ORION INSURANCE COMPANY (*Defendant*) ..... APPELLANT;

AND

ROBERT CRONE, VIOLET CRONE and ROBERT CRONE PICTURES LIMITED (*Plaintiffs*) ..... RESPONDENTS.

1966 *Oct. 19, 20

1967 Jan. 24

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Insurance—Aircraft liability insurance—Injuries received in crash of chartered aircraft—Whether unsatisfied judgment against charterer one for which indemnity provided in policy—Exclusion clause—Whether flight conducted "in accordance with licences issued to insured"—The Insurance Act, R.S.O. 1960, c. 190, s. 95(1).

RC and his wife VC were awarded damages for personal injuries sustained when an aircraft, in which they were passengers and which had been chartered by their employer from Airgo Ltd. for a flight to Washington, crashed at night near Elmira, Pennsylvania. Airgo Ltd. was the proprietor of a commercial air service and was insured with the defendant company under a policy of aircraft liability insurance. In an

*PRESENT: Cartwright, Martland, Judson, Ritchie and Spence JJ.

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action brought pursuant to s. 95 of *The Insurance Act*, R.S.O. 1960, c. 190, in respect of the unsatisfied judgment recovered by the plaintiffs against Airgo Ltd., judgment at trial was rendered in favour of RC and VC. The trial judgment having been affirmed by the Court of Appeal, a further appeal was brought to this Court.

The defence was limited to the interpretation of an exclusion clause in the Declarations of the policy. It was contended on behalf of the insurer that the flight in which RC and VC were injured was not one for which indemnity was provided in the policy because it was not conducted "in accordance with the licences issued to the insured" in that it was an international flight for which no authorization had been obtained from the appropriate authorities contrary to the provisions of Airgo's operating licence and it was a night flight which the company was not authorized to make under the conditions of its operating certificate.

Held: The appeal should be dismissed.

On the evidence of the regulations governing "navigation of foreign civil aircraft within the United States", the nature of the authorization required from "the appropriate authorities" was a permit according to the aircraft in question "the privilege of taking on or discharging passengers, cargo or mail subject to the right of the state where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable." The Court held that failure to obtain this authorization was not such a breach of a condition as to result in the aircraft being used for a purpose not authorized by Airgo's licence, and that it did not have the effect of invalidating the licence.

As to the submission that "night flying" was excluded from the coverage provided by the policy, the words in the operating certificate "under day Visual Flight Rules only" related exclusively to the rules as to visibility from time to time in force for daytime flights and it followed that conformity with these rules, which was not disputed in the present case, constituted conformity with the operating certificate in that regard, whether the flight was conducted by day or by night. At the time of the accident the aircraft in question was being used under Visual Flight Rules which were "in accordance with the licences issued to the insured by the Air Transport Board" and was accordingly in this regard being used for a purpose within the terms of the policy.

APPEAL from a judgment of the Court of Appeal for Ontario[1], dismissing an appeal from a judgment of Stewart J. Appeal dismissed.

Alastair R. Paterson, Q.C., for the defendant, appellant.

William R. McMurtry, for the plaintiffs, respondents.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal for Ontario[1] dismissing an appeal by Orion Insurance Company from a judgment rendered in

[1] [1966] 1 O.R. 221, 53 D.L.R. (2d) 98.

favour of Robert and Violet Crone by Stewart J. at the trial of an action brought by the respondents pursuant to the provisions of s. 95 of *The Insurance Act,* R.S.O. 1960, c. 190, in respect of an unsatisfied judgment recovered by them against Airgo Limited, the proprietor of a commercial air service which was insured with the appellant under a policy of aircraft liability insurance.

Section 95 of *The Insurance Act* reads as follows:

> Where a person incurs a liability for injury or damages to the person or property of another and is insured against such liability and fails to satisfy a judgment against him in respect of his liability and an execution against him in respect thereof is returned unsatisfied, the person entitled to the damages may recover by action against the insurer the amount of the judgment up to the face value of the policy but subject to the same equities as the insurer would have if the judgment had been satisfied.

