03/08; [2007] VSC 413

SUPREME COURT OF VICTORIA

METROPOLITAN FIRE & EMERGENCY SERVICES BOARD v CAPRICORN MUTUAL LIMITED

Williams J

27-28 June, 19 October 2007

CIVIL PROCEEDINGS – INSURANCE – MUTUAL CORPORATION LIMITED BY GUARANTEE – MEMBERSHIP OF MUTUAL AVAILABLE TO MEMBERS OF BUYING CO-OPERATIVE IN THE AUTOMOTIVE INDUSTRY – MUTUAL OFFERING BENEFITS DESCRIBED AS "PROTECTIONS" TO MEMBERS – WHETHER MUTUAL AN "INSURANCE COMPANY" UNDER S3(1) OF THE *METROPOLITAN FIRE BRIGADES ACT* 1958 – FINDING BY MAGISTRATE THAT MUTUAL WAS NOT AN INSURANCE COMPANY – WHETHER MAGISTRATE IN ERROR.

1. An entitlement to the proper consideration of a claim does not suffice for a contract of insurance.
***Medical Defence Union v Dept of Trade* [1980] 1 Ch 82, applied.**

2. Where the essential character of the entitlement of a member of a corporation (CM) was only the consideration of a claim which could be accepted or rejected at the discretion of the corporation's directors, a magistrate was not in error in finding that the corporation CM was not an insurance company and therefore required to lodge a return under s40 of the *Metropolitan Fire Brigades Act* 1958 notwithstanding that:
• the product Disclosure Document made it plain that a member had a right to have a claim considered and the board had a discretion as to whether or not it met that member's claims;
• the expectation that a member might regard the manner in which a discretion might be exercised;
• the board had an obligation to act reasonably in the exercise of its discretion;
• there were similarities between the product and insurance;
• a member's contributions were calculated with reference to a risk.

WILLIAMS J:
The appeal
1. This is an appeal from the dismissal of a charge against the respondent ("Capricorn Mutual") under s41 of the *Metropolitan Fire Brigades Act* 1958 ("the Act") by the Magistrates' Court at Melbourne on 24 August 2006. The charge was filed by the appellant ("the Board") and related to Capricorn Mutual's undisputed failure to lodge a return under s40 of the Act for the financial year to 30 June 2005.

2. The learned magistrate dismissed the charge after finding that Capricorn Mutual was not an insurance company obliged to lodge a return under the Act. That finding was made in response to preliminary questions described as follows in his Honour's reasons:

> The central questions are whether the benefit conferred by Capricorn Mutual to its members is "insurance against fire" and whether Capricorn Mutual is therefore an "insurance company" within the meaning of s3 of the Act.

The Act
3. An insurance company was required to lodge a return with the Board by 15 August in each year under s40(1) of the Act which provided:

> 40. Returns of premiums
> (1) Each insurance company must before 15 August in each year lodge with the Board a return in the prescribed form showing the portion of the total amount of the gross premiums received by or due to the insurance company during the preceding financial year as is properly attributable to insurance against fire in respect of property situated in the metropolitan district.

4. Section 41(1) created the offence with which Capricorn Mutual was charged:

> 41. Penalties in relation to returns.
> (1) Any insurance company which fails to lodge a return before 15 August is guilty of an offence and liable to a penalty of not more than 60 penalty units.

5. Section 3 contained the dictionary of terms. "Insurance company" was defined as follows:

> "insurance company" means—
> (a) a person (including a body corporate or unincorporate, a partnership or an underwriter) who, in Victoria, issues, or undertakes liability under, policies of insurance against fire in respect of property in Victoria; or
>
> (b) an underwriting member of Lloyd's who issues, or undertakes liability under, policies of insurance against fire in respect of property in Victoria;

The term "insurance against fire" was also given a meaning in s3:

> "insurance against fire" means insurance against the risk of fire or the risk of loss of profits consequent on fire whether the insurance is associated with insurance against any other risk or not and "insured against fire" and "insuring against fire" have corresponding interpretations;

6. The Board was established as a body corporate under s6 of the Act. Section 7(1) gave the Board functions which included the provision of fire suppression, fire prevention, emergency prevention and response services in what was defined as the "metropolitan district" in s4.

Agreed facts

7. The Magistrate answered the preliminary questions on the basis of what was described as an agreed statement of facts and the contents of an agreed book of documents.

8. I will set out in the following paragraphs the matters of fact and law which were common ground both in the Magistrates' Court and in this Court.

9. Capricorn Mutual had, since 2 May 2003, been a corporation limited by guarantee with no share capital. It had been incorporated to conduct a not for profit business and held an Australian Financial Services licence issued by ASIC.

10. Capricorn Mutual offered benefits called "protections for personal and business risks" of members of the Capricorn Society, a buying co-operative owned by members involved in the automotive industry. Those protections included protection against the risk of fire or the risk of loss of profits consequent upon fire in the "metropolitan fire district" (defined in s3(1) of the Act as "the metropolitan district").

