IN THE PRIVY COUNCIL No. 37 of 1968

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

Between

CAR OWNERS' MUTUAL INSURANCE COMPANY LIMITED

Appellant

and

THE TREASURER OF THE COMMONWEALTH OF AUSTRALIA

Respondent

CASE FOR THE APPELLANT

INGLEDEW BROWN BENNISON & GARRETT
51 Minories
LONDON
Solicitors for the Appellant

COWARD CHANCE & COMPANY
St. Swithin's House
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LONDON
Solicitors for the Respondent

6, 1969

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Record

1. This is an appeal by leave of Her Majesty by and with the advice of Her Majesty's Privy Council against the order of the High Court of Australia dated 11th March 1968 by which an order nisi for writ of mandamus directed to the respondent the Treasurer of the Commonwealth of Australia made on the relation of the appellant was discharged with costs. pp.43-44 p.27 pp.24-26

2. The question raised by this appeal involves the true construction of section 14(1) of the Insurance Act 1932-1960 (Commonwealth) (hereinafter called "the said Act"). Sections 14(1) and (2) (a) and (b) of the Act provides:-

"14(1) Where the Treasurer is satisfied that a company (in this section referred

to as "the parent company") has become the beneficial owner of the shares of another company (in this section referred to as "the subsidiary company") a deposit made and maintained by the parent company of a value equal to the value of the deposit that would be required by this Act to be made and maintained by the parent company if it carried on the business of the subsidiary company in addition to its own business is, if the Treasurer, by writing under his hand, so certifies, a sufficient compliance by the subsidiary company with the requirements of this Act, and, where the parent company makes and maintains such a deposit, a deposit is not required to be made and maintained by the subsidiary company."

"14(2) Where the parent company has made and maintains a deposit that, by virtue of the last preceding sub-section, is a sufficient compliance by the subsidiary company with the requirements of this Act -

(a) the Treasurer shall return to the subsidiary company any money or approved securities previously deposited by

that company in accordance with this Act;

(b) the insurance business carried on in the Commonwealth by the subsidiary company shall for the purposes of sub-section (4) of section sixteen of this Act, be deemed to be insurance business carried on by the parent company,..."

10 The appellant claims that in the circumstances of this case the respondent was and is bound to certify by writing under his hand in accordance with the provisions of that section.

3. The appellant is a company duly incorporated under the provisions of the Companies Act (New South Wales) and has at all material times carried on the business of insurance within the Commonwealth of Australia. P.1 II. 16-20

4. Fire and All Risks Insurance Company
20 Limited (hereinafter called "Fire and All Risks") is a company duly incorporated under the provisions of the Companies Act (New South Wales). Fire and All Risks has at all material times carried on the business of insurance within the Commonwealth of Australia. Prior to the application for the order nisi p.28 l.29 p.1 ll. 24-27 p.21 ll.18-22

for mandamus herein Fire and All Risks had become and at all material times it has been the beneficial owner of all the shares of the appellant and for the purposes of these proceedings the respondent so admitted.

5. The appellant and Fire and All Risks had at all material times prior to the application for order nisi herein each made and maintained with the respondent the deposit required of it by the Act. p.1 ll.16-20 p.1 ll.24-27

6. At the time of the said application the deposit then made and maintained by Fire and All Risks pursuant to the provisions of the Act was of a value equal to the value of the deposit that would be required by the Act if it carried on the business of the appellant in addition to its own business and the respondent so admitted for the purposes of these proceedings. p.21 ll.22-29

7. The carrying on of insurance business within the Commonwealth of Australia was at all material times governed by the Act. The general scheme and effect of the Act is to provide in respect of each insurance business a fund which remains the property of that business but which is under the control of the Treasurer and can be resorted to directly by policy owners of the

business in events such as bankruptcy and liquidation.

8. Section 9 of the Act provides that a person shall not carry on insurance business in the Commonwealth unless he has lodged a deposit with the Treasurer as required by the Act.

9. Sections 11 to 13C (inclusive) of the Act contain provisions under which persons carrying on or commencing to carry on insurance business in the Commonwealth of Australia are required to deposit and maintain on deposit with the respondent approved securities of a specified value therein stated. In general terms the criteria laid down in those sections in relation to persons other than a foreign company require that the value of the deposit within certain maximum and minimum limits shall bear a certain ratio to the annual premium income from the relevant insurance business. The maximum deposit required in the case of a person other than a foreign company is $160,000 and in the case of a foreign company is $200,000. Provision is made by the Act for the furnishing of information and of returns as to the premium income of the insurance company (section 16).

