SURVEY AIRCRAFT LTD. (*Plaintiff*) ...APPELLANT;

AND

R. C. STEVENSON, in his quality as Attorney in Canada for the Non-Marine Underwriters at Lloyds, London, referred to in Lloyd's Policy of Aviation Insurance No. CA 93410X and ORION INSURANCE CO. LTD. (*Defendants*) .....RESPONDENTS.

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*Feb. 8, 9
May 7

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

Insurance—Aviation—Policy covering loss or damage to aircraft—Clause providing for exclusion of coverage if terms of Certificate of Airworthiness violated—Term of certificate prohibiting carriage of passengers—Crash of aircraft while passenger aboard—Risk excluded.

*PRESENT: Locke, Abbott, Martland, Judson and Ritchie JJ.

[1] (1883), 8 S.C.R. 335 at 372.

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A policy of insurance covering an aircraft owned by the plaintiff company contained a clause providing for exclusion of liability if such aircraft was operated in violation of the terms of the airworthiness certificate issued by the Department of Transport. A term of the certificate was that flight crew, mechanic or survey operators only were to be carried in the aircraft during flight. In the policy "passenger carrying" was included in the definition of "private business and pleasure" which was one of the uses for which the aircraft was insured. On a test flight, during which a 15-year old boy was carried as a passenger, the plaintiff's pilot engaged the plane in various acrobatics in the course of which it crashed. The pilot and his passenger were killed and the plane was totally destroyed. An action brought by the plaintiff to recover indemnity in respect of the aircraft was allowed by the trial judge, but, on appeal, the Court of Appeal by a majority set aside this judgment and dismissed the action. The plaintiff then appealed to this Court.

Held: The appeal should be dismissed.

Per Locke and Abbott JJ.: The restrictive terms of the airworthiness certificate were material to the risk and should have been disclosed by the plaintiff when applying for the insurance.

Per Locke, Abbott, Martland and Judson JJ.: The risk was excluded while the aircraft was carrying a passenger contrary to the provisions of the certificate, by reason of the exclusion clause in the policy.

Per Ritchie J.: By the provisions of the exclusion clause in the policy, a flight, during which any of the terms of the Certificate of Airworthiness were being violated, was excluded from the coverage. As the plaintiff did not disclose the terms of the certificate there could be no ground for the suggestion that the inclusion of passenger liability coverage or any other provision of the policy could have the effect of overriding the provisions of the exclusion clause and the Certificate of Airworthiness.

APPEAL from a judgment of the Court of Appeal for British Columbia[1], reversing by a majority a judgment of Sullivan J. Appeal dismissed.

D. McK. Brown, Q.C., and *D. E. Jabour*, for the plaintiff, appellant.

W. J. Wallace and *H. Housser*, for the defendants, respondents.

The judgment of Locke and Abbott JJ. was delivered by

LOCKE J.:—In this action the appellant sought to recover from the respondent Stevenson, as attorney in Canada for the Non-Marine Underwriters at Lloyd's, and from the respondent company, indemnity in respect of the damage suffered by it in the crash and burning of an aircraft near Prince George, B.C., on June 25, 1956.

[1] (1961-62), 36 W.W.R. 446, 30 D.L.R. (2d) 539.

The insurance contract upon which recovery is sought against Stevenson is embodied in a document described as a Certificate of Aviation Insurance dated April 27, 1956, signed by Hansen and Rowland, Inc., an American corporation, in which that company certified that it had procured insurance on the terms specified from underwriters at Lloyd's, London, upon three airplanes, the property of the appellant, including a Lockheed P.38, upon the terms and conditions stated. At a later date, Orion Insurance Co. Ltd. issued a policy to the appellant, insuring 10.46 *per cent* of the risk upon the same terms.

The action was tried before Sullivan J. who gave judgment for the appellant against both of the defendants, but that judgment was set aside by a judgment of the Court of Appeal[1] and the action dismissed, Desbrisay C.J.B.C. dissenting.

The business of the appellant company, as stated on the face of the certificate, is the making of aerial surveys which involves taking photographs at heights approximating 35,000 ft. The aircraft in question was engaged in such work at Prince George, being operated for the appellant by Frank Pynn, a qualified and licensed pilot. The work upon which he was engaged at the time in question was carrying out high altitude aerial surveys of terrain lying to the north of Prince George.

