



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

**REPORTABLE
Case No 316/2002**

In the matter between

**Lloyds of London Underwriting Syndicates 969, 48,
1183 and 2183**

Appellant

and

Skilya Property Investments (Pty) Ltd

Respondent

Before: Scott, Zulman, Mthiyane, Brand and Conradie JJA

Heard: 29 August 2003

Delivered: 30 September 2003

Summary: Indemnity under contract of aviation insurance; whether exclusion of liability for illegal use incorporated in policy and, if so, whether aircraft used for an illegal purpose

JUDGMENT

CONRADIE JA

[1] This appeal is about the respondent's entitlement to indemnity under a contract of insurance. The issues on appeal are the interpretation of the insurance contract and whether at the time of its loss the respondent's aircraft was being used for an illegal purpose. The judgment of Southwood J, *a quo*, has been reported as *Skilya Property Investments (Pty) Ltd v Lloyds of London Underwriting Syndicate Nos 960, 48, 1183 and 2183*, 2002 (3) SA 765(T). This, together with the parties' broad acceptance of his findings of fact make it unnecessary to burden this judgment with detail. The appeal is before us by leave of this Court.

[2] The respondent was the owner of a Douglas DC 3 aircraft (popularly known as a Dakota) which it had insured under a hull all risks policy ('the hull policy') with the Houston Casualty Company. It covered the respondent against the more common risks of flying an aircraft and moving it about on the ground. The cover was not all-embracing. Some risks were excluded. Among the excluded risks were so-called 'war risks'. I refer to the clause excluding liability for these risks as the 'war risks exclusion'.

[3] Section I of the hull policy is headed 'Loss of or Damage to Aircraft'. The first sub-heading under this section is 'Coverage'. This is the indemnifying provision which commences 'The Underwriters will at their

option replace or repair accidental loss of or damage to the Aircraft ...'. There are then various 'Exclusions' such as wear and tear followed by certain 'Conditions.'

[4] Section II of the hull policy is headed 'Legal Liability to Third Parties (other than Passengers)'. Section III then deals with 'Legal Liability to Passengers'. Sections II and III under the heading 'Coverage' indemnify the respondent against compensatory damages for accidental bodily injury (fatal or otherwise) being awarded to two different classes of persons, passengers and crew. Each section has its own 'Exclusions' and 'Limits'.

[5] There are four parts to section IV. Section IV(A) is headed 'General Exclusions Applicable to All Sections'. Section IV(B) contains 'Warranties applicable to All Sections'. Section IV(C) is headed 'General Conditions Applicable to All Sections'. These three sections, then, contain general exclusions, warranties and conditions. Section IV(D) contains 'Definitions'.

[6] Since section IV(A) applies to all sections it governs Section I. It reads in part-

'This Policy does not apply:-

- | | |
|---------------|---|
| Illegal Uses. | 1 whilst the Aircraft is being used for any illegal purpose or for any purpose other than those stated in the Declarations and as defined in the Definitions; |
| Geographical | 2 whilst the Aircraft is outside the geographical limits stated in the |

Limits.	Declarations hereto;
Pilots.	3 whilst the Aircraft is being piloted by any person other than as stated in the Declarations hereto except that the Aircraft may be operated on the ground by any person competent for that purpose and
Transportation	entitled by law to do so;
by other	4 whilst the Aircraft is being transported by any means of conveyance
Conveyance.	(excluding conveyance by its own motive power)...
Landing and	5 whilst the Aircraft is landing or taking off or attempting to do so
Take-Off Areas.	either at or from a place which does not comply with the recommendations laid down by the manufacturer of the Aircraft unless due to force majeure;
Contractual	6 to liability assumed or rights waived by the Assured under any
Liability	agreement (other than Passenger Ticket/Baggage Check issued under Section III hereof) except to the extent that such liability would have attached to the Assured in the absence of such agreement.

Non Contribution.	7 to claims which are payable under any other policy or policies except in respect of any excess beyond the amount which would have been payable under such other policy or policies had this insurance not been effected;
	8 [This is a lengthy paragraph dealing with radiation damage. It would be prolix to reproduce it: it excludes liability for 'ionising radiations or contamination by radioactivity from any source whatsoever' (which includes the carriage of radioactive materials

under certain circumstances.))]