10. By section 18 of the Act the deposit is to be invested by the respondent in prescribed securities but the deposit is deemed to form part of the assets of the depositor and all interest accruing due on the deposits or the securities in which they are for the time being invested are to be paid to the depositor. Sections 20 and 20A make provision for circumstances which arise when the value of the deposit becomes insufficient (section 20) or becomes excessive (section 20A).

11. Section 21 provides that the deposit is to be a security for the meeting of liabilities of the depositor under policies issued by him and is not available for other liabilities of the depositor until payment in full of liabilities under policies. Section 22 contains machinery provisions to enable a policy owner to have access to the securities deposited in the event of obtaining a final judgment or in the event of winding up or sequestration.

12. Sections 17 and 24 of the Act are in the following terms:-

> "17. (1) Where any question arises under this Act as to the net liability or premium income of any person carrying on

insurance business, the question shall, for the purposes of this Act, be decided by the Treasurer.

(2) A person may appeal to the Court against any decision of the Treasurer under this section and the decision of the Court upon such appeal shall be final and conclusive."

"24. In all matters relating to the value of securities deposited under this Act, the decision of the Treasurer shall, subject to appeal to the Court, be binding and conclusive."

13. Section 14(2) (c)(d) and (e) contains further provisions which operate in the event of a subsidiary company not being required to maintain a deposit by reason of section 14(1). Sections 14(3) and (4) provide:-

"14(3) Where the parent company ceases to be the beneficial owner of the shares of the subsidiary company, the parent company shall forthwith notify the Treasurer in writing of that fact.

Penalty: Two hundred pounds.

(4) Where the Treasurer is satisfied that the parent company has ceased to be

the beneficial owner of the shares of the subsidiary company -

(a) he shall notify the subsidiary company in writing that he is so satisfied;

(b) the deposit by the parent company ceases to be a sufficient compliance by the subsidiary company with the requirements of this Act;

(c) the subsidiary company shall, upon receipt of the notification, forthwith deposit, and maintain on deposit, with the Treasurer approved securities in accordance with this Act; and

(d) until the subsidiary company so makes a deposit, the deposit made and maintained by the parent company shall, for the purposes of this Act, be deemed to be a deposit made and maintained by the subsidiary company".

14. The appellant requested the respondent to give his certificate in accordance with section 14(1) of the Act but the respondent refused so to do without first being supplied

p.3 ll.12-18

pp. 3-5

with and considering certain information as to the affairs of Fire and All Risks.

15. The decision as to whether the order nisi should be made absolute turns upon the construction of sub-section (1) of section 14. The appellant before the High Court of Australia submitted that where the respondent is satisfied:

(a) that the parent company had become the beneficial owner of all the shares of the subsidiary company;

(b) that the deposit made and maintained by the parent company was of a value equal to the value of the deposit that would be required by the Act to be maintained by the parent company if it carried on the business of the subsidiary company in addition to its own business,

he is under a duty to the subsidiary company to certify in terms of the subsection, thus bringing into operation the remaining provisions of the section for the benefit of the subsidiary company and its policy-holders. The respondent submitted before the High Court of Australia that even if he is satis-

fied as to the two matters set forth above he still has a general discretion whether to certify or not.

16. His Honour the Chief Justice accepted the appellant's submissions and concluded his opinion as follows: p.35 l.9 -

"Therefore, it seems to me that conformably to the clear policy of the Act as to the amount of a deposit, and the exclusion from that policy of any discretion in the Treasurer as to that amount, the sub-section should be read as providing that if the Treasurer is satisfied as to the ownership of the shares of the subsidiary and certifies that the amount of the parent company's deposit is equal to what it would be required to make and maintain if it did the whole of the insurance business of both companies, the making and maintenance of that deposit is a sufficient compliance with the Act and the subsidiary is freed of the obligation itself to make and maintain a deposit so long as the parent company maintains the amount of deposit appropriate to the totality of the premium income of both companies. p.36 l.24

What the sub-section does is to accommodate the formal situation of two entities, of which one is wholly owned by the other, conducting two businesses to the reality, which is that of one beneficial owner conducting its business in two departments. It is not really a relaxation of the general policy of the Act as to relationship of the deposit required to the premium income of the insurance business. The Act is constructed on the footing that deposits maintained according to that relationship adequately protect policy-holders. It is not of course for the Court to consider how that protection might be extended by the exercise of an absolute discretion of the Treasurer.