On the day of the accident, Pynn proposed to take the plane from the Prince George Airport and make what was apparently a test flight for the purpose of checking the intercommunicating radio with which it was equipped. Some work had been done on this at Pynn's request by Allan F. Clarke, the radio operator of the Department of Transport at the airport. Pynn asked Clarke if he would like to go up with him while this was being done but the latter declined and suggested that his son, some 15 years old, might like to go. As a result, the boy was carried as a passenger and while the plane was flown, at first, to a considerable height after it left the airport, thereafter it was flown by Pynn at a very low altitude over Prince George and engaged in various acrobatics, including flying upside down, when it crashed. Pynn and young Clarke lost their lives and the plane was totally destroyed.

[1] (1961-62), 36 W.W.R. 446, 30 D.L.R. (2d) 539.

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Under the provisions of s. 4 of the *Aeronautics Act*, R.S.C. 1952, c. 2, the Minister of Transport is authorized, subject to the approval of the Governor in Council, to make regulations to control and regulate air navigation over Canada, including the licensing of pilots and defining the conditions upon which aircraft may be used or operated.

Regulation 210 of the *Air Regulations*, made pursuant to this power which were applicable at the relevant times, provided that no person shall fly an aircraft unless there is in force in respect of such aircraft a Certificate of Airworthiness issued under such regulations and unless all conditions upon which a certificate or permit was issued have been complied with.

Regulation 211 provided that the Minister may establish standards of airworthiness for aircraft including, *inter alia*, requirements in respect of any matter relating to the safety of such craft and, upon being satisfied that an aircraft conforms to the standards of airworthiness established in respect of it, may issue a certificate to be known as a Certificate of Airworthiness. Subsection (6) of Regulation 211 provided that a Certificate of Airworthiness should contain such conditions relating to the equipment, maintenance and operation of the aircraft as may be prescribed by the Minister.

The Certificate of Airworthiness obtained, upon the application of the appellant, for the aircraft in question was issued by the Air Services Branch of the Department of Transport on June 24, 1954. The category of the aircraft was described as being "Normal (restricted)". "Normal category" was described under a sub-heading reading "Classification of Aircraft by Employment" as including public transport for passengers, mails and goods, private purpose aircraft and aerial work other than in respect of the first three mentioned uses. A separate category, the nature of which was described, was designated Acrobatic Category. Below these categories the following appeared:

> Aircraft in normal category are precluded from evolutions causing abrupt changes in altitude.

On page 3 of the certificate, under a general heading reading "Precautions To Be Taken For Safety In Navigation", appeared, *inter alia*:

> 2. Valid for aerial survey only.
> 3. Flight crew, mechanic or survey operators *only* to be in the aircraft during flight.

The certificate issued to the appellant described its occupation as aerial surveys. In the space reserved for the description of the purpose for which the aircraft would be used appeared the following:

> See endorsement No. 1, paragraph No. 6, section "A" & "E" private business & pleasure & serial (sic) surveys.

The word "serial" should presumably have read "aerial". The endorsement referred to defined the expression "private business and pleasure" as including, *inter alia,* passenger carrying not for hire or reward.

On the face of the certificate there appeared the following:

> The insurance afforded hereunder is made in consideration of the declaration herein made and payment of premiums herein provided and subject to the limits of liability, exclusions, conditions and other terms of this certificate and/or policy, and is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The limit of the insurer's liability as to each such coverage shall be as stated herein, subject to all the terms and conditions of this Certificate and/or Policy having reference thereto.

Endorsement No. 3, forming part of the certificate, included under the risks covered, passenger liability to an amount of $100,000.

The insuring agreements were stated with particularity on the second page of the certificate and these were followed by a series of exclusions from the risks. Of these, the principal one to be considered, read with the context, is as follows:

> This certificate and/or policy does not cover any liability:—
> (J) While in flight occurring: While the terms of the Civil Aeronautics Administration Airworthiness Certificate, or Operations Record of the insured Aircraft are violated, or while with the consent of the Assured the terms of the pilot's certificate are being violated.

