Trade&Transport
CaseNote

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Cape York Airlines Pty Ltd v QBE Insurance (Australia) Ltd [2010] QSC 313

In *Cape York Airlines Pty Ltd v QBE Insurance (Australia) Ltd* QSC 313, the plaintiff had a policy of insurance in respect of an aircraft with the defendant insurer. The plaintiff made a claim following the ditching of the aircraft. Under the terms of the policy, the insurer had the option to pay for, repair, or pay for the repair of, accidental loss of or damage to the aircraft. However, the plaintiff was not convinced that a repair would return the aircraft to its pre-accident condition and sought that the insurer pay the amount insured under the policy. This case raises the issue of what amounts to an election where there are a suite of options available to an insurer under a policy of insurance.

The facts

On 8 February 2004, a Cessna 208 Caravan aircraft (**Aircraft**) belonging to Cape York Airlines Pty Ltd (**Plaintiff**) suffered engine failure and ditched in the sea about 120 metres off Green Island, near Cairns. The Aircraft was recovered from the sea some 42 hours later. During that time, the Aircraft, which was partially submerged, underwent periods of immersion in salt water by reason of tidal flows.

The Plaintiff held an aircraft insurance policy (**Policy**) with QBE Insurance (Australia) Ltd (**Defendant**), with the Aircraft insured for $1.8M on an agreed value basis. The Policy also provided cover for loss of the Aircraft's use as a result of an accident, being an allowance of $1,500 per day in excess of 14 days for 90 days. The Plaintiff made a claim under the Policy following the accident.

Under the Policy, the Defendant had the option to pay for, repair, or pay for the repair of, accidental loss of or damage to the Aircraft. The Defendant was of the view that the Aircraft was repairable and not a constructive total loss. The Defendant had obtained a repair estimate from Aircraft Structures International Corp (**ASIC**), a repairer in the USA which specialised in this particular model of aircraft, amounting to US$691,178 (equivalent to approximately A$895,000 at that time). This repair estimate was later revised to US$771,443 (equivalent to approximately A$1,056,772 at that time) upon advice from the Plaintiff that the Aircraft was different from a regular Cessna Caravan and fitted with additional equipment.

The Plaintiff was not prepared to accept the Defendant's proposal for repair of the Aircraft. The Plaintiff had consulted Cessna Pacific, a company of the aircraft manufacturer, which expressed concerns about the possibility of putting the Aircraft back in service after its long period of salt water immersion. As a consequence, the Plaintiff had doubts about whether the Aircraft would be returnable to service in accordance with Civil Aviation Safety Authority (**CASA**) standards following the repair. Further, the Plaintiff was

concerned about the possibility of future liability in relation to the operation of the Aircraft, and its resale value after the repair.

The Defendant obtained another repair estimate from Hawker Pacific, which estimated the repair at A$1,471,407. However, the Plaintiff was still not prepared to accept the Defendant's repair proposal and commenced proceedings in the Supreme Court of Queensland.

The issue

The issue was whether the Defendant had made an election under the Policy to repair the Aircraft.

The Plaintiff submitted that:

- under the Policy, the Defendant had three options, namely to pay for, repair, or pay for the repair of, accidental loss of or damage to the Aircraft, up to an amount not exceeding the agreed value of $1.8M
- choosing between these options required the Defendant to make a clear and unequivocal election between these different contractual rights within a reasonable time of the claim having been made, and
- the Defendant made no election within a reasonable time, or at all, and as a consequence the Defendant was required to pay the agreed value of $1.8M.

The Defendant submitted that it exercised the election under the Policy to repair the Aircraft. By that election, the Policy became a contract to repair the Aircraft. The Plaintiff was obliged to make the Aircraft available to be repaired pursuant to the contract, but refused to do so and therefore repudiated the contract. The consequence being, it was argued, that the Defendant had no further liability in respect of the claim. The Defendant relied upon its letters of 26 February 2004, 22 March 2004, and 24 March 2004 in asserting that an election had been made and communicated to the Plaintiff.

The decision

Daubney J held that no election to repair the Aircraft was made by the Defendant, and certainly none was made within a reasonable time after the claim was made. The consequence was that the Defendant was liable to indemnify the Plaintiff for the agreed value of the Aircraft under the Policy.

Daubney J relied upon the following principles:

- the words or conduct ordinarily required to constitute an election must be unequivocal[1]
- an election must be communicated to the other party. However, an election may be imputed by an act of the electing party irrespective of his actual intention or determination to do so[2], and
- an election must be communicated within a reasonable time[3].

1 Sargent v ASL Developments Ltd (1974) 131 CLR 634
2 Champtaloup v Thomas [1976] 2 NSWLR 264
3 Lake v Hartford Fire Insurance Co Ltd [1966] WAR 161

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Daubney J observed that a party purporting to make an election can only make a choice between the suite of options available under the relevant contract. Where a suite of options is available, the electing party is plainly limited in its range of choices. A purported election by it of an option which is not within the available range is no election at all.

In this case, the suite of options available to the Defendant under the Policy was to pay for, repair, or pay for the repair of, accidental loss of or damage to the Aircraft. In the Defendant's letters of 26 February 2004 and 22 March 2004, the Defendant wrote to the Plaintiff requesting that they sign an "authority to repair" the Aircraft in accordance with the repair estimate obtained from ASIC, and in doing so, attempted to limit their liability to the amount specified in the repair estimate. According to Daubney J, these letters did not constitute a clear and unequivocal notice of the Defendant's election to repair the Aircraft. Rather, these letters represented a request by the Defendant for the Plaintiff to instruct ASIC to proceed with the repairs to the Aircraft as per their estimate only.

In regards to the letter of 24 March 2004, Daubney J held that the letter contained nothing more than an offer which mandated repair of the Aircraft in accordance with the ASIC repair estimate, and a response to queries raised by the Plaintiff. The letter was not a clear and unequivocal election of the option to repair under the Policy. At best, it was an attempt to persuade the Plaintiff to accept the offer to repair the Aircraft pursuant to the ASIC repair estimate.

Daubney J further agreed with the Plaintiff's submission that if the Defendant had made an election to repair, then it did not need to go through the process of providing the Plaintiff with the ASIC estimate at all – it merely had to effect the repairs. The Defendant would have been entitled to take and reinstate the Aircraft and the Plaintiff could not legally prevent it from doing so. There was no evidence of any unconditional demand upon the Plaintiff to deliver up the Aircraft, nor any refusal by the Plaintiff to do so. It follows that there was no election by the Defendant to repair the Aircraft.

Damages

Daubney J entered judgment for the Plaintiff in the sum of $1,942,367.88, representing $1.8M for the agreed value of the Aircraft, $7,367.88 for recovery expenses, and $135,000 for loss of use of the Aircraft.

In addition, interest to the date of judgement was also awarded in an amount of $1,229,519, bringing the total award in favour of the Plaintiff to $3,171,886.88.

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