Case 14 – Ceded policies surrendered

Policies ceded on divorce to minor children – cedent subsequently surrendered policies – children (now majors) contesting surrender

Background

Mr X, the policyholder, and the complainants' mother were divorced in 1993. As part of the divorce settlement, Mr X (hereinafter referred to as the cedent) ceded outright his two Momentum insurance policies to their two minor children who are now majors and the complainants in this matter.

It is common cause that the insurer was aware of the cession in that the complainants' mother personally delivered a copy of the relevant pages of the divorce order to the insurer's offices on 8 August 2002.

In June 2008 the cedent applied to surrender one of the policies whereupon the insurer paid him an amount of R38 363.

In November 2009, the cedent applied to surrender the second policy whereupon the insurer confirms that an amount of R36 122 was paid to him.

Insurer's defence

In its initial response to the complaint the insurer conceded that it had erred by failing to honour the cession. It stated as follows:

> In terms of paragraph 8 of the settlement agreement there was no direct instruction on Momentum to note a cession of the abovementioned policies in favour of the children. The order did however appear to contain a cession declaration from the policyholder in respect of such policies.
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> Momentum failed to take active steps prior to June 2008 to ensure either that the policyholder execute a cession or alternatively note the cession in favour of the children. Momentum did request a cession form to be completed by the policyholder, but again did not actively follow-up on the completion thereof.
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> In light of the fact that Momentum failed to take active steps to ensure recording of the cession, Momentum is prepared to offer the children compensation. In the interest of fairness Momentum would prefer a sworn declaration from the children whether any of the policy proceeds were spent for their benefit. This will provide some guidance to Momentum to decide on the quantum amount...

According to the complainants they did not receive any of the policy proceeds for their education or tuition.

However the insurer then provided us with a copy of an email received from the cedent wherein he (the cedent) refuted this, stating that he had paid for the 'full' schooling of his children amongst other things.

Relying on this email, the insurer then withdrew its offer to pay compensation to the complainants. The insurer stated as follows:

> Based on the affidavits received from the two children ... it seems that they did not divulge all information to Momentum. Alternatively, they are not acting in utmost good faith as the contents of their affidavits is contradicted by the email received from the father / cedent ...
>
> At the time [the cedent] exercised his rights to surrender the policies, it was seemingly utilised towards the tuition and schooling of the children.

The insurer also raised a technical defence that clause 2.2.3 of our rules was applicable in this instance. In terms thereof, the Ombudsman shall not consider a complaint if three or more years have elapsed from the date on which the cause of action arose.

The insurer also alluded to clause 3.3 and clause 5.2 of our rules.

Provisional determination

The case was taken to a meeting of the adjudicators whereupon a provisional determination was issued, a summary of which is set out below:

- Subject to statute, the common law or an agreement between the insurer and the cedent or an agreement between the cedent and cessionary, the rights embodied in a policy of insurance are freely transferable by agreement between the cedent and the cessionary (even without the knowledge of the debtor, the insurer in this instance).

- The divorce order in terms of which the cedent ceded his right, title and interest in the policies to his two minor children had the effect of transferring the rights conferred by the policies from the cedent to the complainants. As such, only they were entitled to payment of the proceeds of the policies, either on maturity or on surrender. Also only they were entitled to surrender the policy.

- Since the policies do not prescribe any formalities for a cession, we were satisfied that receipt of the divorce order by the insurer constituted sufficient notice and that it was obliged to honour the cession accordingly.
- The fact that the divorce order did not instruct Momentum directly to note the cession of the policies, did not exonerate the insurer from that obligation.

- Also the fact that the complainants had received no communication from the insurer or submitted any information to the insurer for some 20 years was not relevant to the validity of the cession.

- Regarding the insurer's reliance on clause 2.2.3 of our rules, the three year period in clause 2.2.3 runs from the date on which the complainant became aware or should reasonably have become aware that he or she had cause to complain to the Ombudsman. According to the complainants they only became aware that the policies had been surrendered in January 2012. Based on this evidence, the meeting was of the view that clause 2.2.3 had no application.

- Regarding the insurer's reference to clause 3.3 and 5.2 of our rules, in the absence of any explanation from the insurer in this regard, it was not clear to the meeting what the applicability, or indeed relevance of clause 3.3 and 5.2 to this complaint was.

- The meeting therefore concluded that the insurer had erred by failing to honour the cession of the policies by the cedent in favour of the complainants.

Insurer's response to the provisional determination

In response to the provisional determination, the insurer provided us with the following chronological report:

- In August 2002 the complainants' mother personally visited the insurer's offices and provided the insurer with the relevant pages of the divorce order

- In March 2005, the complainants' mother visited the insurer's offices to request a policy statement in respect of both policies; the statements were printed and handed to her

- On 22 March 2005 the insurer received a fax from the cedent instructing the insurer to make the policies paid up

- On 28 September 2005, the complainants' mother visited the insurer's offices again to enquire if the policies were up to date and what their respective values were; in the course of her visit she provided the insurer with policy statements dated 1 October 2002 in respect of both policies, a full copy of the divorce order and a letter from Y Attorneys dated 14 August 2002 addressed to the cedent; in that letter the cedent was requested to complete and sign a cession form for both policies pursuant to the divorce order

- On 7 April 2008 the complainants' mother visited the insurer's offices to ascertain if the policies were up to date and what their respective values were; she was advised that both policies were in a paid up status

- After the surrender of the first policy in June 2008, the insurer sent a letter dated 10 June 2008 to the cedent requesting him to complete and sign the cession form in respect of the other policy; the insurer states that a copy of the letter was emailed to the complainants' mother

- Based on the above, the insurer contended that the complainants were fully aware of the history surrounding this matter and that therefore clause 2.2.3 of our rules was indeed applicable.

(On request, the insurer subsequently clarified that because the complainants' mother was the complainants' guardian at the relevant time, her knowledge must be imputed to them).

The insurer concluded as follows:

> ... whether or not the policyholder was entitled to surrender the policies or not, this is not a matter or dispute in which Momentum must be challenged or should get involved in. The early cancellation of these policies is a civil matter between the relevant parties and Momentum is a third party to such a dispute ...

Final determination

The cause of action is the surrender of the policies in June 2008 and November 2009 respectively. Therefore the three year period commences on these dates or on the date on which the complainants became aware or ought reasonably to have become aware that they had cause to complain.

In so far as the letter from Y attorneys dated 14 August 2002 addressed to the cedent makes no reference to the surrender of the policies, it does not assist the insurer's case.

The letter dated 10 June 2008 addressed to the cedent also did not make mention of the surrender of the first policy or to the cedent's request to surrender the second policy.

In the absence of any other evidence to refute the complainants' version that they first became aware of the surrender of the policies in January 2012, the meeting was satisfied that the complaint had not prescribed or become time barred.

The insurer contends that whether or not the cedent was entitled to surrender the policies and the early cancellation of the policies is a dispute in respect of which the insurer is a third party and must not be challenged or get involved in.

However the issue is not whether the cedent was entitled to surrender the policies and the insurer's role in that regard. It is also not relevant whether or not the cedent used the policy proceeds towards the complainants' education and tuition.

The sole issue is whether there was a valid cession of the policies in favour of the complainants which the insurer was obliged to honour.

For the reasons set out in the provisional determination, the meeting was satisfied that there was indeed a valid cession in favour of the complainants and that having received due notification thereof, the insurer was obliged to honour same.

This is our final determination.

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