11. The terms upon which Capricorn Mutual provided the protections, were to be found in the following documents in the agreed book of documents:

- a Product Disclosure Statement filed with ASIC ("the PDS");
- a pamphlet entitled "What is Capricorn Mutual? – Offering Protection";
- a pamphlet entitled "What is Capricorn Mutual? – An Insurance Alternative"; and
- the Mutual's pro-forma documents:
  - certification of Membership;
  - certification of Protection; and
  - Schedule of Protection.

12. As a financial services licensee issuing a "financial product", Capricorn Mutual was a "regulated person" required to file a product disclosure statement with ASIC under s1012B(3) of the *Corporations Act* 2001 (Cth).

13. The definition of a "financial product" in s763A(1) of the *Corporations Act* included a facility through which a person managed financial risk. Section 763C provided that a person managed

financial risk if they managed the financial consequences to them of particular circumstances. A note to the section gave the example of the taking out of insurance.

The terms of the relationship

14. I note at the outset that there is an issue as to what was agreed before the Magistrate as to the "terms" of the relationship between Capricorn Mutual and its members.

15. Counsel for the Board argues that the terms of a contract of insurance are contained in the documents (other than the pamphlets) from the agreed book of documents listed above.[1]

16. Counsel for Capricorn Mutual, on the other hand, maintains that the terms of any contract are to be found in the constitution and the rules which form part of the PDS. He submits that the issue is of no importance in the circumstances, because, he argues, the PDS does not contain anything which characterises the relationship as one between an insurer and an insured.

The PDS

17. The parties made extensive reference to the contents of the PDS, including the constitution and the rules. I mention only some of the passages relied upon, but have taken into account the entire contents of those documents.

18. The PDS opens with the following words:

> WELCOME TO CAPRICORN MUTUAL
>
> This Product Disclosure Statement (PDS) is an important legal document that contains details of the protections available to members of Capricorn Mutual Limited (Capricorn Mutual).
> What is a Product Disclosure Statement?
>
> This PDS is designed to help you understand what you need to know about Capricorn Mutual so that you can make an informed choice about whether or not to join Capricorn Mutual and apply for the protections available to its members.
>
> Before you can make your decision please read this PDS and its attachments carefully. This document, the Constitution, Rules, summary of protections and the direct debit form are all part of the Capricorn Mutual's PDS.

19. The PDS describes the process by which a prospective member can obtain the desired form of protection. An applicant for membership must seek a quotation for the required protection. The board of directors of Capricorn Mutual will then determine, at its discretion, both the cost and the level of the protection to be offered. Those details are subsequently set out in a Schedule of Protection.

20. Significantly, the introductory section of the PDS states this:

> Capricorn Mutual is a discretionary mutual. A discretionary mutual is a mutual where the member's entitlements are at the discretion of a person or people appointed by the members. The Board of Directors of Capricorn Mutual has been appointed for this purpose. The Board is drawn mainly from the membership of Capricorn Society so the Board has an understanding of the needs of members and the business and personal risks that they face.
>
> Capricorn Mutual has the discretion to decide whom to admit to membership and the discretion to decide whether or not to accept a member's application for protection. Only Capricorn Society members are entitled to apply for membership of Capricorn Mutual. Members of Capricorn Mutual have the right to have a claim for protection considered by the Board and the Board has the discretion to grant a member's claim for protection.
>
> Only members of Capricorn Mutual are entitled to make a claim on Capricorn Mutual. This means that its members are not subsidising the costs of claims made by people outside the automotive industry.
>
> Members can have a legitimate expectation that all valid claims will be paid if the claim comes within the wording of the protection. However, the Board has the discretion to refuse a claim if it believes that the claim has been caused by conduct that the membership of Capricorn Mutual would regard as reckless or unacceptable to the automotive industry. Each claim will be considered on its merits and circumstances.

The Board of Capricorn Mutual represents the members and as such the members of the automotive industry. Directors are themselves a part of the industry, with a thorough understanding of the problems and risks faced by members and so are likely to be sympathetic in a way that is different to people from outside the industry.

The discretion also allows the Board to exercise its power so that in unexpected or special or unusual circumstances it may pay claims, which would ordinarily be excluded.

21. The introductory section of the PDS explains the discretion in the Capricorn Mutual Board as follows:

5. Why does the Board have a discretion?
By offering membership and protections that are discretionary Capricorn Mutual is able to offer its members a financial product for management of personal and business risks without establishing an insurance company. Members are assured that the Board's discretion will be exercised cautiously, on the recommendations of CTC and only in circumstances in which the Board believes that the Capricorn Mutual members would expect it to exercise its discretion.

The Australian Prudential Regulatory Authority (APRA) regulates insurance companies not discretionary mutuals such as Capricorn Mutual. Because it is not an insurance company Capricorn Mutual is not subject to APRA regulation and is not required to be authorised under the Insurance Act to conduct insurance business. For this reason it is not subject to the provisions of the Insurance Act which establishes the system of financial supervision of general insurers.

Because it is the provider of miscellaneous mutual risk covers, Capricorn Mutual is regulated only by ASIC and is subject to its supervision.

