46/88

SUPREME COURT OF VICTORIA

THE SCHOOL COUNCIL of POINT GELLIBRAND HIGH SCHOOL v AMERICAN HOME ASSURANCE COMPANY

O'Bryan J

30 June 1988

STATUTORY INTERPRETATION – INSURANCE POLICY FOR 'GAP' MEDICAL EXPENSES – GAP INSURANCE PROHIBITED BY STATUTE – WHETHER LEGISLATION OPERATES RETROSPECTIVELY – WHETHER POLICY ENFORCEABLE BY THIRD PERSON: *HEALTH INSURANCE ACT* 1973 (CTH), S126.

1. The language employed in s126(1) of the *Health Insurance Act* 1973 (Cth) ('Act') (which prohibits 'gap insurance') does not indicate that the prohibition operates retrospectively. Accordingly, a contract of insurance made before the introduction of s126 of the Act is not prohibited and is enforceable against the insurer.

***Maxwell v Murphy* [1957] HCA 7; (1957) 96 CLR 261; (1957) ALR 231; (1957) 31 ALJR 143; and**

***Fisher v Hebburn Ltd* [1960] HCA 80; (1960) 105 CLR 188; 34 ALJR 316, applied.**

2. Whilst s126 of the Act prohibits gap insurance in respect of a person liable to pay medical expenses, it does not apply to a person not liable to pay medical expenses. Accordingly, where a School Council effected a policy of insurance on behalf of the School's full-time students whereby the Council was indemnified in respect of the gap in medical expenses incurred by third persons (the students), it followed that as the Council was not liable to pay the medical expenses it was not affected by the provisions of s126 of the Act.

O'BRYAN J: [1] Order nisi to review a decision of the Magistrates' Court at Williamstown sitting at Broadmeadows on 3 June 1987, wherein the School Council of the Point Gellibrand High School was complainant and American Home Assurance Company was defendant. The applicant claimed in a special summons the sum of $660.88 plus interest pursuant to a contract of insurance known as "Secondary Students' 24 Hour Personal Accident Policy" executed on 18 March 1983 by the respondent. By notice of defence the respondent relied upon illegality, namely breach of s126 of the *Health Insurance Act* 1973. The learned Magistrate upheld this defence and dismissed the claim.

[2] On 7 July 1987 Master Barker granted an order nisi to review the decision on five grounds. It is only necessary to refer to Grounds (a), (b) and (e) which read as follows:

> (a) That the Magistrate erred in his finding that s126 of the *Health Insurance Act* 1973 applied to the insurance policy, the subject of the complaint.
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> (b) That the Magistrate erred in finding that s126 of the *Health Insurance Act* 1973 applied to payments under the insurance policy, the subject of the complaint.
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> (e) That the Magistrate erred in concluding that the complainant and full-time students of the Point Gellibrand High School were one and the same party for the purposes of the contract and failed to apply the principle of privity of contract as disclosed by the insurance documents.

The policy provided "That in consideration of the payment of the premium — if during the period of insurance any of the events defined in the Schedule shall happen to an insured person the company shall pay the compensation specified in the Schedule to the insured". The period of insurance was from 1 February 1983 to 31 January 1984. The insured was the applicant and the insured persons were all full-time students of Point Gellibrand High School. The policy insured the applicant in respect of bodily injuries sustained by a full-time student of the school during the period of the policy and caused by accidental means. Medical expenses thus incurred were limited to 75 per cent of total amount less the excess up to $750. "Medical expenses" is defined in the policy to mean expenses paid by an insured person to a medical practitioner and the like

provided that the insurer will only be liable for the **[3]** excess of the amount which may be refunded to the insured person from any source such as Medicare. The policy does not provide insurance to a student of the school. The insured is the Council of the school. Consequently, a student who suffers bodily injury and incurs medical expenses during the period of the policy cannot claim from the insurer. The liability of the insurer is to pay the compensation specified in the Schedule to the insured.

On 9 August 1983 a female student of the school sustained bodily injury by accidental means and incurred medical expenses. The injury was thus suffered during the period of insurance. Medical expenses totalling $1,938.23 were incurred by the student of which $1,277.35 was recovered from a source such as Medicare. The balance, $660.88, was the subject of the claim made by the applicant pursuant to the policy.

The respondent submitted in the court below that s126 of the *Health Insurance Act* 1973 (Commonwealth) made illegal the payment of the claim, or alternatively made the claim unenforceable. Section 126 was introduced into the *Health Insurance Act* by the *Health Legislation Amendment Act* 1983 s57. The new provision came into operation on 1 February 1984 (s2(2) of Act No.54 1983). Most of the medical expenses of the injured student were incurred after 1 February 1984.

Section 126, so far as it is relevant to this proceeding is in these terms:

> **[4]** (1) A person shall not make a contract of insurance with another person that contains a provision purporting to make the first-mentioned person liable to indemnify the other person in respect of loss arising out of the incurring by the other person of a liability to pay medical expenses in respect of the rendering in Australia of a professional service in respect of which a Medicare benefit is, or but for subsection 18(4) would be, payable.
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> (2) Where there is a contract of insurance (whether made before or after the commencement of this section) under which the insurer is liable to indemnify a person in respect of loss arising out of the incurring by that person of liability to pay medical expenses in respect of the rendering in Australia of a professional service, there is an implied condition in the contract that the insurer is not liable for loss arising out of the incurring of liability to pay medical expenses in respect of the rendering in Australia of a professional service in respect of which a Medicare benefit is, or but for subsection 18(4) would be, payable.
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> (4) Any term of a contract of insurance (including a term that is not set out in the contract but is incorporated in the contract by another term of the contract) that purports to exclude, restrict or modify or has the effect of excluding, restricting or modifying the application in relation to that contact of all or any of the provisions of this section is void.
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> (5) A term of a contract shall not be taken to exclude, restrict or modify the application of a provision of this section unless the term does so expressly or is inconsistent with that provision.

