

Marine insurance — non-disclosure

*HELICOPTER RESOURCES PTY LTD & ANOR v SUN ALLIANCE AUSTRALIA LIMITED & ORS**

Supreme Court of Victoria

26 March 1991

This was a claim on a policy of marine insurance over 4 helicopters which were intended to be carried on the ship *Icebird* from Hobart to the Antarctic base at Casey. The helicopters had all sustained substantial damage shortly after departure from Hobart. The underwriters relied on non-disclosure and breaches of policy conditions. The plaintiffs also sued the broker who had arranged the cover.

The underwriters alleged, first, that there had been non-disclosure of the fact that under the contract between the first plaintiff and the Commonwealth of Australia to supply, charter and operate helicopters for use by the Australian Antarctic Division there was an express indemnity given to the Commonwealth relating to damage to the aircraft during the period of charter. Secondly, it was alleged that it had not been disclosed that the insured party, rather than the master or the stevedore, would be responsible for securing and lashing the helicopters on board the ship and that in fact the securing and lashing were carried out by employees of the insured party. Thirdly, it was alleged that the plaintiffs failed to disclose to the insurers that the risk would involve helicopters being stowed and unstowed repeatedly at sea and in varying weather conditions. Reliance was also placed on clause 4.3 of the Institute Cargo Clauses (A) relating to insufficiency or unsuitability of packing or preparation of the insured subject matter and on clause 5 of the same Clauses to the effect that the vessel was unfit for the safe carriage of the cargo.

In the event that any of the non-disclosure defences succeeded the plaintiffs asserted that there had been a breach of duty of care by the broker.

I. NON-DISCLOSURE

In so far as the indemnity which was given by the first plaintiff to the Commonwealth of Australia was concerned, Ormiston J found that there was no doubt that the clause in the charter pursuant to which an indemnity was given to the Commonwealth had been drawn to the attention of the broker. It was also passed on to another firm of

* Provided by Ebsworth & Ebsworth, Solicitors, Sydney.

brokers who arranged the hull covers for the helicopters. Ormiston J found that Mr Miller of Marine & Aviation Management Services Limited (MAMS), the agent for the pool of insurers who underwrote 25% of the marine policy, was not notified of the terms of the charter.

Ormiston J accepted the underwriters' submission that the fact that the insured had no rights of recovery against the Commonwealth of Australia was a matter which was material and should have been disclosed to the underwriters. This effectively meant that the underwriters' right of subrogation would be valueless and the insured would "for all practical purposes be solely responsible for any damage in all circumstances in which the Commonwealth might otherwise be held responsible". The plaintiff sought to argue that, because Government contracts contained such indemnities, this was a matter which the underwriters might be presumed to have known. This argument relied essentially on the fact that the quotation slip, which had been sent to Mr Miller and which had been initialled by him, contained the words "including waiver of subrogation, hold harmless and loss payee clauses as expiring in respect of all joint assureds". Of critical significance in rejecting that argument was his Honour's reliance on the fact that "in the truncated list of joint assureds which he [Miller] saw, the Commonwealth of Australia and the Department of Administrative Services were omitted". Ormiston J was "not satisfied on the evidence that Mr Miller came to know either the terms of the indemnities or the fact that the Commonwealth of Australia was requested to be a joint assured for the purpose of the 1988-1989 Aviation Policy".

It was also argued that the underwriters had waived their right to have disclosed to them information relating to the relevant clauses in the charterparty. This argument rested upon what was described by the Judge as the "remarkably casual way in which the marine department of MAMS approached the writing of this policy". This argument was rejected by Ormiston J also on the basis that Mr Miller had not been put on enquiry as to the existence of any such clauses particularly as he was unaware of the fact that the Commonwealth and the Department were intended assured parties. Ormiston J then dealt with the question as to whether knowledge of those clauses was "material". He confessed that when the matter was first raised he felt the assertion by the underwriters that it was material was "somewhat artificial". He referred to the fact, however, that the plaintiffs' and broker's expert witnesses had asserted that those matters were not material in reliance on the matters already discussed and rejected by his Honour. He also noted that the plaintiffs' two principal expert witnesses "conceded that, unless knowledge of the clauses could be imputed to the insurers, they would be material and ought to have been disclosed".