22. The PDS introduction:

(a) states that Capricorn Mutual's objectives and powers are set out in its constitution (para 6) and that its day to day business is conducted in accordance with its rules (para 7);

(b) refers to the "discretionary nature" of the protections (para 7);

(c) notes Capricorn Mutual's appointment Charles Taylor Consulting (Australia) Pty Ltd ("CTC") as its manager and to assist in the handling of members' claims (para 10);

(d) states that only a member of Capricorn Mutual is eligible to apply for benefits described as "protections" to "highlight the fact that it is offering an alternative to insurance" (para 10);

(e) describes the Capricorn Mutual Board's discretion as to whether it accepts a member's application for protection (para 10);

(f) states specifically that "[t]here is no insurance premium paid by members" (para 12) who can select from "business protections" and "personal protections" (para 11);

(g) states that a failure to provide relevant information or any misleading conduct entitles the Capricorn Mutual Board to refuse a claim, reduce the amount paid or cancel a protection (para 21); and

(h) states that, in order to reduce the risk of a call being made upon members, Capricorn Mutual is insured with Capricorn Insurance New Zealand for any payments it may make to members (para 29) .

23. The description of the claims process in para 14 expands slightly on the relevant statements in the introductory section. It refers to and describes the Capricorn Mutual Board's discretions:

14. When you make a claim
As a member of Capricorn Mutual you will have a right to have your claim for protection considered by the Board of Directors of Capricorn Mutual. The payment of all claims under the selected protections is at the discretion of the Board. CTC will manage claims on behalf of Capricorn Mutual and will make recommendations to the Board on whether or not to accept a claim and the amount to be paid for each claim.

The Board's discretion to refuse or reduce a claim will only be exercised in circumstances where the Board believes that the members of Capricorn Mutual would expect it to do so. The Board also has the power to pay claims that are specifically excluded under the protections.

> The exercise of the Board's discretion will be based on, among other things, the summary of what protection is given and what is not given, as set out in each protection in Part 5 (Business Protections) and Part 6 (Personal Protections) in this PDS.

The constitution

24. Clause 4 of Capricorn Mutual constitution sets out the objects for which it is said to have been established. They include the following:

> (a) to receive subscriptions and Contributions from Members;
>
> (b) to pay claims relating to certain liabilities, losses or expenses incurred by Members on a discretionary basis in accordance with the Rules.

25. Clause 50 of the Constitution provides that the directors shall manage Capricorn Mutual and determine the contributions payable by members which make up Capricorn Mutual's funds. Significantly, cl 50 goes on to state:

> The Board shall consider all claims made by Members under the Rules and may, in its sole and absolute discretion and in accordance with the Rules, grant from the funds of the Mutual to any such Member an indemnity wholly or in part in respect of the claim made by such Member.

26. Clause 64 gives the directors rule making powers. It provides that the directors shall make rules prescribing:

> (a) the form of application for admission to membership of the Mutual;
>
> (b) the nature and extent of the cover provided by the Mutual to Members and the exclusion therefrom provided that all such cover shall be available on a discretionary basis only, such discretion to be exercised by the Directors ... ;
> (c) the basis on which claims from eligible members shall be considered by the Directors;
>
> (d) the amounts of Contributions to the Mutual to be paid from time to time;
>
> (e) the obligations of the Mutual and the Members in respect of their claims; ...

The rules

27. The dictionary in r2 includes definitions which refer to the discretionary nature of the "protections" offered to members:

> 17. Protection
> The membership benefits for personal and business risks which are offered to Members by the Mutual on a discretionary basis and which if accepted by the Mutual in accordance with Rule 61(2) are set out in a Member's Schedule of Protection.
>
> 18. Schedule of Protection
> A document and any endorsement to it issued by the Mutual in its discretion in accordance with Rule 6 which evidences the scope and extent of the discretionary protections granted to a member.

28. Rule 3 emphasises that discretion:

> RULE 3 Discretionary nature of protections
>
> *The Board has the power and/ right to make a decision concerning the Protections as the Board deems fit.*
>
> Protections 3(1)
> The Protections which may be provided by the Mutual as set out in these Rules and, if issued in accordance with Rule 6(3) in the Member's Schedule of Protection. The Protections provide a Member with the right to ask the Board to consider the Member's claim against loss, damage, liability, cost or expense incurred by that Member for a protection that is recorded on the Member's Schedule of Protection. Any decision of the Board to accept a Member's claim for Protection is at the sole and absolute discretion of the Board in accordance with Rule 18(2)(A). Any reference in these Rules or in any Schedule of Protection issued in accordance with these Rules to "protected risks" or to "indemnity" or to "protection", or any such similar expression must be read accordingly.

29. Rule 5 (1) provides that a member shall be entitled to recover from Capricorn Mutual's

funds the amount of loss and damage incurred in respect of "the risks" set out in r13 on the basis of the terms and conditions set out in the rules and any Schedule of Protection.

30. Rule 13 is headed "Protection Offered" and lists "risks" under the headings "Business" and "Personal". The categories of risks mirror those in relation to which details are provided in Parts 5 and 6 of the PDS which describe "Business Protections" and "Personal Protections" respectively.

