

2. Orders the defendant to pay the costs, including those of the interveners and the sums due to the witnesses and technical experts.

O'Keeffe

Bosco

Koopmans

Delivered in open court in Luxembourg on 22 September 1983.

J. A. Pompe

Deputy Registrar

A. O'Keeffe

President of the First Chamber

OPINION OF ADVOCATE GENERAL SIR GORDON SLYNN
DELIVERED ON 14 JULY 1983

My Lords,

Under Article 73 of the Staff Regulations, officials of the Community are covered against the risks of accident, subject to rules made thereunder. Article 4 of those Rules signed on 22 December 1976 excludes from cover accidents resulting from acts which are "manifestly reckless".

The Community institutions insured against the risks covered with a group of insurance companies under a policy which provides that any dispute arising out of the performance of the contract may be submitted to the Court of Justice.

Mr Gerrit van Kasteel, an official of the Commission, was killed in a flying accident on 29 April 1978. His widow, on her own behalf and on behalf of their five minor children, together with one other child, made a claim against the Commission, which the latter passed on to the insurers. The latter contended that the accident was due to manifestly reckless acts of the deceased, so that they were not liable under the policy. Mrs van Kasteel instituted proceedings against the Commission, which in turn brought this action under Article 181 of the EEC Treaty against Royale Belge as a representative of the consortium of

insurers, the widow's action being stayed pending the decision in the present case.

It is in my opinion for the Commission to show that the death arose from an accident; that they have done. It is for the insurers to establish the exemption, that is that the accident was due to "manifestly reckless acts" ("actes notoirement téméraires" in the French text). That is a question for the Court and not for the experts and the sole issue in the case is whether this accident was due to "manifestly reckless acts". Submissions have been made as to the meaning of "manifestly reckless acts" or "actes notoirement téméraires" and reference has been made to the level of fault and the nature of the act which respectively can amount to "faute lourde", "faute inexcusable", "dol", "faute équivalent à dol", "wilful misconduct" and the definition in the Hague Protocol of 28 September 1955 to the Warsaw Convention of 12 October 1929. Not least because of the different meanings which different jurisdictions may give to these phrases, I do not consider that any of them should be adopted as the equivalent of "manifestly reckless acts". It is right, of course, to look at the different language versions of the article, though there seem to be differences of emphasis on what are described as the objective and the subjective aspects of the matter.

as in the Warsaw Convention. It was submitted that the term refers only to acts which are "obviously foolhardy, committed with knowledge of the risks involved and a willingness to take on those risks", or put another way, that "there must be a deliberate breach of duty or a deliberate intentional error with full awareness of the danger". On page 11 of the Defence, on the other hand, it is said by the insurers that there is a manifestly reckless act where a person, after evaluating his chances, pursues a course of action with such audacity that he fails to see ahead and he embraces the dangers to which he exposes himself and of which he must have been aware. At the hearing, counsel for the defendants defined such an act as "a daring and abnormally imprudent act, an act basically which creates a new risk".

"Manifestly reckless acts" are listed with many other activities which lead to accidents which are not covered by the policy. Because of what seems to me to be a widely diverging level of risk in the various acts which are specifically excluded I would not apply the rules of interpretation *cognoscere a sociis* in order to extend the concept of a manifestly reckless act. In my opinion the phrase must be construed on its own in the light of the objects of the Staff Rules and Regulations.

The Commission puts the test high, not least since this is an exclusion of a right otherwise conferred, rather than the removal of an exemption from liability,

It seems to me, without attempting an exhaustive definition, that in a situation like the present, the question is whether in the light of what he knew or plainly

ought to have realized, the official did an act which was obviously foolhardy, or failed to do an act when it was obviously foolhardy not to act, with the likelihood of grave consequences. He must have known or he ought to have appreciated the foolhardiness and the likelihood of grave consequences.

On the day of the accident Mr van Kasteel, with two passengers, was flying a hired Piper Cherokee aircraft. He and two colleagues, Mr Turli and Mr Chabert, who also were flying hired light aircraft, were travelling from Brussels to Greece. They arrived at Lyons-Bron Airport at about 13.45 local time without incident. After lunch, refuelling and a briefing by the meteorological service, they left for Cannes intending to meet there. Mr van Kasteel took off first at about 16.30, followed by Mr Turli. Mr Chabert took off some 30 minutes after Mr van Kasteel. The latter flew over Montélimar, from there over Carpentras and subsequently south. He then flew south-east towards St Tropez. At about or possibly a little before 17.00 hours, his aircraft crashed into the side of Mont Sainte-Victoire at a height of 960 metres and he and his two passengers were killed instantly.