To sum up, with respect to other views, I have formed the clear opinion that upon its proper construction the subsection by the expression "if the Treasurer so certified" commits no more to the Treasurer than the certification that the parent company's deposit is of that amount which would be required to make and maintain if it carried on its own and the subsidiary's

business. I am quite unable to discover any indication in the Act that, whereas in all other circumstances the amount of the deposit is determined by the Act itself, it should in this instance be in the absolute discretion of the Treasurer. I say "absolute discretion", for if the Treasurer has a discretion as to whether or not the companies shall have the benefit of the provisions of section 14, I can find no considerations indicated by the Act or to be inferred from it within which he should confine himself in its exercise. Nor were any suggested in argument.

Upon this construction of the sub-section and upon the admissions made by the Treasurer, there arose in this case, in my opinion, a duty to certify that which is the fact. Accordingly, in my opinion, the order nisi for mandamus should to that extent be made absolute."

17. His Honour Mr. Justice McTiernan rejected the appellant's submissions and said:- p.37 l.37-p.38 l.8

"I am of the opinion that the insertion by the draftsman of those words between "is" and the words "a sufficient compliance"

prevents ambiguity as to the sense in which the word "so" is used. It is not used to avoid repetition of what is previously said in the sub-section as to the deposit of the "parent company". The result of this construction is that there would be no utility in the Treasurer's certifying formally that the deposit of the "parent company" is of the extent mentioned. A writ of mandamus does not lie to command the Treasurer to certify that. I am of the opinion that upon the true construction of s.14(1) the words under consideration is to certify that a deposit which had the attributes mentioned is a sufficient compliance by the subsidiary company with the requirements of the Act."

18. His Honour Mr. Justice Menzies construed the sub-section in the same way as His Honour Mr. Justice McTiernan and was of the opinion that this grammatical construction was supported by a consideration of the purposes of the Act. In the course of his judgment His Honour said:

"My conclusion that the Treasurer can so refuse rests principally upon the language and the grammatical construction of s.14(1). p.40 l.23-p.41 l.25

Both the interpolation of the qualifying provision "if the Treasurer, by writing under his hand, so certifies" between the words "is" and "a sufficient compliance" and the use of the word "if" to introduce the qualification indicates that as a matter of grammar and language the required certificate is one that the parent company's deposit is a sufficient compliance by the subsidiary with the requirements of the Act, that is s.11. It seems to me that the section applies when, and only when, three conditions have been fulfilled.

(1) that the Treasurer is satisfied that the parent company has become the beneficial owner of the shares of the subsidiary company;

(2) the fact is that the parent company's deposit is of the requisite value; and

(3) the Treasurer certifies that the parent company's deposit is a sufficient compliance by the subsidiary with the requirements of the Act ...

What I regard as the prima facie meaning of s.14(1) is, moreover, powerfully supported by a consideration of the policy of the

Act as appears from its terms as a whole. The consequence of the operation of s.14(1) is to take a subsidiary company outside the operation of s.11 and deprive its policy holders of the protection of deposit by the company with which they are insured while affording them the protection of the deposit made by that company's parent company."

SUBMISSION

19. The appellant respectfully submits that the Judgment and Order of the High Court of Australia discharging the Order Nisi with costs was erroneous and should be reversed and that the Order Nisi should be made absolute by ordering the respondent to certify by writing under his hand that the deposit made and maintained by Fire and All Risks is of a value equal to the value of the deposit that would be required by the Act to be made and maintained by it if it carried on the business of the appellant in addition to its own business or alternatively by ordering the respondent to

certify by writing under his hand that Fire and All Risks has become the beneficial owner of the shares of the appellant or alternatively by ordering the respondent to certify by writing under his hand in the form required by section 14 of the Act for the following amongst other

REASONS

1. That as a matter of grammatical construction particularly having regard to the natural meaning of the word "certify" section 14(1) of the Act should be read as imposing on the respondent the duty of certifying in writing as to the fact if it be the fact that the deposit of the parent company made and maintained by it is of the value therein stated.

2. That in determining whether a deposit made and maintained by a parent company is of a value equal to the value of the deposit that would be required to be made and maintained by it if it carried on the subsidiary company's business in addition to its own,

it is necessary to determine the premium income of the company so as to ascertain the nominal amount of the required deposit and to form an opinion as to the value of the securities lodged. The decision as to both these matters is elsewhere committed to the Treasurer subject to appeal. (See sections 17 and 24) It would therefore be consistent with this if section 14 made a certification of the fact of the extent of the parent company's deposit a matter for the Treasurer rather than it being left for determination by some other method.