31. Rule 18(1) provides that the Capricorn Mutual Board may meet "as and when it thinks fit" to consider claims for protection and may authorise payment of claims at a manager's discretion. Rule 18(2)(A) permits the Board to grant or withhold protection in its absolute discretion. Rule 18(2)(B) gives the Board power to reject claims in certain nominated circumstances "without prejudice" to any other provisions of the Rules.

The protections

32. Part 5 of the PDS sets out various categories of "business protections" available. They relate to buildings, contents, theft, money, personal accident and illness, assault, goods in transit, engineering, business interruption, public and product liability, professional protection, legal expenses, tax audit, motor vehicles and general property. In every case, the answer to the question "What is protected?" commences with the words:

> You have the right to have a claim considered for loss or damage to ...

or words to similar effect.

33. Only if a claim is successful will repair or payment for repair or replacement be made.

34. Part 6 describes the "personal protections" offered by Capricorn Mutual to members. Once again, each protection is described in terms of the member applicant's "right to have a claim considered", followed by a description of what will happen if a claim is successful.

The pamphlets

35. The pamphlets state that Capricorn Mutual is not an insurance company. They point out that it is regulated by ASIC and not subject to APRA regulations as a result.

36. The pamphlet entitled "What is Capricorn Mutual?" includes the following:

> WHAT IS A DISCRETIONARY MUTUAL AND HOW DO I GET MY CLAIMS PAID?
> Members have the right to apply to the Board to request assistance and indemnity when a claim falls within one of the categories of risk that the Member has selected. The Board may at its discretion accept, partly accept or reject applications by Members for assistance and payment of the claim.

37. That pamphlet does also contain the following statement relied upon by counsel for the Board:

> The Capricorn Mutual Board of Directors is mainly drawn from the membership of the Mutual. Members can be assured that the discretion to refuse a claim will only be exercised in circumstances where the Board believes that members of the Mutual would expect it to do so.

38. The pamphlet entitled "What is Capricorn Mutual? – an insurance alternative" describes Capricorn Mutual as "an insurance alternative available exclusively to Australian and New Zealand members of Capricorn Society Limited". It advises that Capricorn Mutual "offers a financial product that members can use as protection against risks that they encounter during their business and personal lives."

The pro-forma documents

39. I note that the rules refer specifically to the certificate of membership which sets out details of membership (r6) and the Schedule of Protection which states the protections to be provided by Capricorn Mutual to that member (r3, r7).

The Magistrate's reasons

40. The learned Magistrate gave detailed reasons for his decision.

41. His Honour set out the relevant parts of s3(1), s40(1) and s41(1) of the Act. He then recorded the contents of the agreed statement of facts.

42. The learned Magistrate summarised the submissions of counsel, before discussing the contentions and the authorities to which he had been referred. His Honour concluded that a member and Capricorn Mutual contracted on the basis that Capricorn Mutual would consider a member's claim and that it was invested with the discretion as to whether it granted that claim. As a result, in light of the authorities, he went on to conclude that the benefit offered by Capricorn Mutual was not "insurance against fire" under the Act and that Capricorn Mutual was not an insurance company for the purposes of the Act.

The questions of law in the appeal

43. The questions of law were stated in the grounds of appeal as follows:

> The questions of law which arise are, on the basis of the agreed statement of facts filed by the parties and dated 4 May 2006, and on the basis of the agreed book of documents filed by the parties and dated 4 May 2006:-
> (a) Whether the protections offered by Capricorn Mutual include 'insurance against fire' as defined in s3(1) *Metropolitan Fire Brigades Act* 1958?
>
> (b) Whether in the circumstances, Capricorn Mutual is an 'insurance company' as defined in s3(1) *Metropolitan Fire Brigades Act* 1958 and therefore required under s40 of the said Act to lodge returns?

The grounds of appeal

44. The grounds of appeal were also set out in the notice of appeal:

> *Grounds of Appeal*
> 1. The learned Magistrate was wrong in law in finding that the protections offered by the respondent, evidenced by the product disclosure statements dated 4 September 2003 and lodged with the Australian Securities and Investments Commission, and the respondent's pamphlets, and the respondent's Certificate of Membership, Confirmation of Protection and Schedule of Protection [all of which such documents ('the protection documents') were contained in the agreed book of documents before the learned Magistrate], did not constitute 'insurance against fire' within the meaning of s3 *Metropolitan Fire Brigades Act* 1958.
>
> 2. The learned Magistrate was wrong in law by finding that the respondent's (sic) Board's discretion to refuse claims by members was not relevantly circumscribed, restricted or negatived by the protection documents such that the protections it offered constituted 'insurance against fire'.
>
> 3. In all of the circumstances, the learned Magistrate should have found that the protections offered by the respondent and described in the protection documents, constituted 'insurance against fire' as defined in s3(1) *Metropolitan Fire Brigades Act* 1958, and that the respondent was an 'insurance company' as defined in s3(1) of the Act.

