

6, 1969

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IN THE PRIVY COUNCIL

No. 37 of 1968

ON APPEAL

FROM THE HIGH COURT OF AUSTRALIA

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES

MAR 1970

BETWEEN :-

25 RUSSELL SQUARE
LONDON, W.C.1.

CAR OWNERS' MUTUAL INSURANCE COMPANY LIMITED
Appellant

- and -

THE TREASURER OF THE COMMONWEALTH OF AUSTRALIA
Respondent

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C A S E FOR THE RESPONDENT

1. This appeal concerns the construction of Section 14(1) of the Insurance Act 1932-1966 of the Parliament of the Commonwealth of Australia. The Section is in the following terms :

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"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

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a deposit, a deposit is not required to be made and maintained by the subsidiary company."

2. The Treasurer is a Minister of State for the Commonwealth of Australia and responsible to the Parliament of the Commonwealth for the administration of the Act.

3. The Appellant has at all material times carried on an "Insurance business" within the meaning of the said Act. It has lodged and at all material times has maintained a deposit in accordance with the provisions of the said Act.

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4. A company, Fire & All Risks Insurance Company Limited, also carries on an "insurance business" within the meaning of the said Act and has lodged and at all material times has maintained a deposit pursuant to the provisions of the said Act.

pp. 21-22

5. On 4th August 1967 the First Assistant Secretary of the Commonwealth Treasury wrote to the Appellant's Solicitors Messrs. Holman Webb & Co. a letter which contained the following paragraphs :

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" In order that the issue before the Court may be confined to the principles involved, the Treasurer is prepared to admit that Fire and All Risks Insurance Company Limited has become the beneficial owner of the Shares of Car Owners' Mutual Insurance Company Limited and that the deposit presently made and maintained by Fire and All Risks Insurance Company Limited pursuant to the provisions of the Act, is of a value equal to the value of the deposit that would be required by the Act if it carried on the business of Car Owners' Mutual Insurance Company Limited in addition to its own business.

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It is advised that the Treasurer has delegated his function under Section 14 of the Act to the Assistant Secretary, Budget and Accounting Branch and an extract of the formal delegation is enclosed."

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The delegation referred to above was made pursuant to Section 5A of the said Act.

6. On the 23rd March 1967 the First Assistant Secretary of the Commonwealth Treasury had written to Fire & All Risks Insurance Co. Limited a letter which contained the following paragraphs :

p. 15

10 " The Commonwealth Crown Solicitor has advised that, in his opinion, the power of the Treasurer to certify under Section 14 of the Insurance Act 1932-65 is discretionary. Acting in accordance with this advice, the Treasurer decided not to comply with the request that the concession referred to in that Section be granted to Fire and All Risks Insurance Co. Ltd., and its subsidiary company, Car Owner's Mutual Insurance Co. Ltd. The decision was taken for reasons within the scope and purpose of the Act and not on grounds irrelevant, capricious or arbitrary. In these circumstances, Treasury is unable to agree with the contentions in the second paragraph of your letter under reply.

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30 You are again advised however that if the steps referred to in the Treasury letter addressed to Fire and All Risks Insurance Co. Ltd., on 17th May, 1966 are taken, and all the necessary information supplied, the question whether the Section 14 concession should be granted will receive further consideration."

7. The letter of 17th May 1966 contained the following statements :

p. 3

40 " It is within the discretion of the Treasurer whether or not to apply the provisions of Section 14. Since the effect of his certificate under Section 14(1) would be the return of the deposit held for the benefit of the policy owners of The Car Owners' Mutual Insurance Company Ltd., it is essential 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).