War Hijacking 9 to claims caused by :-

- and Other Perils
- (a) war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, martial law, military or usurped power, or attempts at usurpation of power;
 - (b) any hostile detonation of any weapon of war employing atomic or nuclear fission and/or fusion or other like reaction or radioactive force or matter;
 - (c) strikes, riots, civil commotions or labour disturbances;
 - (d) any act of one or more persons, whether or not agents of a sovereign Power for political or terrorist purposes and whether the loss or damage resulting therefrom is accidental or intentional;
 - (e) any malicious act or act of sabotage;
 - (f) confiscation, nationalisation, seizure, restraint, detention, appropriation, requisition for title or use by or under the order of any Government (whether civil military or de facto) or public or local authority;
 - (g) hi-jacking or any unlawful seizure or wrongful exercise of control of the Aircraft or crew in flight (including any attempt at such seizure or control) made by any person or persons on board the Aircraft acting without the consent of the Assured.

Furthermore this policy does not cover claims arising whilst the

Aircraft is outside the control of the Assured by reason of any of the above perils.

The Aircraft shall be deemed to have been restored to the control of the Assured on the safe return of the Aircraft to the Assured at an airfield not excluded by the geographical limits of this Policy and entirely suitable for the operation of the Aircraft (such safe return shall require that the Aircraft be parked free of duress with engines shut down);

Wilful and/or Malicious Acts of the Assured.	10 in respect of any damage which is attributable to the wilful and/or malicious act of the Assured or any agent or servant of the Assured or other person under the control of the Assured acting within the scope of his employment or authority.’
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[7] These general exclusions from cover leave an aircraft owner vulnerable, particularly in turbulent parts of the world.¹ Happily there are niche markets for everything. The product developed by the war insurance niche market in London was the ‘Aviation Hull “War and Allied Perils” Policy’, referred to in argument simply as the ‘war policy.’ It was intended to fill the gap created by the introduction of the war risks exclusion in the hull policy.

[8] The war policy, consistent with its scope and function as an adjunct to the hull policy, is much shorter. It consists of only four sections. The first

¹ See on this topic Rod D Margo Aviation Insurance 3 ed 325 - 330

imposes on the insurer liability for loss of or damage to the aircraft in these words –

‘Subject to the terms, conditions and limitations set out below, this Policy covers loss of or damage to the Aircraft nominated in the Schedule against claims excluded from the Assured’s Hull “All Risks” Policy as caused by:

- (a) War, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, martial law, military or usurped power or attempts at usurpation of power.
- (b) strikes, riots, civil commotions or labour disturbances.
- (c) Any act of one or more persons, whether or not agents of a sovereign power, for political or terrorist purposes and whether the loss or damage resulting therefrom is accidental or intentional.
- (d) Any malicious act or act of sabotage.
- (e) Confiscation, nationalisation, seizure, restraint, detention, appropriation, requisition for title or use by or under the order of any Government (whether civil military or *de facto*) or public or local authority.
- (f) Hi-jacking or any unlawful seizure or wrongful exercise of control of the Aircraft or crew in flight (including any attempt at such seizure or control) made by any person or persons on board the Aircraft acting without the consent of the Assured.

Furthermore this Policy covers claims excluded from the Hull “All Risks” Policy from occurrences whilst the Aircraft is outside the control of the Assured by reason of any of the above perils. The Aircraft shall be deemed to have been restored to the control of the Assured on the safe return of the Aircraft to the Assured at an airfield not excluded by the geographical limits of this Policy, and entirely suitable for the operation of the Aircraft

(such safe return shall require that the Aircraft be parked with engines shut down and under no duress).’

[9] The description of the risks covered by the war policy coincides word for word with the exclusion from liability found in the war risks exclusion of the hull policy except that cover is not extended to ‘any hostile detonation of any weapon of war employing atomic or nuclear fission...’

[10] Section 2 deals with extortion and hi-jack expenses and is not now relevant. The third section of the war policy is headed ‘general exclusions.’ Here one finds catalogued the kind of calamities that are by and large economically uninsurable. They include, as in paragraph (b) of section 1, the detonation of a nuclear weapon and also war between the world’s major powers and confiscation and similar acts of appropriation by certain governments named in a schedule to the policy. Also excluded is liability for loss of the aircraft arising from any contractual arrangement as well as for consequential loss not specifically covered.

[11] The fourth section is the ‘general conditions.’ It is by means of clause 1 of this section that the war policy seeks to incorporate certain, in fact most, of the provisions of the hull policy:

- ‘1. This Policy is subject to the same warranties, terms and conditions (except as regards the premium, the obligations to investigate and defend, the renewal agreement (if any), the amount of deductible or self-insurance provision where

applicable AND EXCEPT AS OTHERWISE PROVIDED HEREIN) as are contained in or may be added to the Assured's Hull "All Risks" policy.'