Submissions

45. Counsel for the Board first argues that s40 and the definitions in s3(1) of "insurance company" and "insurance against fire" in the Act should be construed as covering the arrangement between Capricorn Mutual and its members, because that construction would be consistent with the language and purpose of the statute.[2] He contends that the purpose of the Act is to ensure that those benefiting from the activities of the fire brigades should contribute to their funding. Counsel for the Board refers to the analysis of similar provisions of the *Fire Brigades Act* (1890) by the High Court in *Yorkshire Fire and Life Insurance Company v The British Foreign Marine Insurance Company Ltd.*[3]

46. Counsel for Capricorn Mutual does not dispute this contention as to the purpose of the Act. He argues that its purpose is irrelevant because the Act's provisions do not relate to the business carried on by Capricorn Mutual.

47. It is common ground that Sutton, *Insurance Law in Australia* (3rd ed, 1999) correctly describes a contract of insurance at p3:

> What is insurance
> 1.1 ... it is a contract whereby one person, the insurer, agrees in return for money or other consideration called the premium, to pay to another person, the assured, a sum of money or its equivalent on the

> happening of a specified event. The event must involve some element of uncertainty – there must be either some uncertainty as to whether the event will ever happen or not, or if the event is one which is bound to occur, as in the case of life insurance payable on death, there must be uncertainty as to the time at which it will happen. And last, in *Prudential Insurance Co v Commissioners of Inland Revenue* ([1904] 2 KB 658 at 663) Channell J described a contract of insurance as one:
>
> Whereby for some consideration, usually but not necessarily for periodical payments called premiums, you secure for yourself some benefit, usually but not necessarily the payment of a sum of money, upon the happening of some event.

48. Counsel for the Board submits that there is nothing inimical or unusual about a mutual society offering or dealing with insurance products. Counsel for Capricorn Mutual concedes that a mutual can carry on an insurance business and that the description of the business will not determine the issue.

49. Counsel for the Board goes on to contend that Capricorn Mutual is an insurance company within the meaning of the Act because it effectively issues or undertakes liabilities under policies of insurance against fire in respect of property in Victoria, even if the word "insurance" is not used to describe any aspect of its business. He refers extensively to the agreed documents. He argues that they are consistent with an insurance relationship. He cites such matters as the description of the product as an "insurance alternative", Capricorn Mutual's agreement in section 9 of the PDS to cover any costs associated with the attendance of the fire brigade and the PDS statement that Capricorn Mutual has insured itself in relation to its own obligations to members (para 12).

50. Counsel for Capricorn Mutual maintains that the learned Magistrate correctly concluded that Capricorn Mutual does not carry on a business of insurance because its members' contractual rights to have claims considered do not have the character of insurance. He relies upon the decision of Sir Robert Megarry V-C in *Medical Defence Union v Department of Trade*[4] and cites subsequent cases in which, he contends, certainty of entitlement to a benefit is recognised as a hallmark of an insurance contract.[5]

51. Counsel for the Board argues that Medical Defence Union is authority for no more than that the Medical Defence Unions in question was not an insurance company. The decision is confined to its own facts. He contends that the facts of this case are distinguishable in two respects from those in Medical Defence Union and those subsequent authorities.

52. He first points to what he says is the absence of an unfettered discretion in Capricorn Mutual in relation to the indemnification of a member. He relies upon the following passages from the introduction to the PDS to demonstrate the confined nature of the discretion:

> Members can have a legitimate expectation that all valid claims will be paid if the claim comes within the wording of the protection. However, the Board has a discretion to refuse a claim if it believes the claim has been caused by conduct that the membership of Capricorn Mutual would regard as reckless or unacceptable to the automotive industry.
>
> and Members are assured that the Board's discretion will be exercised cautiously, on the recommendations of CTC and only in circumstances in which the Board believes that the Capricorn Mutual members would expect it to exercise its discretion.

53. Counsel for the Board argues that the extracted passages indicate that the discretion is "circumscribed and illusory", submitting that a fettered discretion is no discretion at all and citing *Leighton Contractors v Kilpatrick Green.*[6]

54. Counsel for Capricorn Mutual replies that the court in *Leighton Contractors* held that an appellate court should not lay down guidelines to fetter a general discretion conferred by parliament. It was in that context that Fullagar J concluded that a requirement that a discretion be exercised in a particular way would, in effect, take it away.[7] Counsel contends that the decision does not govern the question confronting the Court. He says that it is open to contracting parties to qualify or confine a discretion. He points to Megarry V-C's reference in *Medical Defence Union* to the "legitimate expectation" on the part of a member that discretionary benefits would be received "in all proper cases" which would not convert the right to have a claim considered into a contractual right to receive a benefit.[8]

55. Counsel for the Board goes on to submit that the calculation of contributions with reference to risk differentiates the facts of this case from those of the authorities relied upon by counsel for Capricorn Mutual. He cites Megarry V-C's reference to the payment of a fixed annual subscription, determined by membership class, as a feature which was "unusual at least in the case of normal contracts of indemnity insurance".[9]

56. Counsel for Capricorn Mutual responds that the authorities do not support the recognition of a contract of insurance absent a certain entitlement to a benefit, regardless of the existence of any proportionality between contribution and risk. He argues that Megarry V-C did not cite proportionality as a relevant consideration in *Medical Defence Union* and notes the absence of any reference to the matter by the High Court in *Bailey v New South Wales Medical Defence Union Ltd.*[10] He also cites a decision of the Full Court of the Federal Court in *Australian Health Insurance Association Ltd v Esso Australia Ltd*[11] as a case in point.