An investigation was held by Mr Grimaud, a principal engineer and the head of the External Aerodromes Division of the Aeronautical District of Provence. He concluded that the initial cause of the accident was the pilot's decision to take "the direct route" from Lyons to Cannes. A further cause was that the pilot had not remained in visual

meteorological conditions; and the *causa causans* was that he had descended in instrument meteorological conditions when he did not know the cloud base, in an area where there were relatively high peaks.

Although this single-engined aircraft had instruments which showed, *inter alia*, the height of the aircraft and the angle of the plane to the horizon, it is common ground that the aircraft was not fully equipped for instrument flying, and that neither the aircraft nor Mr van Kasteel under his pilot's licence were authorized to fly other than in visual conditions by day.

The first point taken by the insurers was that Mr van Kasteel acted in a manifestly reckless way when he took the route followed, in the light of information given to him at Lyons, that the weather was going to be very bad and that some pilots had been forced to return from Montélimar, particularly as his two colleagues decided not to follow that route. As it was put in the Defence — "he wanted to show that he was stronger and better" than they. On the material initially available it seems that there was doubt as to the wisdom of taking the particular route. A summary dated 3 May 1978 of information said to have been given orally to pilots flying to Cannes (and not specifically related to the three pilots in question) did suggest a perturbation with heavy rain beyond Montélimar, a strong and irregular south wind and very strong turbulence. Altostratus at 2 400 metres covered by 4 to 6/8 stratocumulus between 600 and 1 000 metres was forecast and reference

is made in the document to pilots who had been obliged to turn back above Montélimar because of the wind and turbulence. Moreover, the police investigation report recorded (as did Mr Turli's own statement) that Mr Turli had thought it wise to follow the Rhône Valley, and he had landed at Toulon, Mr Chabert flying direct to Marseilles.

15 kilometres on the ground, subject to a reduction to 6-10 kilometres in rain. The conditions met by Mr Turli over Montélimar were not in any event as is said to have been forecast in the summary dated 3 May. Finally, since a flight plan was not obligatory for this sector of the flight, no adverse inferences are to be drawn from the fact that Mr van Kasteel did not have one.

The Court, however, had the advantage of hearing Mr Turli and Mr Chabert, together with expert witnesses. It emerged, in my view clearly, that the oral briefing given to Mr Turli and Mr Chabert (at which Mr van Kasteel was present) did not give them a warning or even the impression that it was unwise to follow the route over Provence, even less that it was "not flyable". Mr Turli in fact took the Rhône Valley route when he found that he had difficulty in contacting Montélimar by radio, and because he did not like flying in turbulence, even such turbulence as might well be acceptable to other pilots. Mr Chabert took the route which he had taken previously, which was visually more interesting for his passengers, and his eventual decision to land at Marseilles arose from the fact that his passengers suffered from airsickness. It also emerged that the route Montélimar—Carpentras—St Tropez (which is not strictly the direct route) is one recognized by French aviation authorities for the flight from Lyons to Cannes. Moreover, it appeared from the technical evidence given that disturbance is likely below the strato-cumulus and above the altostratus, so that even on the information given in the summary dated 3 May, a calm corridor between the two layers of cloud was indicated. Further, visibility was said to be between 10 and

In the light of this evidence, not least when two of the experts agreed that, on what he was told, it was not unreasonable for him "to go to have a look", the insurers through their counsel, in my opinion rightly, accepted that the decision to take this route could not constitute a manifestly reckless act.

The second main point taken was that Mr van Kasteel was manifestly reckless when he deliberately reduced height in order to fly below the clouds, at a time when he could not see, and when he was in a mountainous area. There is no doubt that at 16.52 hours, when he made his last radio communication, Mr van Kasteel was at 1 300 metres and the aircraft crashed at 960 metres. The experts, however, accepted that, on the information available, it could not be said confidently that he had deliberately sought to fly below the clouds. The loss

of height could be due to other causes such as sudden wind which, even if not proved, could not be ruled out. In view of the 90 degree angle of the aircraft to the line of flight at the time of impact, it was equally possible that Mr van Kasteel was seeking carefully to do what the defendants said he should have done, namely to turn to get out of cloud. Once again the insurers, despite the inference they had initially sought to draw, recognized that decisions in the air may have to be taken quickly and very properly accepted that it was not known that he had decided to reduce height so that this allegation could not succeed.