Liability was denied by the insurers and this action was commenced on June 28, 1957. The original statement of defence was filed on October 31, 1957, and it is evident from its terms that the respondents' solicitors were at that time unaware of the restrictions upon the use of the plane imposed by the airworthiness certificate, as no mention was made of that document. The appellant had filed a proof of loss dated August 23, 1956. This contained no mention of these restrictions or, in the description of the accident, that the aircraft had been destroyed while engaging in acrobatics. Thereafter, the respondents became aware of the terms of

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the certificate and an amended defence setting up, *inter alia,* the defence that the aircraft was carrying a passenger and engaging in acrobatics at the time the accident occurred, was filed. In addition, the non-disclosure of the terms of the certificate when applying for the insurance and when filing the proofs of loss was raised as a defence.

Agreeing as I do with Sheppard J.A. that the term of the certificate that flight crew, mechanic or survey operators only were to be carried in the aircraft applied to all flights, whether aerial surveys or otherwise, and that exclusion (J) of the policy applied, these terms of the airworthiness certificate were material to the risk and should have been disclosed by the appellants when applying for the insurance. The evidence is clear that there was no such disclosure.

Mr. D. V. Magee was the manager of the Aviation Insurance Department of Hansen and Rowland, Inc. at the time the insurance was applied for and the certificate issued. While there had been a written application for policies previously issued, there is no mention of any in respect of the certificate in question. Magee said that he did not inquire as to the terms of the airworthiness certificate when deciding to issue the certificate insuring against passenger hazard, the reason apparently being that he assumed that the applicant would not be applying for insurance protection against a risk which it was not authorized to assume. As he put it, the insurers relied upon the exclusion clauses in the certificate.

At the trial, the respondents tendered the evidence of the witness Spexarth who was experienced in aviation insurance underwriting and he was asked whether, if he had known of the terms of the airworthiness certificate to which reference has been made, he would have undertaken the risk. The question was intended obviously to obtain the opinion of the witness as to whether these restrictive terms were, in his opinion, matters which he would consider to be material in deciding whether or not to recommend that the risk be undertaken. The evidence was objected to and excluded. It was clearly admissible, in my opinion (Phipson on Evidence, 9th ed., p. 404, and the cases there cited). However, the evidence, while admissible, was unnecessary since the materiality of this information is in this matter obvious.

The learned trial judge who found for the plaintiff proceeded upon the ground that the defendants had failed to satisfy the onus resting upon them to prove that the loss was within the exclusions in the certificate. He was of the opinion that the evidence of Magee showed that there had been no failure by the applicants to make full disclosure, a conclusion with which, with great respect, I am unable to agree. The restrictive terms of the airworthiness certificate were admittedly not communicated.

Sheppard J.A. held that the risk was excluded while the aircraft was carrying a passenger contrary to the provisions of the airworthiness certificate, by reason of the exclusion clause (J) above quoted. Davey J.A. agreed that the action should fail upon this ground. I respectfully agree with this conclusion and with the reasons assigned for it by Sheppard J.A.

I see no ambiguity in the language of the exclusion clause or of the terms of the airworthiness certificate to which I have referred. In view of this conclusion, I find it unnecessary to deal with the various other defences raised, such as the legal consequences of the failure to disclose the material facts referred to when applying for the insurance and when filing the proofs of loss.

I would dismiss this appeal with costs.

MARTLAND J.:—I concur with my brother Locke in expressing agreement with the conclusion reached by Sheppard J.A., with which Davey J.A. agreed, that the risk was excluded while the aircraft was carrying a passenger, contrary to the provisions of the Certificate of Airworthiness, by reason of the exclusion created by clause (J) of the exclusions from the risks covered by the insurance contract. I would dispose of this appeal in the manner proposed by him.

JUDSON J.:—I would affirm the judgment of the Court of Appeal dismissing this action on the ground which is common to the reasons of Davey and Sheppard JJ.A., namely, that the plaintiff's pilot was operating the aircraft contrary to clause (3) of the Certificate of Airworthiness by carrying a passenger.

RITCHIE J.:—I have had the advantage of reading the reasons for judgment prepared by my brother Locke in which the circumstances of the unfortunate accident which

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gave rise to this litigation are fully outlined, and I agree that the matter should be disposed of in the manner proposed by him.

I would dismiss this appeal on the common ground taken by Mr. Justice Davey and Mr. Justice Sheppard that the coverage afforded by the policy sued upon did not include any loss occurring while a passenger was being carried in the insured aircraft.