The purpose of s126 is to prohibit medical insurance which purports to indemnify a person in respect of the gap or difference between the total cost of medical expenses in respect of professional services and the Medicare benefit payable in respect of those medical expenses. The section prohibits what is commonly known as "gap insurance". Mr Andrews of counsel, who appeared for the applicant, submitted that subsection 1 of s126 does not operate retrospectively to divest the applicant of rights **[5]** fixed by the policy. The common law rule of the interpretation of statutes relating to events and conduct antecedent to an enactment was expressed by Dixon CJ in *Maxwell v Murphy* [1957] HCA 7; (1956-1957) 96 CLR 261 at 267; [1957] ALR 231; (1957) 31 ALJR 143 as follows:

> "The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events. But, given rights and liabilities fixed by reference to past facts, matters or events, the law appointing or regulating the manner in which they are to be enforced or their enjoyment is to be secured by judicial remedy is not within the application of such a presumption. Changes made in practice and procedure are applied to proceedings to enforce rights and liabilities, or for that matter to vindicate an immunity or privilege, notwithstanding that before the change in the law was made the accrual or establishment of the rights, liabilities, immunity or privilege was complete and rested on events or transactions that were otherwise past and closed."

The Chief Justice approved the following passage from the judgment of Justice of Appeal Sloan in *Dixie v Royal Columbian Hospital* (1941) 2 DLR 138 at 139-140:

> "Unless the language used plainly manifests in express terms or by clear implication a contrary intention, a statute divesting vested rights is to be construed as prospective".

In *Fisher v Hebburn Ltd* [1960] HCA 80; (1960) 105 CLR 188; 34 ALJR 316 Fullagar, J expressed the general rule as follows at 194:

> "There can be no doubt that the general rule is that an amending enactment - or, for that matter, any enactment – is *prima facie* to be construed as having a prospective operation only. That is to say, it is *prima facie* to be construed as not attaching new legal consequences to facts or events which occurred before its commencement."

[6] The language of subsection 1 does not indicate that Parliament intended the prohibition to operate retrospectively. A contract of insurance made before 1 February 1984, as was the case in this proceeding, which contains a provision making an insurer liable to indemnify an insured in respect of the gap between medical expenses incurred by an insurer and a Medicare benefit paid is not prohibited by subsection 1. No prosecution could lie against the respondent in the present case because there is a presumption not displaced by the language used in subsection 1 that the section operates prospectively. Mr Gibbons of counsel who appeared for the respondent did not contend that subsection 1 operated to render illegal the contract of insurance or any part of it. He submitted that the claim is unenforceable by subsection 2. Subsection 2 expressly applies to a contract of insurance made before the commencement of s126 so as to introduce an implied condition into a contract of insurance "under which the insurer is liable to indemnify a person in respect of loss arising out of the incurring by that person by liability to pay medical expenses in respect of the rendering in Australia of a professional service".

Mr Andrews submitted, correctly in my opinion, that the contract of insurance, the subject of the claim in the court below, is not a contract of insurance to which subsection 2 applies. Subsection 2 only applies to a contract of insurance "under which the insurer is liable to indemnify a person in respect of loss arising **[7]** out of the incurring by that person of liability to pay medical expenses". The contract in the present case indemnifies a person (the applicant) in respect of loss arising out of the incurring by another person (a student) of liability to pay medical expenses. A rule of construction that the legislature does not intend what is unjust may be used to produce the result contended for by Mr Andrews: see *Doro v Victorian Railway Commissioners* [1960] VicRp 12; (1960) VR 84 at 86; and *Maxwell on Interpretation of Statutes* 12th Ed. (1965) at 215. Courts lean against a construction which is manifestly unfair. Here the parties to the contract of insurance made their bargain free of the restraint now imposed by s126. The legislature prohibited gap insurance by a person liable to pay medical expenses; it did not prohibit gap insurance by a person not liable to pay medical expenses. In subsection 2 the identical person is meant by the words "a person" and "that person". The defence insofar as it was founded upon subsection 2 must fail.

Mr Gibbons further submitted that subsection 4 of s126 avoids the claim because to uphold the applicant's claim under the policy would have "the effect of excluding, restricting or modifying" the application of the provisions of s126. In my opinion this argument is unsound because it is based upon a misunderstanding of the meaning of subsection 4. Subsection 4 is intended, in my opinion, to void any term in the contract of insurance which purports **[8]** to exclude, restrict or modify the operation of s126. Because subsection 4 does not operate retrospectively it does not apply to the contract made in the present case. For the same reason subsection 5 has no operation to the policy in the present case. In my opinion, the defence taken in the court below based upon s126 was not sound in law and the learned Magistrate erred in holding that s126 applied to the contract. The result produced, if one were to uphold the defendant's arguments, would be manifestly unjust, in my opinion. Although the contract of insurance by its terms purports to confer a benefit upon third persons (or full-time students of the insured) the contract is not enforceable by a third person in his/her own name. The contract is between the applicant and the respondent, and only those parties may enforce the contract: *Beswick v Beswick* [1967] UKHL 2; [1968] LR AC 58; [1967] 2 All ER 1197; [1967] 3 WLR 932. Section 126 properly construed does not prohibit or render unenforceable a provision in the contract of insurance which offers indemnity to an insured in respect of the gap in medical expenses incurred by a third person.

Such a construction would carry the language of the section too far. The order nisi will be made absolute on Grounds (a), (b) and (e). The order in the court below will be set aside, and there will be substituted an order that there be judgment for the complainant in the amount claimed.