For this purpose, a complete investigation would have to be made of the affairs of the Company and its subsidiary by a firm of Chartered Accountants selected by the Treasurer and at the cost of the Company. It would be necessary for the investigating accountants to prepare a complete Consolidated Balance Sheet as at the date of their acceptance of the assignment and to certify to the correctness thereof." 10

pp. 10-12

8. On 3rd February 1967 the First Assistant Secretary of the Commonwealth Treasury wrote a letter to Fire & All Risks Insurance Co. Limited in which the following paragraph appeared :

" Your request that the provisions of Section 14 of the Insurance Act 1932-1965 be applied to your company and Car Owners' Mutual Insurance Co. Ltd. so that the deposit held by the Treasurer on behalf of Car Owners' Mutual Insurance Co. Ltd. may be returned, has been noted. You are reminded however that in the Treasury letter of 17th May, 1966 you were advised that if certain information was provided further consideration would be given to the return of the securities. Treasury has had no reply to that letter." 20 30

pp. 24-26

9. On 1st September 1967 the Chief Justice of the High Court of Australia in Chambers made an order nisi calling upon the Respondent to show cause before a Full Court of the High Court of Australia why a writ of mandamus should not issue out of the Court directed to the Respondent commanding that he under his own hand or that of his delegate certify that the deposit made and maintained by Fire & All Risks Insurance Co. Limited with the Treasury of the Commonwealth of Australia is of a value equal to the value of the deposit that would be required by the Insurance 40

Act 1932-1960 to be made and maintained by that Company if it carried on the business of the Appellant in addition to its own business and that the making and maintenance of that deposit by Fire & All Risks Insurance Co. Limited is a sufficient compliance by the Appellant with the requirements of the Act. At the hearing which came on before the Full High Court of Australia on 9th November 1967 Counsel appearing for the Appellant informed the Court that he sought mandamus in terms of the order nisi except for the words "and that the making and maintenance of that deposit by Fire & All Risks Insurance Co. Limited is a sufficient compliance by the Appellant with the requirements of the Act".

10. The matter was heard by the Full High Court of Australia on the 9th and 10th days of November 1967 and judgment was delivered on 11th March 1968. The order of the Court was that the order nisi for writ of mandamus be discharged with costs. McTiernan and Menzies JJ. were of this opinion; Barwick C.J. who dissented was of the view that the order nisi for mandamus should have been made absolute.

pp. 28-42

11. The Respondent respectfully submits that the majority of the High Court were correct in the view that they took of the construction of the Section and for the reasons that they gave. The purpose and object of the Act is the protection of policy holders. It is submitted that it is consistent with such purpose and object that the Treasurer in the circumstances of this case should have the discretion for which the Respondent contends. In the course of his judgment Menzies J. said :

"The Insurance Act 1932-1965 (Cth) is plainly a law for the protection of those who insure in Australia against loss or damage contingent upon the happening of a specified event."

p. 39

He later said :

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

p. 41

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 a deposit by the company with which they are insured while affording them the protection of the deposit made by that company's parent company.... That a discretion should be vested in the Treasurer to protect policy holders in such circumstances is clearly a matter that would be in keeping with the purposes of the Act." 10

12. Section 14(1) requires the existence of two conditions before any question of a certificate by the Treasurer arises. These two conditions are :

- (a) The Treasurer must be satisfied that the parent company has become the beneficial owner of the shares of the subsidiary company. 20
- (b) The deposit made and maintained by the parent company must be of a value equal to the value of the deposit that would be required by the 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.

The certificate is not necessarily, it is submitted, to be given merely or perhaps at all in respect of the Treasurer's satisfaction that the parent company has become the beneficial owner of the shares in the subsidiary company. 30

13. The second condition does not depend upon the Treasurer's satisfaction - it is satisfied if the deposit in fact made and maintained by the parent company is of the required value. It is submitted that these considerations show that the Treasurer when certifying may take into account more than his satisfaction that the parent company is the beneficial owner of the shares in question and the fact that the deposit is of the extent 40

required by the Section. In relation to this matter Menzies J. said :

10 "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
10 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.
It is to be observed that although the
Treasurer must be satisfied of (1) no
certificate particularly limited to that
area of satisfaction is required. It is
further to be observed that (2) is not
20 expressed as a matter for the satisfaction
of the Treasurer at all; it is expressed
as a matter of fact, although the
examination of the Act shows that in many
cases, though not all, this will be a
matter upon which the Treasurer will have
to form an opinion. In (sic) any case where
the deposit of the parent company is at the
maximum sufficiency will be obvious. This
review of the sub-section itself reveals
30 sound internal reason for reading it
according to its natural sense and as
requiring a certificate going to the full
operation of the sub-section and so
covering all conditions."