By the provisions of s. 2A of Endorsement No. 1 to the policy now sued upon (hereinafter called "Exclusion J"), a flight, during which any of the terms of the Certificate of Airworthiness issued by the Department of Transport in respect of the insured aircraft are being violated, is excluded from the coverage.

The terms of the paragraph numbered 3 of clause D of the Second Part of the Certificate of Airworthiness have the effect of limiting the capacity of this aircraft during flight to "Flight Crew, Mechanic or Survey Operators", and I agree that when this paragraph is read in conjunction with Exclusion J the effect is to exclude the aircraft from coverage under the policy while carrying passengers, but it is contended on behalf of the appellant that the inclusion of "Passenger Carrying" in the policy definition of "PRIVATE BUSINESS AND PLEASURE" which is one of the uses for which the aircraft was insured should be read as overriding this exclusion or at least as creating an ambiguity which is to be resolved in the appellant's favour.

In the present case, however, the terms of the Certificate of Airworthiness were not disclosed to the insurers, and Mr. D. V. Magee, one of the appellant's witnesses, who was the manager of the Aviation Insurance Department of Hansen & Rowland, Inc., general agents for the insurers, at the time when the terms of the policy were negotiated with Rush & Upton Limited, insurance brokers, who were agents for the appellant, testified that if he had known that carrying passengers was in violation of the terms of the Certificate of Airworthiness he would either have refused the premium for passenger liability carriage or taken it upon himself to modify the provisions of Exclusion J so as to extend the coverage. It is apparent to me, however, that as the appellant did not disclose the terms of the Certificate there can be no ground for the suggestion that the inclusion

of passenger liability coverage or any other provision of the policy can have the effect of overriding the provisions of Exclusion J and the Certificate of Airworthiness.

The argument of counsel for the appellant is founded in large measure on the proposition which is stated in his factum in the following terms:

> Exceptions or exclusionary clauses are to be construed strictly against the Insurer, and in case of doubt or ambiguity the wording is to be construed in accordance with the principle of *contra proferentum*.

The extent of the exclusion for which provision is made in Exclusion J is governed by the terms of the Certificate of Airworthiness, and it is, therefore, contended that "the underwriters have brought into play the same interpretation of the certificate as would apply to the policy."

Under the so-called principle of *contra proferentum,* ambiguities in insurance policies are, in appropriate cases, construed in favour of the insured on the ground that the insurers have selected the wording of the policy and that they are, therefore, not to be entitled to the benefit of any genuine doubts created by their own draftsmanship which cannot be resolved by employing the ordinary rules of construction. In my view the principle was correctly stated by Lord Sumner in *London and Lancashire Fire Insurance Company v. Bolands, Limited*[1], and the following language in my opinion has direct application to the present case:

> It is suggested further that there is some ambiguity about the proviso, and that, under the various well-known authorities, upon the principle of reading words contra proferentes, we ought to construe this proviso, which is in favour of the insurance company, adversely to them. That, however, is a principle which depends upon there being some ambiguity—that is to say, some choice of an expression—*by those who are responsible for putting forward the clause,* which leaves one unable to decide which of two meanings is the right one. In the present case it is a question only of construction. There may be some difficulty, there may be even some difference of opinion, about the construction, but it is a question quite capable of being solved by the ordinary rules of grammar, and it appears to me that there is no ground for saying that there is such an ambiguity as would warrant us in reading the clause otherwise than in accordance with its express terms. (The italics are mine.)

It is clear that the principle is limited in its application to cases in which the ambiguity has been created by words which the insurers have themselves selected and its force is very considerably weakened when it appears that the wording of the policy has been arrived at, as it was in the present

[1] [1924] A.C. 836 at p. 848.

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case, as the result of negotiation between the insurers and a broker for the insured. In any event, I cannot see that the principle could have any application to the terms of a document such as the Certificate of Airworthiness in the present case which was at all times in the possession of the insured and the wording of which was not selected by the insurers but was unknown to them because the insured failed to disclose it. I do not find any ambiguity in the combined effect of clause J of the policy and the provisions of the Certificate of Airworthiness, but if such ambiguity existed, the *contra proferentum* rule could not, in my opinion, be applied to the Certificate.

As I have indicated, I would dispose of this appeal as proposed by my brother Locke.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Russell & Dumoulin, Vancouver.

Solicitors for the defendants, respondents: Bull, Housser, Tupper, Ray, Guy & Merritt, Vancouver.