Privy Council Appeal No. 37 of 1968

Car Owners' Mutual Insurance Company Limited – – *Appellant*

v.

The Treasurer of the Commonwealth of Australia – *Respondent*

FROM

THE HIGH COURT OF AUSTRALIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 17TH MARCH 1969

Present at the Hearing:

THE LORD CHANCELLOR
LORD MORRIS OF BORTH-Y-GEST
LORD PEARCE
LORD WILBERFORCE
LORD PEARSON

[*Delivered by* LORD WILBERFORCE]

The appellant moved the High Court of Australia to make absolute an order *nisi* for a writ of mandamus to the Treasurer of the Commonwealth of Australia directing him to issue a certificate in accordance with the Insurance Act 1932–1960 section 14. The motion was refused by the High Court and the present appeal is against that refusal.

The proceedings arose out of the admitted fact that the appellant, Car Owners' Mutual Insurance Company Limited is a wholly owned subsidiary of Fire and All Risks Insurance Company Limited. Each of these companies was incorporated under the Companies Act (New South Wales) and each at all material times carried on the business of insurance within the Commonwealth of Australia. Each company made and maintained with the Treasurer a deposit as required by the Insurance Act, and it is admitted that Fire and All Risks Insurance Company Limited (the parent company) maintained a deposit equal to the value of the deposit which would be required under the Act if it carried on the business of the appellant in addition to its own business. The object of the proceedings was and is to obtain the return of the deposit maintained by the appellant.

The section dealing with this matter, upon the construction of which this appeal turns, is section 14 of the Insurance Act. For the present it is sufficient to quote subsections 1 and 2 (*a*) and (*b*).

> " 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.

(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; "

It will be seen that subsection 1 requires two initial conditions to be fulfilled. First, the Treasurer must be satisfied, in effect, that the subsidiary should have become the wholly owned subsidiary of the parent company: there is no difficulty and no dispute about this in the present case. Secondly, it must be shown that the parent company has made and maintained a deposit of such an amount as would be required if it carried on the business of the subsidiary as well as its own business. This may involve decisions as to two matters. The amount of the deposit is, under the Act, based on the amount of premium income, and any question as to premium income must be decided by the Treasurer, subject to appeal to the Court (Section 17). Then, the value of the deposit made by the parent company may have to be determined. This too is a matter for the Treasurer, subject, again, to appeal to the Court (Section 24). In the present case there is no dispute that the deposit made and maintained by the parent company was, on this formula, sufficient in amount. So each of the initial conditions was satisfied.

The question for decision arises out of the words which follow the statement of the two conditions " is, if the Treasurer, by writing under his hand, so certifies, a sufficient compliance by the subsidiary company with the requirements of this Act ". Do these words, as the Treasurer contends, introduce a third requirement, namely a certificate by the Treasurer which the Treasurer is entitled, at his discretion, to withhold, or which at least he is not bound to give, or, on the contrary, is the Treasurer bound to give the certificate once he is satisfied (as admittedly he is) as to the two previously stated matters.

The argument for a third requirement was accepted by the majority of the High Court of Australia. Menzies J. rested his conclusion that the Treasurer might refuse a certificate, notwithstanding that the two stated conditions were complied with, principally upon the grammatical construction of subsection 1 and upon the interpolation of the qualifying provision between the words " is " and " a sufficient compliance ".

He was further of opinion that the policy of the Act was to maintain the protection of the policy holders, and that a reduction of the deposit should not happen automatically but should be safeguarded by a discretion conferred on the Treasurer. His opinion was concurred in by McTiernan J.

Sir Garfield Barwick C. J. took the opposite view. He could find no reason in the Act for bringing the sufficiency of the deposit within the Treasurer's discretion. He considered that all that the Treasurer was called upon or entitled to certify was the amount of the deposit; this was not a matter of opinion, but a fact which, under the Act, he was qualified to appreciate. If the Treasurer had a discretion, there were no considerations indicated by the Act or to be inferred from it within which he should confine himself in its exercise: but no indication could be found in the Act that an absolute discretion in this particular matter only should be conferred upon him. The Chief Justice would have made absolute the order *nisi* for mandamus.

Their Lordships are in agreement with the judgment of Sir Garfield Barwick C.J. There are two main arguments, based upon the scheme and structure of the Act, which they regard as convincing.