Robert and Violet Crone sustained bodily injuries on May 19, 1961, when an aircraft, in which they were passengers and which had been chartered by Robert Crone Pictures Limited from Airgo Limited for a flight to Washington, crashed at night in a wooded area near Elmira in the Commonwealth of Pennsylvania, U.S.A. At the time of the crash the aircraft was being operated by one Leo Brando a servant and agent of Airgo Limited.

In the action brought by Robert Crone, Violet Crone and Robert Crone Pictures Limited against Airgo Limited and its servant Brando, the first two plaintiffs claimed damages for personal injuries resulting from the negligent operation of the aircraft and breach of contract in failing to carry them safely on the chartered trip, and the Robert Crone Company claimed damages for loss of the services of its employees. No appearance was entered by either defendant and on an assessment of damages Mr. Justice Walsh awarded $7,452.93 to Robert Crone, $15,000 to Violet Crone and $15,500 to Crone Pictures Limited. Execution against Airgo Limited in respect of these damages was returned unsatisfied and its servant Brando has left the country.

When the present action was brought before Stewart J. pursuant to s. 95 of *The Insurance Act,* he gave judgment against the insurers for the damages awarded to Mr. and Mrs. Crone in the Airgo action together with interest from the date of the award, but held that the claim by the Crone

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Company was not one for which the statutory action could lie. This latter finding was not made the subject of appeal by the Crone Company either to the Court of Appeal for Ontario or to this Court, and accordingly the sole remaining issue in the present appeal is whether the judgment of Mr. and Mrs. Crone against Airgo Limited is one for which indemnity is provided in the Aircraft Liability Policy issued by the appellant.

The relevant portion of the insuring agreements recited in the policy reads as follows:

> NOW, THEREFORE, IN CONSIDERATION OF the payment of the specified premium total and the Declarations contained herein and subject to the Limits, Exclusions, Terms and Conditions and other provisions of this policy including its endorsements, if any, the Insurer hereby agrees with the Insured, to pay on behalf of the Insured in respect to such Coverages as are specified in paragraph 3 hereof, all sums which the Insured shall become legally obligated to pay as damages resulting from: ... COVERAGE C—Passenger Bodily Injury Liability Bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any passenger, caused by an occurrence and arising out of the ownership, maintenance or use of the aircraft referred to in the Schedule.

The coverage specified in para. 3 of the policy in respect of the aircraft in question specified limits of $100,000 for each person and $300,000 for each occurrence.

The policy in question is made subject to certain exclusions which form a part thereof and include the following:

> This insurance does not apply...
>
> (6) while the Aircraft is (a) used for any purpose other than as stated in Item 6 of the Declarations; (b) operated in flight by other than the pilot or pilots specified in Item 7 of the Declarations; (c) used for instruction unless specified in Item 6 of the Declarations; . . .

The defence advanced by the appellant is, by the terms of its notice of appeal to this Court, limited to the interpretation of Item 6 of the Declarations of the policy which reads as follows:

> Item 6. Purposes. This insurance applies only while the aircraft is used for the following purpose(s).
>
> *Flight Training and Aircraft Rental, in accordance with Licenses issued to the Insured by the Air Transport Board, Private Business and Private Pleasure.*

The italics are my own.

By the terms of s. 15(1) of the *Aeronautics Act*, 1952 R.S.C., c. 2, it is provided that, subject to the approval of

the Minister, the Air Transport Board may issue a license to operate a commercial air service to any person applying therefor, but notwithstanding the issuance of such a license it is stipulated by s. 15(5) that:

> No carrier shall operate a commercial air service unless he holds a valid and subsisting certificate issued to him by the Minister certifying that the holder is adequately equipped and able to conduct a safe operation as an air carrier over the prescribed route or in the prescribed area.