57. Counsel for Capricorn Mutual answers the "insurable interests" argument by reference to s16(1) of the *Insurance Contracts Act* 1984 (Cth) which provides that an insured need not have an insurable interest at the time of entering into a contract of insurance. He argues that Capricorn Mutual would certainly have an insurable interest, once it has exercised its discretion to extend cover to a member.[12]

58. Finally, counsel for Capricorn Mutual argues that the word "insurance" in the Act should be construed in accordance with the meaning accorded it by the courts before amendment. He relies upon *Re Alcan Australia Ltd; Ex parte Federation of Industrial Manufacturing and Engineering Employees*[13] in which the High Court recognised the abundance of authority for the proposition that it will be presumed that parliament intended that words repeated in legislation have the meaning previously judicially attributed to them. He submits that the legislature has amended even the definition of "insurance company" in the Act in 1958, 1969, 1991 and 2005[14] without incorporating any reference to the discretionary consideration of claims.

Relevant authorities

59. In 1980, in *Medical Defence Union v Department of Trade*[15], Megarry V-C held that Medical Defence Union Ltd, a company limited by guarantee, was not carrying on an insurance business. The contract between the company and its members arose in the terms of its memorandum and articles upon its acceptance of applications for membership. The articles gave the council of the union the discretionary power to conduct the defence of any proceeding concerning a member's professional character or interest and to indemnify the member in relation to any such proceeding or claim. The indemnity could be granted, restricted or declined in the council's absolute discretion. There was no definition of "insurance" in the relevant legislation, the *Insurance Companies Act* 1974 (UK).

60. Applying the common law, Megarry V-C held that a member did not have the requisite "benefit" to which Channell J had referred in the *Prudential* case. He characterised the right to have a request relating to proceedings or an indemnity properly considered as a benefit, but rejected the contention that it "sufficed for a contract of insurance".[16]

61. It had been argued that such a conclusion might encourage evasion of the relevant legislation. Megarry V-C considered it unlikely that many would be content with a situation in which a premium purchased no more that the right to have a claim considered by a body with full discretionary power to reject it in part or totally. He did go on to observe that, nevertheless:
Where the body concerned, like the union in the present case, is run by honourable members of an honourable profession it may well be that many members of that profession will be content to rely on the discretion being always exercised in a proper way by the governing body which they elect, with meritorious claims being admitted and the unmeritorious excluded; but this reliance does not convert a legitimate expectation of receiving discretionary benefits in all proper cases into a contractual right to receive those benefits.[17]

62. *Medical Defence Union* was followed by Yeldham J of the New South Wales Supreme Court in *Oswald v Bailey & Anor.*[18] In that case, the issue was as to the effect of a change in the memorandum and articles of NSW Medical Defence Union Ltd, a company limited by guarantee of which Dr Bailey was a member. Under the articles, Dr Bailey was entitled as of right before 1982

to indemnification in relation to legal liability for claims against him. In 1982, the articles were amended to give the council of the Medical Defence Union a sole and absolute discretion as to whether or not to grant indemnity to a member. Relevantly, Yeldham J agreed with the proposition that the effect of the application of the principle correctly enunciated by Megarry V-C was that the contract between the union and a member after 1982 was not one of insurance, because of the absence of any legal entitlement to indemnity.[19]

63. In *Bailey v New South Wales Medical Defence Union Limited*,[20] the High Court relevantly held that the 1982 amendments to the articles were ineffective to vary the terms of any contract based on the articles in their earlier form. Brennan CJ, Deane and Dawson JJ held that any alteration in the articles would affect the terms of any contract made after the alteration, but their Honours concluded that it could not have been the intention of the parties that the insurance cover already purchased should be diminished by an alteration to the articles.[21] McHugh and Gummow JJ stated that the changes were "to be treated as ineffective to commute a current right to indemnity, which had been conferred by contract created in the course of conduct of an insurance business, into a right in the council, in its sole and absolute discretion, to provide assistance to members in certain circumstances".[22]

64. In *Barclay MIS v ASIC*[23] Dowsett J considered the characterisation of plans offered by the applicants, under which landlords paid annual amounts for various services which included access to a tenancy database. ASIC alleged that the applicants were carrying on a "financial services business" without a licence. If the plans offered were contracts of insurance, the alleged breaches would be made out.

