

F. NORWEST REFRIGERATION SERVICES PTY LIMITED V. BAIN DAWES (W.A.) PTY LIMITED AND GERALDTON FISHERMAN'S CO-OPERATIVE LIMITED¹

A decision of the High Court of Australia, 2 October 1984.

Norwest owned a fishing vessel the "Sonoma". The vessel was insured through the fleet policy organised by the Co-operative. A representative of Norwest had filled in the proposal form and forwarded it to the Co-operative, who in turn had passed the completed proposal form on to Bain Dawes. Bain Dawes arranged with underwriters to have the "Sonoma" added to the fleet policy. That policy contained a clause which excluded liability in the case of a vessel which did not have a current certificate of survey issued pursuant to Western Australian legislation. The Co-op and Bain Dawes both knew of the exclusion clause but, contrary to the Co-op's invariable practice, Norwest was not informed of it. Before certain aspects of survey could be carried out prior to the issue of a certificate, the vessel was destroyed by fire. The underwriters relied on the exclusion clause and denied liability. Norwest sued the underwriters, Bain Dawes and the Co-op. At first instance the trial judge held that the underwriters were entitled to rely on the exclusion clause. He dismissed the claim against the Co-op and Bain Dawes holding that neither of them knew or ought to have known that the "Sonoma" was not the subject of a current survey certificate and that, in those circumstances, the fleet policy provided suitable cover and there was no obligation to warn Norwest.

Norwest appealed to the Full Court of the Supreme Court of Western Australia. The Court unanimously dismissed its appeal against Bain Dawes. It allowed the appeal against the Co-op. The Co-op appealed to the High Court seeking the restoration of the decision of the trial judge and Norwest appealed against the dismissal of its claim against Bain Dawes and renewed its claim for interest and for a "bullock" order in respect of the underwriters' costs.

Gibbs C. J., Mason, Wilson and Dawson JJ. found that the Co-op had failed to take reasonable care in dealing with Norwest's request for insurance cover. In particular, it had held itself out as being prepared to arrange insurance. That being so, it was under a duty to exercise proper care to ensure either that it arranged insurance of the type requested by the members or that it warned a prospective insured of the limitations that would be contained in any insurance cover that it arranged for its members. However, the Court held that the Co-op had a duty to warn Norwest of the limitations under the policy *without* regard to the question of whether the Co-op knew or ought to have known that the vessel was out of survey.

¹ (1984) 58 A.L.J.R. 521.

The Co-op also sought to rely on the warranty of legality implied by section 47 of the Marine Insurance Act 1909 (Cth). By going to sea without a certificate, Norwest was in breach of the Western Australian marine legislation. The High Court found that had Norwest been told of the importance of the survey certificate it would have obtained one and, in the result, there was no breach of this warranty.

Norwest appealed to the High Court against the dismissal, by the trial judge and the Full Court, of its claim against Bain Dawes. The High Court said that if Bain Dawes had been dealing with Norwest directly, it would have found the breach of duty argument against Bain Dawes most persuasive. The Court recognised that this was contrary to the recent New South Wales Court of Appeal decision of *Fanhaven Pty Limited v. Bain Dawes Northern Pty Limited*.² The Court found that, because Bain Dawes was acting as the intermediary between the Co-op and the underwriters, there was no duty of care of the type alleged by Norwest.

The case is of interest in two respects. First, the High Court found, in effect, that a broker could be (in this case the Co-operative and not Bain Dawes) liable for failing to inform Norwest of the importance of the survey warranty. Secondly, the Court has raised a question mark over the duty of an insurance broker to enquire into matters that are not dealt with in detail in the proposal form. This casts considerable doubt on whether the *Fanhaven* decision of the New South Wales Court of Appeal would be upheld by the High Court.

² [1982] 2 N.S.W.L.R. 57.