[12] One point of contention between the parties is the meaning of the expression 'warranties terms and conditions'. The appellants contend that the 'exclusions' are terms of the hull policy and are, therefore, by reference, incorporated into the war policy. The submission for the respondent is that the policies, read together, contemplate a category of provisions called 'exclusions' which does not come within the ambit of the expression 'warranties terms and conditions'. For this reason the attempt to incorporate them in the war policy failed. In support of this contention the respondent argued that an 'exclusion' (in the context in which this expression is used in the war policy) is a legal concept sufficiently distinct from either of the other three, that is to say, a term, a condition or a warranty, to justify the conclusion that, if the appellants had wished to incorporate 'exclusions' in the hull policy into the war policy, they would (and should, in order not to have fallen foul of the *contra proferentem rule*) have said so.

[13] That 'exclusions' are not warranties or conditions of the hull policy may be accepted. In insurance law 'warranties' and 'conditions' have acquired rather specialised meanings. (*Lawsa* vol 12 (1988) paras 155,156,161 at 151 and 155). But 'exclusion' seems to me simply to be a convenient description for a provision with certain characteristics. The fact that such a provision may

fulfil a particular function does not deprive it of its character as a term. I agree with the respondent's counsel that one must look at the way the parties employed these expressions in the policies, having regard to the object of the policies seen as a whole, but I detect no feature of their use in the context to suggest that those provisions of the contract which cannot properly be categorized as 'warranties' or 'conditions' are to be regarded as anything other than 'terms'. The most one can say in favour of the respondent's contentions is that there is in the hull policy some inconsistent use of the expressions 'terms', 'warranties' and 'conditions' and that if 'warranties' and 'conditions' were also 'terms' it would have been superfluous to mention them separately. But the 'presumption' against superfluity which in appropriate circumstances may be a useful device for construing a document, in the light of all the contrary *indiciae* in the policies, cannot carry the day.

[14] Sophisticated semantic analysis is not the best way of arriving at an understanding of what the parties meant to achieve by paragraph 1 of section IV. A better way is to look at what, from the point of view of commercial interest, they hoped to achieve by the incorporation provision. It is quite clear that without the incorporation of exclusions from the hull policy, the war policy would have left the appellants with potential liabilities they could not have intended to assume and which the respondent could not have thought they were assuming. For one thing, no limit on the liability for loss or damage

to passengers, crew or third persons is written into the war policy itself. These are topics which in the hull policy are hedged about with limits and exclusions.

[15] There are other important exclusions in the hull policy relating to occurrences of increased risk which one cannot imagine a prudent underwriter of the war policy would ever have wished to take upon itself. They are assembled in section 1V(A) ('General Exclusions applicable to all sections') and comprise, among others, landing or taking off at or from a place which does not comply with the recommendations of the manufacturer of the aircraft and flying of the aircraft by an unauthorised pilot. They exclude claims for liability assumed, or rights waived, by the assured under any agreement as well as claims which are payable under any other policy (except in respect of any excess).

[16] I did not understand the respondent's counsel to contend that the incorporation clause failed to integrate *any* of the general exclusions in the hull policy into the war policy. Clearly, that would make no business sense. Nevertheless, he maintained that one of the general exclusions suffered this fate. It is the first one reading as follows:

'This policy does not apply:-

1 whilst the aircraft is being used for any illegal purpose or for any purpose other than those stated in the Declarations and as defined in the Definitions.'

[17] The appellants repudiated liability on the basis of this, the illegal purpose exclusion, maintaining that the aircraft was lost whilst it was being used for an illegal purpose, the smuggling of four tons of South African duty free cigarettes into Mozambique. It is obvious that the use of an aircraft for an illegal purpose increases the risk of loss of damage. This is as true for the hull as for the war policy. A risk such as confiscation for which the war policy provides cover is greatly increased by illegal use of the aircraft. Considering the two policies together as constituting a sensible business arrangement to provide greater cover for the respondent than was provided by the hull policy on its own, there is every reason to give the war policy a meaning that would acknowledge that its underwriter was not contractually prepared to take the risk of illegal use upon itself. In my view the judge *a quo* erred in holding that the war policy did not incorporate the illegal purpose exclusion.