The certificate pursuant to which Airgo Limited was carrying on its operations at the time of the accident was originally issued on August 21, 1959, and at that time had reference only to a license to operate a commercial air service between points within Canada and to recreational flying and aerial advertising from a base at Toronto, Ontario. This certificate was, however, on October 13, 1959, endorsed so as to refer to a license No. 251/59, dated September 15, 1959, which was in force at the time of the accident, by which Airgo Limited was "licensed ... subject to the conditions herein stated to operate a Class 9-4 International Non-Scheduled Charter commercial air service to transport persons and/or goods from a base at Toronto, Ontario." The flight in question was an "International Non-Scheduled Charter commercial air service ..." of the type authorized by this License, one of the conditions of which provides that:

> Prior to conducting an international flight under this Licence, the Licensee must obtain the required authorization from the appropriate authorities of the foreign government concerned.

It is to be noted also that the operating certificate issued to Airgo Limited certified that that company was "adequately equipped and able to conduct a safe operation as an air carrier from a base at Toronto (Island Airport), Ontario with the types of aircraft and under the conditions hereinafter set forth:

> Non-scheduled charter, recreational flying, and aerial advertising commercial air services, using landplanes and seaplanes, under day Visual Flight Rules only."

It is contended on behalf of the appellant that the flight in which the Crones were injured was not one for which indemnity is provided in the policy in question because it

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was not conducted "in accordance with the licences issued to the insured" in that it was an international flight for which no authorization had been obtained from the appropriate authorities contrary to the provisions of Airgo's operating licence and it was a night flight which the company was not authorized to make under the conditions of its operating certificate.

The submission that "night flying" was excluded from the coverage provided by the policy is based entirely on the contention that the words "under day Visual Flight Rules only" as they occur in the condition which forms a part of the operating certificate are to be read as meaning that the certificate was only valid in respect of daytime flights and that an aircraft which was being used at night was therefore not being used for a purpose "in accordance with the licences issued to the insured by the Air Transport Board" as required by Item 6 of the Declarations.

It appears to me, however, that the words "under day Visual Flight Rules only" are to be construed as limiting the use of the insured aircraft to periods when the conditions as to visibility conform to the rules established for daytime flying under the provisions of the Air Regulations and by directions made by the Minister in that behalf. Whether these rules differ from the rules, if any, governing night flying is, as it seems to me, a matter which must depend on the Air Regulations and ministerial direction made pursuant to the *Aeronautics Act* which are from time to time in force. The Visual Flight Rules which appear to have been in force at the time of the flight in question make no distinction between day and night flying. (See Air Regulations 540 and 541 and Air Navigation Order Series 5 No. 3).

In this regard it is admitted in the factum filed on behalf of the appellant that the "Visual Flight Rules apply equally by day and night" and it is further stated that:

> The Appellant has never sought to deny liability under the contract of insurance on the grounds that at the time of the accident the aircraft was being operated in conditions which were below the weather minima for VFR flights. The Appellant's position is that it was a condition of the relevant Operating Certificate No. 1571 that *all* operations of Airgo Limited should be by *day* only and it is common ground that at the time of the accident the aircraft was being operated at *night*.

I am, as I have indicated, of opinion that the words "under day Visual Flight Rules only" relate exclusively to the rules as to visibility from time to time in force for daytime flights and it appears to me to follow that conformity with these rules, which is not disputed in the present case, constitutes conformity with the operating certificate in that regard, whether the flight be conducted by day or by night. I am accordingly of opinion that when conducting the flight in question, Airgo Limited was the holder of a valid and subsisting operating certificate as described in subs. 5 of s. 15 of the *Aeronautics Act* and that at the time of the accident the aircraft in question was being used under Visual Flight Rules which were "in accordance with the licences issued to the insured by the Air Transport Board" and was accordingly in this regard being used for a purpose contemplated in Item 6 of the Declarations.

In support of the contention that the coverage afforded by the policy did not extend to an aircraft conducting an international flight for which the licencee had not obtained "authorization from the appropriate authorities of the foreign government concerned", the appellant tendered the evidence of the Assistant Executive Director of the Aeronautics Board in Washington who produced as an exhibit the Special Regulations governing "navigation of foreign civil aircraft within the United States". From a perusal of this evidence and of the relevant regulations, it appears to me that the nature of the authorization required from "the appropriate authorities" was a permit according to the aircraft in question "the privilege of taking on or discharging passengers, cargo or mail subject to the right of the state where such embarkation or discharge takes place to impose such regulations, conditions or limitations as it may consider desirable. (Regulation 375.42).