3. That the natural reading of the subsection associates the expression "if the Treasurer so certifies" with the fact of the extent of the parent company's deposit. According to its terms the section requires the Treasurer to certify a fact, not express an opinion or exercise a discretion and it is a fact peculiarly within his own knowledge as to which the Act elsewhere makes him in substance the arbiter.

4. That this construction is required by a consideration of the provisions of the remaining subsections of section 14 and of the remainder of the Act.

5. That the word "certifies" in section 14 is appropriate to a state of fact but inappropriate to the expression of a discretionary opinion.

6. That it is not possible to discover in or infer from the Act any indication of the considerations to which the Treasurer should confine himself if he has a discretion under section 14(1) of the Act.

7. That the effect of reading the sub-section in the manner contended by the appellant is fully consistent with the frame-work and policy of the Act. Elsewhere in the Act the Legislature has wherever necessary specified the amount of the deposit required or has laid down a formula by reference to which such deposit can be calculated and has not committed to the Treasurer any discret-ion to fix the amount of the deposit. It would be inconsistent with this declared policy if section 14 were to confer on him such a discretion.

8. That the provision at the end of section 14(1) namely -

"where the parent company makes and main-tains such a deposit a deposit is not re-quired to be made and maintained by the

subsidiary company" - indicates that it is the deposit of the required value which constitutes compliance with the requirements of the Act and strongly supports the construction for which the appellant contends.

9. That if the view expressed in the majority judgments were correct it would mean that the parent and the subsidiary could be required to make and maintain deposits which together were double the amount of the deposit which the parent company would have to make and maintain if it carried on the business of the subsidiary in addition to its own and there is nothing in the subsection or in the Act which would support the view that the Legislature intended such a result.

10. That if the Legislature had intended to confer a discretion on the Treasurer of the nature referred to in the majority judgments one would, consistent with other provisions in the Act, have expected it to have clearly said so and to have indicated the principles upon which such discretion should be based. This it has not done.

11. That the method adopted by the Act to protect policy holders is to provide a fund

to which they may resort directly in certain events which is of a value calculated by reference to the premium income of the particular insurance business and which need not exceed a maximum which the Legislature has deemed sufficient to provide for the eventualities against which it sought to protect the policy holders. This basic concept of the Act is carried into and preserved by section 14 of the Act since section 14(2) provides that the parent company's deposit is directly available to the policy holders of the subsidiary and section 14(1) and (2) in their very terms preserve the method of fixing the amount or value of the deposit laid down by the Act. Section 14(2)(d) and (e) in any event provide means which automatically give the policy holder any further protection required.

12. That, with respect, the examples given by His Honour Mr. Justice Menzies to support his construction of the sub-section are not of assistance because: p.41 l.25-p.42 l.23

(i) The only relevance of fixing a higher maximum deposit for foreign incorporated companies than for locally incorpor-

ated companies would be to give greater protection to policy holders where control of the insurance business is overseas. However in the example which concerned his Honour namely the case of local parent company with a foreign subsidiary the control is in Australia and the need for the higher maximum deposit disappears. In such circumstances section 14 only operates so long as all the shares in the foreign company are owned by a local company (see section 14(3) and (4)).

(ii) Policy holders in an insolvent subsidiary company would not be disadvantaged by being given the right to resort directly to the parent company's deposit.

(iii) Where the Legislature has considered solvency or insolvency to be relevant it has expressly said so. (See sections 20A(2) and 26(3)).

(iv) Once the provisions of section 14(2) do apply the section expressly covers the specific situations which may arise in the event of insolvency but does not

use insolvency as a criteria for any step.

(v) It would have been an easy matter for the Legislature to refer to these situations when drafting the section if they had been in contemplation.

13. That with respect the reasons advanced by His Honour the Chief Justice are to be preferred to those advanced in the judgments of their Honours McTiernan and Menzies J.J.

14. Alternatively to the foregoing, it is submitted that on its true construction the respondent's duty to certify under section 14 arises upon his being satisfied as to the fact expressly committed to him by the section namely the fact, if it be the fact, that "the parent company" has become the beneficial owner of the shares of "the subsidiary company". This construction of the section is supported by the terms of section 14(3) and (4) of the Act and by the submissions in paragraphs 5, 6, 8, 9, 10 and 11 hereof and is also consistent with the scheme and policy of the Act as set forth in these submissions and the judgment of the Chief Justice. On this view

he would be bound to certify in writing under his hand as to the fact so committed to him or alternatively that a deposit made and maintained by the parent company of a value as therein defined is a sufficient compliance with the Act.

R.J. Ellicott

Counsel for the Appellant.