[18] The respondent's alternative argument also revolved around a semantic construction, this time of the phrase 'whilst the Aircraft is being used for any illegal purpose.' It was contended that the provision had no application to the facts, either because the *purpose* of the flight was not to smuggle but some other purpose, or because the loss was not suffered *whilst* the aircraft was being used for an illegal purpose.

[19] The ultimate purpose of the flight was the repositioning of the aircraft at Nairobi for the distribution of relief supplies. First, however, the aircraft was

to be used to convey cigarettes to Beira. The cost of the Beira leg for which the aircraft had been specially chartered was to be borne by the exporter of the cigarettes. It was a voyage charter in terms of which the use of the aircraft and crew were made available to the exporter. It was not a contract for the carriage of goods. The flight to Beira was not simply a diversion on the way to Nairobi. Because of flight control regulations overflight clearances had to be arranged before take-off from Lanseria airport. From that time the first leg of the flight was undertaken for an illegal purpose even though the projected second leg of the flight, the repositioning of the aircraft at Nairobi, would have been legal.

[20] Another argument closely allied to this was also raised by the respondent: The loading of the cigarettes at Lanseria airport, it was said, was perfectly legal; while the aircraft was winging its way towards Beira it was not engaged in any illegal activity; no illegality would be committed until the pilots of the aircraft attempted to take the cigarettes through Mozambican customs without paying duty on them. This was an independent act, unrelated to the flying or the use of the aircraft.

[21] This argument loses sight of the terms in which the illegal purpose exclusion is couched: it does not exclude from indemnity the unlawful carriage of goods; it excludes liability where the purpose for which the aircraft is used is illegal. The legality of the conveyance need have no bearing on the

unlawful object: of importance is the object for which the aircraft was used, not the manner in which it was used.² The respondent relied on cases where provisions relating to the seizure or forfeiture of articles used for an illegal purpose were considered.³ They might have been of assistance if the aircraft had flown into Beira for another purpose and contraband cigarettes had been discovered on board. Here the facts are that the aircraft flew to Beira for no purpose other than to convey the cigarettes to that destination.

[22] It was also argued by the respondent that at the time the aircraft was seized the smugglers had abandoned the idea of smuggling the cargo of cigarettes into Mozambique so that the illegal purpose provision (which operated *whilst* the aircraft was being used for an illegal purpose) had, at the time of seizure, ceased to operate. To test the validity of this submission, it is necessary to look closely at certain aspects of the evidence.

[23] It is not disputed that the consignor and consignee of the cigarettes, the pilots of the aircraft and some of the officials at Beira airport participated in the smuggling. The South African customs authorities had notified their Mozambican counterparts that the aircraft was carrying cigarettes that might be clandestinely introduced into that country. This intelligence had been made available to the smugglers and their confederates even before the aircraft

² *Nel v Santam Insurance Company* 1981(2) SA 230 (T) at 238E – 239F.

³ *R v Samuel* 1958 (4) SA 314 (SWA) at 316; *S v Mtshali* 1972 (4) SA 207 (N); *S v Bissessue* 1980 (1) SA; 228(N); *S v Crawford and Another* 1978 (1) SA 640 (O).

landed. For that reason they were too apprehensive to unload the cargo that evening. One of the pilots simply made a declaration concerning the cargo on board (which did not give the correct quantity and weight of the cigarettes). During the night the plan to unload the cargo the next morning was aborted when it became known that customs inspectors were keeping the aircraft under observation. It was accordingly decided by the conspirators to keep the cigarettes on board and fly them to Nairobi. When it became clear to the customs inspectors the following morning that the aircraft was about to depart without having offloaded the cigarettes it was seized. Thereafter it was forfeited to the state by a Mozambican customs court.

[24] To find that by the time the aircraft was seized the members of the conspiracy had abandoned their plan to smuggle the cigarettes into Mozambique would be putting too charitable a construction on what occurred. The smugglers' plan could not be carried out because it had been foiled. A purpose is not abandoned simply because it goes wrong. One might as well say that a robber holding up a victim abandons his purpose to rob when the police force him to drop his weapon. The purpose of the pilots was not merely illegally to move cigarettes into Mozambique but, having done so, to transport themselves out. That was part of the venture and, clearly, the aircraft was to be used for this purpose. In attempting to remove the contraband cigarettes from Mozambique the smugglers had not yet extricated themselves from that

situation of increased risk against which the appellants sought to protect themselves by the illegal purpose exclusion.