As to the manner in which the helicopters were stowed and unstowed, Ormiston J found that both the broker and Mr Miller were aware broadly of the manner in which the helicopters were used in the course of the Antarctic expeditions, and in particular of the fact that they were unstowed and put into commission for the purpose of reconnaissance and transport on the approach of the vessel to each Antarctic base. However, he was not satisfied that either the broker or Mr Miller knew anything of the detailed method by which the helicopters were stowed either at the beginning of each voyage in Hobart or in the Antarctic, or of the precise method of unstowing during those voyages. He was not satisfied that they were aware that the task of lashing and unlashng the helicopters in the hold was, and would be, performed only by members of the plaintiffs' air crew with no assistance from stevedores or ship's crew and with minimal supervision by the master and boatswain.

Ormiston J found that there was a good deal of evidence which supported the assertion that the air crew (the insured party's employees) "were more experienced and more familiar with the methods of tying down helicopters ..." Notwithstanding that, he found that it was material and should have been disclosed to underwriters that the insured party's crew were so involved in the stowage operation. The reason for this finding was also linked to the earlier finding in relation to the existence of the indemnity clauses in the charterparty with the Commonwealth of Australia. The fact that the insured party's crew were involved in the stowage and lashing of the helicopters once again limited the underwriters' rights of recovery against third parties in circumstances such as those in which the helicopters were damaged on this occasion.

The third matter of non-disclosure related to the alleged repeated stowings and unstowings of the helicopters at sea. In finding against underwriters on this issue, Ormiston J found that the policy of marine insurance terminated when the helicopters were unlashng and commenced to be used for reconnaissance and transportation of passengers, on the basis that they were no longer "in the ordinary course of transit" within the meaning of clause 8 in the Institute Cargo Clauses. Accordingly the only stowing and unstowing which underwriters could point to as having been done "repeatedly at sea and in varying weather conditions" was that which took place when helicopters were taken to one or two other bases and used for similar purposes and so restowed for that part of the voyage. He found that those operations did not fall within the description of "stowing and unstowing repeatedly at sea and in varying weather conditions".

II. INSUFFICIENCY OF PACKING

In relation to the defence of insufficiency of unsuitability of packing or preparation Ormiston J ruled against the insurers. He found that the exclusion contained in subclause 4.3 of the Institute Cargo Clauses was directed “to those steps which are necessary to prepare the cargo for the loading process, not to the very acts which result in the cargo being stowed on board”. The particulars of “insufficiency or unsuitability of packing or preparation of the subject matter insured” relied upon by the insurers had related to the manner of securing the cargo on the vessel.

III. UNFITNESS OF VESSEL

As to the exclusion contained in clause 5 relating to the unfitness of the vessel, which was particularised by the insurers as being the insufficient number of pontoons to take 4 helicopters in the hold of the vessel, Ormiston J again found against the insurers.

IV. BROKER’S LIABILITY

Having found that the underwriters were entitled to avoid the policy, Ormiston J then went on to consider whether or not the broker was liable to the insured parties for having failed to disclose those matters which had been successfully relied upon by the underwriters as not having been disclosed. Essentially, Ormiston J found that, in breach of his duty to his client, the broker had taken no steps to inform Mr Miller directly or indirectly of the existence of the clauses in the charterparty. The Court found that there was no doubt that the broker had been given the names of all joint assured parties and given sufficient detail of the “waiver of subrogation” and “hold harmless” clauses in the charterparties which he failed to pass on to Mr Miller. In relation to the other ground of avoidance which the underwriters had successfully relied upon, namely the stowage of the cargo by the insured party’s crew, Ormiston J found that the broker had no direct knowledge of the method of stowing which he held should have been disclosed to the insurers. Accordingly if the broker’s duty was limited to disclosing only that information of which he was directly aware, the broker could not have any liability in relation to this aspect of the underwriters’ defence. Ormiston J however found that:

a reasonable broker, particularly one dealing in the complex world of aviation insurance must do more for his client. If his client may be at risk of having his insurance cover avoided for non-disclosure, the broker must have a duty to inform himself of sufficient of the business activities of his client to carry out his duties adequately and in particular to prevent the avoidance of liability under any policy written. More especially is this the case in this field where no formal proposal was made by the client. The broker cannot, of course, discover everything, but he must attend to discover those elements in the activities of the client which might put its cover in jeopardy.

Accordingly Ormiston J went on to conclude:

Nevertheless, in my opinion, if he had paid reasonable regard to his duties as a marine broker, he ought to have been in a position to advise his clients as to those matters which a marine insurer would wish to know, including any unusual methods of despatching or stowing the cargo. In truth, this was a most unusual "marine adventure" in the sense described in Sections 7 and 9 of the Marine Insurance Act and in the ordinary connotation of that expression.

Thus the broker was held liable. It is of particular interest to note the duties imposed on a broker in regard to his client's disclosure obligations, especially in complex insurance.