14. The Respondent further submits that the
presence of the word "if" is of prime importance.
The use of the word clearly suggests a discretion
to certify or not to certify depending upon the
view of the situation which the Treasurer
considers proper. If it were merely a matter of
40 certifying his satisfaction as to the beneficial
ownership and/or the factual extent of the
deposit, the word "if" would be entirely
inappropriate. The Section could be expected to
provide clearly for an obligation on the part of
the Treasurer to certify. This would normally be
indicated by the use of such words as "the

Treasurer shall so certify his satisfaction and the extent of the deposit". In relation to this matter Menzies J. said :

p. 40

"The question before us is whether under this Section the Treasurer can refuse his certificate notwithstanding that he is satisfied both that a parent company has become the beneficial owner of the shares in a subsidiary company and that the deposit made and maintained by the parent company is of a value equal to the value of the deposit that would be required if the parent company carried on the business of the subsidiary company in addition to its own business. 10

My conclusion that the Treasurer can so refuse rests principally upon the language and the grammatical construction of s. 14(1). Both the interpolation of the qualifying provisions '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 indicate 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." 20 30

15. It is clear that McTiernan J. also relied upon the use of the word "if". He said :

pp. 37-38

"According to the terms of the order nisi the writ of mandamus sought by the prosecutor (that is the Appellant) would command the Treasurer to certify that the deposit of 'the parent company' is of the extent set out in s. 14(1). I am of the opinion that the insertion by the draftsman of those words (that is 'if the Treasurer, by writing under his hand, so certifies') between 'is' and the words 'a sufficient compliance' prevents ambiguity as to the sense in which the 40

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 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 authority which is vested in the Treasurer by the words under consideration is to certify that a deposit which has the attributes mentioned is a sufficient compliance by the subsidiary company with the requirements of the Act. This is a matter which the sub-section leaves to the ministerial judgment and discretion of the Treasurer".

16. It is respectfully submitted that the judgment of the learned Chief Justice was erroneous for the following reasons :

- (a) His Honour did not take into account the presence in the Section of the word "if". He has not in his judgment dealt with the significance of that word and merely says that 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..." It is respectfully submitted that there is no occasion or reason for construing the words "if the Treasurer... so certifies" in this way and that the Chief Justice has not,

in giving the words the meaning that he has, paid attention to the words actually used and their grammatical setting.

- (b) His Honour has relied overmuch on the use of the word "certifies". In relation to this word his Honour described it as being "so appropriate to a state of fact and so inappropriate to the expression of a discretionary opinion...." It is true that the dictionary meaning of the word lends some support to this view. However the Respondent respectfully submits that the word "certify" and the word "certificate" are used in certain branches of the law in cases where a substantial discretion is given. An instance of this is in the field of building contracts. As to these Halsbury, 3rd Ed., Vol. 3, pages 458-9 says :
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- " Although as between the parties the certificate to be binding must be the result of the exercise of the skill and judgment of the certifier, this does not make the certificate an award nor the certifier an arbitrator; he has been described as a preventer of disputes but in fact he appears to be a quasi-arbitrator, whose duty is to act impartially (so far as his natural bias in favour of his employer will permit), and to apply his practical knowledge to the facts patent to him and decide accordingly. He should hear what each party desires to say, and if he gives opportunities to one he should give the same opportunities to the other. A stipulation that the certifier shall 'adjudge' or act as 'exclusive judge' as to the sum to be paid does not operate so as to make the certificate an award".
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(c) His Honour is, it is submitted with respect, incorrect in so construing s. 20A of the Act as to mean that the liabilities there referred to do not include the contractual obligations of the company to policy holders where no liability absolute or contingent has arisen. It is submitted that the proper meaning of liabilities especially by reason of the words "(including contingent liabilities)" includes the potential liability of an insurer to pay in the event of the risk, against which insurance is effected, arising.