65. Dowsett J relied upon *Medical Defence Union* when he held that one of the offered plans was not a contract of insurance because the applicants had a discretion to decide whether to provide facilities under the plan, notwithstanding that the discretion was to be exercised reasonably. His Honour said:

> ASIC also asserts that the Basic Assistance plan is a contract of insurance. As I have demonstrated, Barkly MIS has a discretion to decide whether to provide facilities under the plan, although the discretion is to be exercised reasonably. In the *Medical Defence Union* case, it was conceded that the discretion could not be exercised "by whim or caprice". The present obligation to act reasonably is not a sufficient basis for distinguishing that decision which has stood for a long time. Although the relevant aspect of the decision appears not have been specifically considered, the case has been referred to with apparent approval by von Doussa J in *Re Barrett; Ex parte Young v NM Superannuation Pty Ltd* [1992] FCA 83; (1992) 34 FCR 508 at 523; (1992) 106 ALR 549; (1992) 7 ANZ Insurance Cases 61-108 and by Sheller JA in *New South Wales Medical Defence Union Ltd v Crawford* (1993) 31 NSWLR 469 at 523; 11 ACSR 406 at 456; (1993) 7 ANZ Insurance Cases 61-192; (1993) 11 ACLC 1114. The proposed Basic Assistance plan would not be a contract of insurance.[24]

66. In *Australian Health Insurance Association Ltd v Esso Australia Ltd*[25] a Full Court of the Federal Court held that a contract of insurance did not lose that character because premiums charged were not proportionate to the risk undertaken. Black CJ said:

> It is understandable that in some, though not all, dictionary definitions of insurance, the proportionality of the premium to the risk is included as an element. In a definition, rather than in an elaboration of the topic, the proportionality of the premium may help to distinguish the concept of insurance from other concepts but it is not an indispensable element.[26]

Conclusions

67. Sir Robert Megarry V-C's decision in *Medical Defence Union* that an entitlement to the proper consideration of a claim does not suffice for contract of insurance has been followed in the cases to which I have referred and would appear to have been approved by McHugh and Gummow JJ in *Bailey v New South Wales Medical Defence Union Limited*.[27] I am not persuaded that I should decide otherwise in this case. In my opinion, the relationship between Capricorn Mutual and its members is not one of insurer and insured.

68. The PDS, which includes the constitution and the rules, makes it plain that a member has a right to have a claim considered and the Capricorn Mutual board has a discretion as to whether or not it meets that member's claim. This is so, notwithstanding the indications that there should be an expectation that the discretion will be exercised in the foreshadowed way and the specification of circumstances in which a claim might be rejected.

69. In the quoted passages and throughout, the PDS, the constitution and the rules are replete with references to the member's right to consideration of a claim and the Capricorn Mutual Board's discretion. I agree with counsel for Capricorn Mutual that it does not matter whether or not the PDS (as opposed to the constitution and the rules within it) also contains any contractual terms, because there is nothing in the balance of the PDS which I consider alters the character of the relationship.

70. The reference to the expectations which might be legitimately entertained by a member with regard to the manner in which the discretion would be exercised do not, in my opinion, so fetter or confine the directors' discretion as to deprive them of it and render the Medical Defence Union principle inapplicable. I am not persuaded by the argument that Capricorn Mutual is bound to pay a claim.

71. Indeed, Sir Robert Megarry V-C recognised that there might be members of groups prepared to pay for a right to consideration of claims by an elected governing body, "content to rely on the discretion being always exercised in a proper way" by that body. He noted that in practice it was rare for a request for indemnification to be refused and that the member had a right to have his request "properly considered".[28]

72. Further, in *Barclay MIS Group*, Dowsett J considered that an obligation to act reasonably in the exercise of the discretion did not justify distinguishing *Medical Defence Union*.[29] I take a similar view in the circumstances of this case. I do not consider it distinguishable from *Medical Defence Union*.

73. I am not persuaded that the issue is governed by the Court's decision in *Leighton Contractors* or by any proposition that a discretion which is limited is not a discretion at all. It is open to contracting parties to confine a discretion. *Leighton Contractors* was concerned with the different issue as to the appropriateness of a judicial statutory discretion being confined by guidance as to its exercise.

74. I am not persuaded by the argument that Capricorn Mutual is offering insurance under another name, notwithstanding any similarities between the product and insurance. The entitlement of a Capricorn Mutual member to have a claim considered, described in the PDS which includes the constitution and the rules, is not to a relevant benefit within the meaning of Channell J's definition of insurance in *Prudential Insurance Company v Inland Revenue Commissioners*.[30]

75. The contract is not converted into a contract of insurance because a member's contributions are calculated with reference to risk. That proportionality is not an essential element of a contract of insurance.[31] Nor are any other similarities decisive. They do not alter the essential character of the entitlement of a member being only to the consideration of a claim which can be accepted or rejected at the discretion of the Capricorn Mutual directors.

76. I note that, although there would appear to have been amendments to the Act which have not included within the definition of insurance the right to have a claim considered in the context of a discretion as to whether or not it will be accepted, I do not make my decision on the basis of an application of the *Re Alcan* principle. I am not persuaded to do so because I am not aware of any authority dealing specifically with the relevant provisions of the Act and, further, it would appear that some of the amendments relied upon pre-date Medical Defence Union.