By s. 6(*d*) of the *Aeronautics Act* "commercial air service" is defined as meaning "any use of an aircraft in or over Canada for hire or reward" and I am of opinion that "international . . . charter commercial air service" must therefore be treated as meaning "use of the aircraft . . . for hire or reward" which in my view constitutes "aircraft rental" within the meaning of Item 6 of the Declarations which forms a part of the policy and which, as has been

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stated, limits the "purposes" for which the aircraft is insured to "flight training and aircraft rental in accordance with licences issued to the insured . . .".

I do not, however, think that the words "in accordance with" as they are employed in this context are to be construed as requiring strict compliance with all the conditions which are attached to the operating licence issued to the insured, but I am rather of the opinion that they are to be treated as synonymous with "authorized by" and that if the flight is of a kind for which the insured holds a valid and subsisting operating licence it does not cease to be used for one of the purposes for which indemnity is provided in the policy simply because the insured has not complied with all the terms of the conditions which are attached to that licence.

In the present case, as has been indicated, the licence authorizing the insured to operate "international non-scheduled charter commercial air service . . ." was issued subject to the conditions therein stated, but one of those conditions stipulated that "unless otherwise provided herein the licence shall remain in effect until suspended or cancelled". This is to be contrasted with the wording of the Certificate of Airworthiness which was considered in *Survey Aircraft Ltd. v. Stevenson et al*[1]. In that case there appeared above the signature on the certificate the words: "This Certificate is only valid subject to the above compulsory conditions being fulfilled and until the date shown on page 4 hereof."

There are two conditions in the operating licence in the present case breach of which would, in my opinion, result in the aircraft being used for a purpose not authorized by the licence and therefore not covered by the policy. One of these is the condition that the licencee "*shall not operate* unless he holds a valid and subsisting operating certificate . . .", and the other prohibits the licencee from undertaking any forms of operation except within the limits of continental North America and the territorial waters thereof.

I am, however, of opinion that failure to obtain "the required authorization from the appropriate authorities of the foreign government concerned" is not such a breach of a condition as to result in the aircraft being used for a

[1] (1962), 30 D.L.R. (2d) 539, affirmed [1962] S.C.R. 555.

purpose not authorized by the licence, and that it does not have the effect of invalidating the licence.

I am accordingly of opinion that the insured aircraft at the time of the accident in question was being used for "international ... charter commercial air service" for which the insured held a valid and subsisting licence and I am reinforced in this view by a consideration of s. 15(10) and (11) of the *Aeronautics Act* which provides:

> (10) Where in the opinion of the Board an air carrier has violated any of the conditions attached to his licence, the Board may cancel or suspend the licence.
>
> (11) Any air carrier whose licence has been so cancelled or suspended may appeal to the Minister.

For these reasons I am of opinion that the aircraft was being used for one of the purposes for which indemnity was provided in the policy and that under the circumstances and by virtue of s. 95 of *The Insurance Act*, Mr. and Mrs. Crone were entitled to recover from the appellant the amount of the judgments which they obtained against Airgo Limited.

I am in agreement with Mr. Justice Stewart and with the Court of Appeal in awarding to the respondents interest on the original judgment obtained by them in their action against Airgo Limited.

Having regard to all the above I would dismiss the appeal with costs.

It should perhaps be mentioned that although the judgment in favour of Mr. Crone was for a sum of less than $10,000, it was agreed by all concerned that leave to appeal against this judgment should be granted.

Appeal dismissed with costs.

Solicitors for the defendant, appellant: Manning, Bruce, Paterson & Ridout, Toronto.

Solicitors for the plaintiffs, respondents: Bassel, Sullivan, Holland & Lawson, Toronto.