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THE "MIEKE": A WARNING TO UNDERWRITERS

ENGLISH LAW, SOUTH AFRICAN JURISDICTION

Lloyds & Others v Classic Sailing (250/09) [2010] ZASCA 89 (31 May 2010)

Photograph taken of the sinking "MIEKE" by one of her crew

This recent case that came before the South African Supreme Court of Appeal ("SCA") offers a stark warning to underwriters writing business in South Africa and relying upon English Law as the choice of law within the contract for insurance.

The judgment, as will have been noted is that of the Supreme Court, departs from established and settled law clearly stated by Dicey and Morris on The Conflicts of Law.

It states with reference to *lex fori* as:

"All matters of procedure are governed by the domestic law of the country to which the court wherein any legal proceedings are taken belongs".

"While procedure is governed by lex fori*, matters of substance are governed by the law to which the court is directed by its choice of law rule* ***[lex causae]****.... The difficulty in applying this rule lies in discriminating between rules of procedure and rules of substance".*

The case involved a motorised fishing yacht called the MY "MIEKE" that was later converted into a 12 berth luxury charter yacht in 2003. On the 15th September 2005 the "MIEKE" sailed from Vilanculos off the Mozambican coast with only the crew on board, three days later "MIEKE" sank approximately 58 nautical miles offshore. All the crew safely reached shore on a rubber dinghy.

Insurance was issued for the "MIEKE" under a cover note for a period of 12 months from the 1st December 2004; the interest insured was stated to be "Hull Materials etc, Machinery Outfit etc, and everything connected therewith nothing excluded". Choice of Law and Jurisdictions was "English Law and South African Jurisdiction".

In defending the claim Lloyds relied on a number of defences including those set out under section 18, section 20, and section 41 of the English "Marine Insurance Act 1906" (the "MIA 1906").

Section 18 of the MIA 1906 allows an insurer to avoid liability under the contract if the assured fails to disclose a material circumstance prior to the commencement of a policy. Underwriters alleged that when the vessel was converted the instructions from the naval architect as to the addition of extra concrete had not been followed properly and produced witness evidence form the person responsible for pouring the ballast concrete into the vessel.

Lloyd's underwriters argued that non-disclosure of these facts allowed them to avoid liability. Under s.18 MIA 1906 the test for determining what constitutes a material circumstance is "*every circumstance…that would influence the judgment of a prudent insurer in fixing the premium or determining whether he will take the risk".*

Against the evidence the Court found that the amount of concrete put in the ballast was accurate and that Owners had followed the naval architects' plans; it disbelieved the evidence from the person who actually poured the concrete.

Underwriters further relied upon section 20 of the Marine Insurance Act which provides: "*every material representation made by the assured or his agent to the insurer during the negotiations for the contract and before the contract is concluded must be true. If it be untrue the insurer may avoid the contract."*

Underwriters submitted, with supporting cogent evidence, that 3 vital documents from the local maritime authority, SAMSA, clearly showing that the Master wasn't qualified, were excluded from the presentation shown to them. Astonishingly the Court held that it should have been apparent from the disclosure made that the Master, whose qualifications were in dispute, would continue to skipper the vessel without the proper qualifications.

Underwriters also relied on s.41 of MIA 1906 which provides that "*there is an implied warranty that the adventure insured is a lawful one… and that the adventure shall be carried out in a lawful manner".* They argued that in this case the skipper did not hold the proper certificates and that the correct stability book was not carried on board as required by other South African Acts, and as a result the vessel was engaged on an unlawful adventure when she sank.

All of these provisions of the Marine Insurance Act 1906 conflicted with the South African "Short –Term Insurance Act 1998" (the "STIA") which provided wholly different tests in favour of the assured with regard to the defences raised by underwriters. The STIA is clearly a piece of consumer legislation designed to protect the man on the street and does not appear on the face of it to be directed to commercial parties with equal bargaining power. Nevertheless it was held to apply in this case.

Section 53 of STIA provided that a material non-disclosure occurred where "*a reasonable, prudent person would consider that the particular information… should have been correctly disclosed".* The judgment noted that this provision "*is designed to protect assured who are*

ignorant, careless or uneducated from unscrupulous insurer", this is in stark contrast to the "*prudent insurer"* test under the English Act.

Section 54(1) of the STIA stated that a "*policy shall not be void merely because a provision of law… has been contravened or not complied with".*

These provisions of the STIA had the effect of placing the South African assured in a much better position than it would have been had the matter been decided under English Law, as contracted for.

An argument ensued as to the applicability of South African legislation to a contract in which the parties had chosen the applicable law as English law. The South African Court of Appeal ("SCA") reasoned that because of the effect of the sections of the STIA it should not be open to the parties to contract out of the application of the provisions of that statute by choosing another system of law to govern their contract. The Court went further and held that an assured would not be able to waiver the benefits of these provisions because it would be contrary to public policy and interest and equally therefore, it cannot contract out of the benefits afforded.

Ultimately it was held that the STIA, to the extent that it is inconsistent with the MIA 1906, must apply in favour of the assured despite the two commercial parties' contractual choice of English Law as the applicable law. The reasoning of the SCA would appear to be flawed.

Underwriters had also argued that the vessel had not sunk as a result of an assured peril. The assured had advanced two alternative theories as to the sinking of the vessel in Court. One of these involved the vessel being holed forward by a sharp edged object possibly a semi-submersed container. This argument was pursued at first instance and then dropped. The alternative argument favoured by the judge at first instance and by the Appeal Court judges was that the loss was caused by a latent defect in the stern of the vessel. It involved a doubler plate around the exhaust of the vessel falling out and causing the loss. In so finding, the Court discounted submissions from underwriters that water ingress must have come from the forward part of the vessel and that with an opening of that size (the gap left by the doubler plate section) the vessel would have sunk much more quickly than she actually did.

Nowhere in the appeal judgement is there any reference to the principles set out in the "POPI M" [1985] 2 LLR 1 (HL) which held that under English law the burden of proving, on a balance of probabilities, that the loss was occasioned by a peril insured against, remains throughout on the assured. The effect of the "MIEKE" judgement is to cast an evidential burden on underwriters to show the existence of an alternative uninsured peril which may have caused the loss. In other words, the practical effect of the judgement is that insurance against "specified perils" becomes "all risks" insurance.

This case stands as a severe warning to underwriters providing cover to an assured using English law within this jurisdiction and the pitfalls which may be encountered. Defences regularly relied upon by the London insurance market under English law were completely undermined by the approach taken by the South African Courts.

The Court's decision to apply domestic law rather than apply the law of the contract is of serious concern. In the circumstances of this case and in view of the judgment being handed down by the SCA it would appear necessary to ensure that both the proper law and jurisdiction of the contract is that of England and Wales.

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