On receipt of such information, he would be wise to notify the insurer immediately in writing and, once he has done so, the insurer would no longer have the protection of the latter part of

subsection (2). A prudent executor would also advise the insurer as was done in this case.

The learned judge found the notification by the executor was notice by the policy holder. For the reasons given we do not consider it was and to that extent the appeal succeeds. We would, however, add that it was certainly sufficient warning to put the insurers on notice of a possible dispute and, in those circumstances, it was a rash step to proceed with payment to the second defendant. It would have been prudent to hold up payment until the matter was resolved in court as the respondent's solicitors advised in their letter of 19 January 1993.

With that exception, we consider the learned judge was correct in his judgment and the appeal is dismissed otherwise.

At the hearing in the High Court, it appears counsel agreed that, should the court find for the first plaintiff, there should be no award of costs. Although the appellants have succeeded in part in this court, the finding of the court below in favour of the first plaintiff stands. In the circumstances we order that the appellants should pay two thirds of the respondent's costs of the appeal.

We would finally point out that the sealed Judgment orders payment of the proceeds of the life policy to the plaintiffs. This is clearly incorrect. The only person

entitled under the policy is the first plaintiff and that was, in fact, the order the learned judge made. We therefore order that the sealed judgment be altered accordingly.

Gordon Ward

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Mr. Justice Gordon Ward
Judge of Appeal

I. R. Thompson

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Mr. Justice I. R. Thompson
Judge of Appeal

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Mr. Justice J. D. Dillon
Judge of Appeal