77. The learned Magistrate did not err as alleged. The questions of law stated in [43] above should be answered as follows:

(a) They do not.

(b) It is not and is not required to do so.

78. The appeal should be dismissed.

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[1] At [11].

[2] *Project Blue Sky v Australian Broadcasting Authority* [1998] HCA 28; (1998) 194 CLR 355 at 381; 153 ALR 490; (1998) 72 ALJR 841; (1998) 8 Leg Rep 41.

[3] [1905] HCA 47; (1906) 3 CLR 196 at 212 per Barton J; 12 ALR 26.
[4] [1980] 1 Ch 82.
[5] *Oswald v Bailey (No 1)* (1986) 4 ANZ Insurance Cases 60-704 at 74,206 per Yeldham J; *Bailey v NSW Medical Defence Union Limited* [1995] HCA 28; (1995) 184 CLR 399 at 431 per McHugh and Gummow JJ; (1995) 132 ALR 1; (1995) 8 ANZ Insurance Cases 61-291; (1995) 69 ALJR 890; (1995) 18 ACSR 521; (1995) 13 ACLC 1698; (1995) 18 Leg Rep 2; *Rafter v Solicitors' Mutual Defence Fund Ltd* [2002] 3 IR 621.
[6] [1992] VicRp 83; [1992] 2 VR 505 at 509-10, 512-3 per Fullagar J.
[7] [1992] VicRp 83; [1992] 2 VR 505 at 510 per Fullagar J.
[8] [1980] 1 Ch 82 at 98.
[9] [1980] 1 Ch 82 at 96.
[10] [1995] HCA 28; (1985) 184 CLR 399; (1995) 132 ALR 1; (1995) 8 ANZ Insurance Cases 61-291; (1995) 69 ALJR 890; (1995) 18 ACSR 521; (1995) 13 ACLC 1698; (1995) 18 Leg Rep 2.
[11] [1993] FCA 376; (1993) 41 FCR 450; (1993) 116 ALR 253; (1993) 7 ANZ Insurance Cases 61-195.
[12] Citing Kelly and Ball*, Principles of Insurance Law in Australia and New Zealand* (1991) at [2.59].
[13] [1994] HCA 34; (1994) 181 CLR 96 at 106 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ; (1994) 123 ALR 193; (1994) 68 ALJR 626.
[14] See: *Metropolitan Fire Brigades Act* 1958 (consolidation); *Fire Brigades (Contributions) Act* 1969 s3; *Fire Authorities (Amendment) Act* 1991 s3(1); *Victoria State Emergency Service Act* 2005 s67(2).
[15] [1980] 1 Ch 82.
[16] [1980] 1 Ch 82 at 97.
[17] [1980] 1 Ch 82 at 98.
[18] (1986) 4 ANZ Insurance Cases 60-704.
[19] (1986) 4 ANZ Insurance Cases 60-704 at 74,206.
[20] [1995] HCA 28; (1995) 184 CLR 399; (1995) 132 ALR 1; (1995) 8 ANZ Insurance Cases 61-291; (1995) 69 ALJR 890; (1995) 18 ACSR 521; (1995) 13 ACLC 1698; (1995) 18 Leg Rep 2.
[21] [1995] HCA 28; (1995) 184 CLR 399 at 415; (1995) 132 ALR 1; (1995) 8 ANZ Insurance Cases 61-291; (1995) 69 ALJR 890; (1995) 18 ACSR 521; (1995) 13 ACLC 1698; (1995) 18 Leg Rep 2.
[22] [1995] HCA 28; (1995) 184 CLR 399 at 431; (1995) 132 ALR 1; (1995) 8 ANZ Insurance Cases 61-291; (1995) 69 ALJR 890; (1995) 18 ACSR 521; (1995) 13 ACLC 1698; (1995) 18 Leg Rep 2.
[23] [2002] FCA 1606; (2002) 125 FCR 374; 21 ACLC 238; 12 ANZ Insurance Cases 61-551.
[24] [2002] FCA 1606; (2002) 125 FCR 374 at 385; 21 ACLC 238; 12 ANZ Insurance Cases 61-551.
[25] [1993] FCA 376; (1993) 41 FCR 450; (1993) 116 ALR 253; (1993) 7 ANZ Insurance Cases 61-195.
[26] [1993] FCA 376; (1993) 41 FCR 450 at 454; (1993) 116 ALR 253; (1993) 7 ANZ Insurance Cases 61-195.
[27] [1995] HCA 28; (1995) 184 CLR 399 at 431.
[28] [1980] 1 Ch 82 at 90.
[29] [2002] FCA 1606; (2002) 125 FCR 374 at 385; 21 ACLC 238; 12 ANZ Insurance Cases 61-551.
[30] [1904] 2 KB 658 at 663.
[31] *Australian Health Insurance Association Ltd v Esso Australia Ltd* [1993] FCA 376; (1993) 41 FCR 450 at 454 per Black CJ; 472 per Northrop J; 489-90 per Sheppard J; (1993) 116 ALR 253; (1993) 7 ANZ Insurance Cases 61-195.

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