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(d) The learned Chief Justice recognised the purpose of the Act as being to protect policy holders but thought that the policy of the Act was such as not to require protection in the circumstances of s.14. He was of this opinion because he considered, in the Respondent's submission wrongly, the reality of the situation to be that the business of the parent company and the subsidiary company was for the purposes of the Act and in reality one business. The Act had set a maximum for a single business and there was no reason in principle to provide an additional deposit merely because the business although owned in the one set of hands was carried on by two or more corporate entities. His Honour went on to deal with an example given in argument which suggested that it might be important for the Treasurer to have a discretion when dealing with foreign companies. The learned Chief Justice says :

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pp. 30, 32

" An instance was given during argument of a subsidiary being a foreign company, the maximum deposit for foreign companies being greater than that for domestic companies. However, upon the parent

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company, being a domestic company, becoming the owner of the subsidiary's shares it seems to me that any reason for requiring the larger maximum deposit may have gone. The consequence for policy holders of foreign incorporation and therefore of possible foreign control would scarce obtain once the ownership and control were vested in a domestic company. In addition sub-ss. (2), (3) and (4) give direct access by policy holders to the assets of the parent company." 10

"Foreign company" is defined in the Act to mean a company which is incorporated or the head office of which is outside the Commonwealth. Merely because such a company became the subsidiary of a parent company which was not a foreign company would not prevent the foreign company from remaining a foreign company for the purposes of the Act. It may well be carrying on a substantial business in parts of the world other than the Commonwealth of Australia and in those circumstances policy holders who were entitled to access against the security deposit lodged by the parent company might nevertheless be in a most disadvantageous position compared with that in which they would have been if the deposit had been lodged by the subsidiary company itself. In relation to this matter and in relation to other examples the Respondent respectfully relies on what is said by Menzies J. in his judgment as indicating the need for an overriding discretion in the Treasurer when giving a certificate under Section 14 of the Act. 20 30 40

(e) The learned Chief Justice said :

" ... if the Treasurer has a discretion as to whether or not the companies shall have the benefit of the provisions of s. 14, I can find no considerations

indicated by the Act or to be inferred from it within which he should confine himself to its exercise".

10 It is respectfully submitted that the confines of the Treasurer's discretion are to be found from a consideration of the Act as a whole and its purpose and object in protecting policy holders. The Respondent respectfully submits that the Treasurer has a discretion vested in him by s. 14 to consider, when application is made for a return of a deposit by reason of the existence of the circumstances set forth in that section, whether in the interests of policy holders the case is a proper one for the return of the deposit. The correspondence indicates that this was the concern of the Treasurer in the present case and that no other consideration moved him in coming to his decision. It is respectfully submitted that the argument put forward on behalf of the Respondent does not involve there being a discretion of the absolute nature suggested by the learned Chief Justice.

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(f) The learned Chief Justice relied upon the provisions of Section 32 of the Life Insurance Act 1945-1965 of the Parliament of the Commonwealth of Australia. It is submitted that it is not appropriate to consider the terms of this Section because the Insurance Act and the Life Insurance Act are not in pari materia.

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17. It is therefore respectfully submitted that the judgment of the majority of the High Court was correct and should be upheld for the following and other

R E A S O N S

40 (1) The Treasurer had in the present case an overriding discretion to refuse the certificate sought by the Appellant although the Appellant was the subsidiary

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of Fire & All Risks Insurance Co. Limited and although that company had lodged a deposit of the required extent.

- (2) The certificate contemplated by the section is not a certificate merely confirming that the deposit made and maintained by the parent company is of a value equal to the value of the deposit that would be required by the Act to be made and maintained by the parent company if it carried on the business of a subsidiary company in addition to its own business.

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M. BYERS

Counsel for the Respondent

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COMPANY LIMITED Appellant

- and -

THE TREASURER OF THE COMMONWEALTH
OF AUSTRALIA Respondent

C A S E FOR THE RESPONDENT

COWARD, CHANCE & CO.,
St. Swithins House,
Walbrook,
London, E.C.4.

Solicitors for the Respondent