[25] Moreover, in extricating themselves the users of the aircraft contravened article 113(2) of the Mozambican customs regulations. They failed prior to departure to make a written declaration of the cargo on board the aircraft. This was an illegality which continued until the aircraft was seized and which falls within the definition of ‘smuggling’ in article 37(3) of the Mozambican Customs Act⁴, the penalty for a contravention of which is a fine and forfeiture of the smuggled goods and the transport used to smuggle them.

[26] For these reasons I have come to the conclusion that the aircraft was seized whilst it was being used for an illegal purpose.

[27] Clause 17 of section IV(C) of the hull policy deals with the liability of the insurer where operational directives and regulations are breached:

’17 Any Breach of Air Navigation Directions and/or Regulations or contravention of the Assured’s flying instructions and Regulations without the Assured’s knowledge and consent shall not invalidate a claim by the Assured under this Policy, but the individual causing such breach or contravention shall not be entitled to indemnity hereunder.’

The respondent says that this clause indicates that the illegal purpose exclusion should be read subjectively and that it is accordingly use of the

⁴ The Act refers to the ‘movement’ of goods without the required documentation. Undocumented import and export are thus punishable in the same way. The respondent’s argument that the smuggling, (which it sees as the failure to properly declare or pay customs duty in respect of the cigarettes) was an act independent of the use of the aircraft is for this reason not good.

aircraft by the insured that is in issue and not use by the cigarette exporter or the pilots. In this regard, it is common cause that it has not been shown that the plaintiff, the owner of the aircraft, or its associated company which operated it, knew of the smuggling of cigarettes into Mozambique.

[28] Section IV(C) 17 should be read together with clause 1 of section IV(B):

‘The Assured warrants:-

1 compliance with all air transportation, air navigation and airworthiness enactments, regulations, rules, orders and requirements issued by any competent authority affecting the safe operation of the Aircraft. Nevertheless, the Assured shall ensure:-

- (a) that the Aircraft is airworthy at the commencement of each flight;
- (b) that (as far as may be reasonably possible) the employees and agents of the Assured shall comply with such enactments, regulations, rules, orders and requirements.’

The effect of the warranty in clause 1 of section IVB is that an absolute liability is imposed on the insured.⁵ Any breach of any of the rules and orders would invalidate its claim even if the breach occurred without its knowledge or consent and despite its reasonable efforts to prevent it. The purpose of the breach of rules and orders extension is to soften the effect of non-compliance with the rules and orders warranty. It ensures that an insured’s claim is not invalidated by a breach of the rules and orders described in the extension if it

⁵ Cf *Imprefed (Pty) Ltd v American International Insurance Co Ltd* 1983 (3) SA 335 (AD)

occurs without the insured's knowledge and consent. It does not mean that a loss altogether excluded from cover will nonetheless be covered under the policy if the conduct that triggered the exclusion also happens to constitute a breach of the rules and orders warranty committed without the insured's knowledge and consent.

[29] Apart from other shortcomings, the respondent's argument confuses the illegal purpose of a flight with the illegal manner in which it is undertaken. The difference was pointed out in *Nel v Santam Insurance Company Ltd op cit* and has been highlighted by courts in the United States of America.⁶

[30] Finally the respondent submitted that one of the 'purposes' stated in part 3 of the Declarations 'Purposes of Use' in the hull policy was 'rental'. According to this submission all the respondent did (through its associate company) was to 'rent' the aircraft and 'rental' of the aircraft not being an illegal purpose the respondent's conduct did not fall within the illegal purpose exclusion. There is no merit in the point. The rental purpose is too remote. It is the immediate operational risk that concerned the parties. It is 'use' of the aircraft in that sense which is decisive, not an enquiry into the contractual arrangement by which it came to be put to such use.

1. The appeal succeeds with costs which are to include the costs consequent upon the employment of two counsel.

⁶ *Hall's Aero Spraying, Inc v Underwriters at Lloyds, London* 274 F.2d 527; *Roach v Churchman* F. 2d 849; *Middlesex Mutual Insurance Company v Herbert C Bright* 106 Cal. App.3d 282.

2. The order of the court *a quo* is altered to read;

‘The plaintiff’s claim is dismissed with costs which are to include the costs consequent upon the employment of two counsel and are to include all costs reserved when this matter was adjourned on 13 September 2001’.

J H CONRADIE
JUDGE OF APPEAL

SCOTT JA)Concur
ZULMAN JA)
MTHIYANE JA)
BRAND JA)