In the first place, accepting, as it is right to accept, that it is the policy of this Act to provide some statutory protection of the interests of insurance policy holders, it appears that the method which has been chosen to achieve

this is through the compulsory deposit of money with the Treasurer. The amount of the deposits is fixed rigidly by the Act according to a number of formulae adapted to particular situations. The general obligation to lodge a deposit is created by section 9; section 11 fixes the deposit in the normal case at a value of £1,000 for each £5,000 of annual premium income subject to a maximum of £80,000 or in the case of a foreign company of £100,000. Sections 12, 13 and 13B deal with special cases of companies which commenced business after the commencement of the Act. The amounts required to be lodged vary, according to the stated criteria, but the Treasurer has no power or discretion to fix, increase or dispense with their amount: his functions are of a purely supervisory or policing character. Apart from these provisions and apart from the special case which is dealt with in section 20A (to which their Lordships will return) there is no further mechanism established for the protection of policy holders: the lodging of a deposit, related to premium income, is judged to be sufficient.

In connection with the special case of parent or subsidiary it is significant that section 14 itself incorporates a specific and additional safeguard of a somewhat elaborate character. In subsection 2 after a provision (*c*) dealing with the case where the subsidiary carries on business outside the Commonwealth, it is provided (*d*) that if a policy owner obtains a judgment against the subsidiary which is not satisfied, the parent company's deposit is to be a security for preferential payment of the debt and (under section 22) is to be available to satisfy the judgment: there are further special provisions to deal with the event of liquidation. These provisions are followed by one which requires the parent forthwith to make a deposit up to the full amount which would have been required to be made by both companies and any other subsidiary of the same parent but for the provisions of section 14 (1). This both demonstrates that the legislature had clearly in mind that section 14 (1) might in certain circumstances require to be supplemented by a requirement for further deposit, and confirms that the policy and scheme of the Act is to protect policy holders by specifically stated deposits quantified by the Act itself and not fixed by the discretion of any administrative authority.

The second argument relates more particularly to the drafting of section 14 itself. Subsection 2 (*a*) lays down in imperative terms that, if the parent company has made and maintains a deposit which is a sufficient compliance by the subsidiary company with the requirements of the Act, the Treasurer shall return the subsidiary company's deposit. This subsection is to be compared with section 20A (this is the special case above mentioned) which deals with the situation where there has been an appreciation in the value of deposited securities. There the Treasurer is directed to return any surplus, subject to the qualification that he is not required so to do if he " is not satisfied that that person [the depositor] has made adequate provision to meet his liabilities (including contingent liabilities) to policy owners in the Commonwealth ". This provision, and the absence of anything comparable from section 14 becomes the more significant when it is seen that section 20A was introduced in 1960 when section 14 was itself amended by (*inter alia*) the addition of subsection 2. The omission in section 14 to insert any power or duty on the part of the Treasurer to satisfy himself as to the liabilities of the subsidiary must be deliberate, and it becomes impossible to read anything of this character into section 14.

The Treasurer, in fact, in his letter of 17th May 1966 based his refusal to return the deposit in the first place on section 20A: " it is essential," he stated, " that the Treasurer be assured that the group has made adequate provision to meet its liabilities (including contingent liabilities) to policy owners in the Commonwealth—*vide* section 20A (2) (*c*) ". The letter then proceeded to require a complete investigation into the affairs both of the subsidiary and of the parent company by an accountant selected by the Treasurer.

In their Lordships' opinion this was a misconception. There are no grounds upon which the Treasurer could claim to introduce the discretionary powers of section 20A into section 14: nor, having regard

to the scheme of the Act as already analysed, can any basis be found in the Act for conferring upon the Treasurer any other discretionary power, in the supposed interest of policy holders, to control the application of the section. Indeed, unless the Treasurer's discretion is to be governed by the considerations expressed in section 20A (2) (which for the reasons given cannot be accepted) there is no other standard or principle to be found in or implied from the Act upon which any discretion could be exercised. But in a statutory framework it is impossible to conceive of a discretion not controlled by any standard or consideration stated, or to be elicited from, the terms of the Act.

Their Lordships, with the majority of the High Court, appreciate that section 14 (1) is not free from linguistic difficulty: but the latter is not so great as to compel a conclusion which would run counter to the whole scheme of the Act. No doubt the issue of a certificate by the Treasurer is essential in order to establish, or to frank, the subsidiary company's exemption from the obligation to maintain a deposit, and no doubt too the Treasurer is entrusted, under section 14, with responsibility for verifying compliance with the two stated conditions. But the word " if " does not introduce any further condition or requirement: the certificate of the Treasurer is to relate to, and only to, the value of the deposit, and if this is sufficient, and the Treasurer is satisfied as to the beneficial ownership of the shares, he has no residuary discretion to refuse the certificate or consequentially to withhold the subsidiary company's deposit.

The appellant was in their Lordships' judgment entitled to the order of mandamus for which it asked and they will humbly advise Her Majesty that the cause will be remitted to the High Court for action accordingly. The respondent must pay the costs of the appeal.

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In the Privy Council

CAR OWNERS' MUTUAL INSURANCE COMPANY LIMITED

v.

THE TREASURER OF THE COMMONWEALTH OF AUSTRALIA

DELIVERED BY

LORD WILBERFORCE

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