There remained the final allegation that it was manifestly reckless, deliberately to continue the route through cloud when he could not see and when there was turbulence.

The report of the air transport police dated 10 May 1978 as to weather on 29 April shows that the general meteorological situation in the area was disturbed; that the top of the hilly region was covered with light rain and moderate turbulence linked with a strong south-east wind of 30 to 40 knots between 500 and 1 000 metres. The cloud in the area consisted of stratocumulus and cumulus between 6 and 8/8 at a base of 800 to 1 000 metres, with a ceiling of between 2 500 and 3 500 metres. Mr Thouvenot, one of the experts, was some 60 kilometres away over the Cévennes, and saw black clouds in the direction of Mr van Kasteel's route. Mr Chabert saw black clouds when he was over Carpentras and he put them at 1 000 metres, but that seems to have been some 30 minutes or so later than Mr van Kasteel was at Carpentras.

The insurer's case is thus broadly that Mr van Kasteel was warned of cloud and bad weather; he should not, therefore, have been surprised by bad weather, but have anticipated it and changed his route or landed once he saw the bad weather and before he got into it. Instead he went into it consciously and deliberately: that was a manifestly reckless act.

Clearly there was a warning that the weather might deteriorate, but not such that he could not reasonably go on to see. Clearly also in parts of the region there was cloud, wind and turbulence, though the distance of Mr Thouvenot in space and Mr Chabert both in space and time from the scene of the accident call for caution in the assessment of their evidence as to what Mr van Kasteel himself met. The most precise evidence is probably that of the last radio contact between Mr van Kasteel and the control tower at Marseilles at 16.52 hours.

Marseilles: "You have to maintain good visibility."

Mr van Kasteel: "Affirmative, sir, but I am in a shower."

Marseilles: "Have you the ground in sight?"

Mr van Kasteel: "Sometimes, yes."

Some minutes later came the crash.

If Mr van Kasteel had deliberately, without adequate instruments and qualifications, flown into thick cloud, rain and wind, that, particularly for someone of 300 hours flying experience, might have constituted manifestly reckless conduct in the absence of any exonerating explanation.

I am not, however, satisfied that this is what happened. It is obviously not possible to read too much into the short exchange between Marseilles and Mr van Kasteel at the end of the flight. It does seem to me, however, at least equally possible that, in attempting to stay in the corridor between the layers of cloud, he had for the most part had the ground in sight; he then ran into a shower and intermittent cloud. It is accepted that in some circumstances the best way of getting out of a shower is to fly straight on through it. Mr van Kasteel recognized the need to maintain good visibility. The defendants admit that it is

not known how long he was in dense cloud, if indeed he was. Moreover the air traffic control did not find it necessary to tell him to leave the area at once, but only to maintain visibility.

The angle of the aircraft to the line of flight suggests that in the presence of cloud he sought to turn and to avoid it. There is nothing really to my mind to support the suggestion that prior to this time he should have sought out an airport where he could land.

It may well be that in his assessment of the conditions he was mistaken and that he was suddenly in a situation which led to the disaster. On what is known it does not seem to me that in doing what he did, he was guilty of manifestly reckless acts. I reach this conclusion on the standard of recklessness I have suggested above, but equally on the basis of the definitions put forward respectively by the parties to the action.

Accordingly, in my view, the Commission's action should succeed. The defendants acting in their own name and on behalf of the other companies, parties to the insurance policy of 28 January 1977, should pay to the Commission a sum equal to that for which the Commission is liable to Mrs van Kasteel and their children under Article 73 of the Staff Regulations. It seems to me appropriate in this case that the insurers should also pay interest on the amount due at the rate of 8% per annum, which of course should be paid by the Commission to the claimants. Interest should run from a date two months after the claim was initially made to the Commission.

In my opinion the costs of these proceedings should be borne by the defendants.