IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

A.No.108/81

1649

BETWEEN OPOSSUM EXPORTS LIMITED
a duly incorporated company having its registered office at Christchurch and carrying on business there and elsewhere in New Zealand as an exporter of opossum skins and game products

Plaintiff

A N D AVIATION AND GENERAL (UNDERWRITING AGENTS) PTY LIMITED
a company incorporated in New South Wales and having its registered office at 127 Walker Street, North Sydney, Australia and carrying on business there and in New Zealand as insurers

Defendant

A.No.222/82
(formerly Wellington Registry A.57/81)

BETWEEN UDC FINANCE LIMITED

Plaintiff

A N D AVIATION AND GENERAL (UNDERWRITING AGENTS) PTY LIMITED

First Defendant

A N D THE NATIONAL INSURANCE COMPANY OF NEW ZEALAND LIMITED; ASSURANCE COMPAGNIET BALTICA-SKANDANAVIA AKTIESELSKAB; INSURANCE COMPANY OF NORTH AMERICA (AUSTRALIA) LIMITED; ALLIANZ INSURANCE COMPANY LIMITED; SWITZERLAND GENERAL INSURANCE COMPANY LIMITED

Second Defendants

Hearing: 28 May 1984 - 31 May 1984

Counsel: C.B. Atkinson Q.C. and T. Sissons for Opossum Exports Limited
H.S. Hancock for UDC Finance Limited
R. Bernard and L.J. Taylor for Defendants

Judgment: 21 November 1984

JUDGMENT OF PRICHARD, J.

These two actions, heard together, relate to an ill-fated enterprise embarked upon in 1980 by Opossum Exports Limited, a Christchurch based company of which Mr Bushby is the principal shareholder and managing director.

Prior to 1980 Opossum Exports Limited was engaged solely in the business of exporting opossum skins. In 1979, Mr Bushby determined that his company should move into the lucrative but hazardous business of capturing live deer in the Nelson District, using a helicopter. To this end the company obtained the required licences and purchased, from a source in the U.S.A., a used Hughes 500C helicopter. This machine cost $184,000 of which amount the sum of $70,000 was borrowed from U.D.C. Finance Limited. The helicopter was assembled and tested in Auckland and was ready to fly by 24 January 1980.

Mr Bushby is a guarantor of his company's liability to U.D.C.

Opossum Exports insured the helicopter for $180,000 with Aviation and General (Underwriting Agents) Pty Ltd. Mr Bushby arranged the policy through brokers, Marsh McLennan Fenwick Ltd, dealing in particular with Mr Harrison of that company.

The policy was endorsed with a "breach of warranty" endorsement the effect of which is to afford insurance cover to U.D.C. as "lienholder" to the extent of the amount from time to time owing by Opossum Exports to U.D.C. The endorsement provides that the insurance shall not be invalidated as regards the interest of the lienholder by any act or neglect of the insured.

On 8 March 1980, in the course of an early attempt at deer recovery, the helicopter met with an accident. The pilot got too close to a deer which was trying to avoid capture. The deer collided with the tail rotor. The helicopter went out of control and crashed. The damage was so extensive that only a few parts of the machine could be salvaged.

The U.D.C. loan was repayable with interest at 20.5% by 36 monthly instalments, first payment 20 February 1980. Opossum Exports Limited has paid the instalments up to

and including the instalment due 30 May 1980. The amount outstanding (with interest to 28 February 1983) is $78,087.21.

Action A.222/82, (Christchurch Registry) was originally commenced in Wellington on 23 March 1981 as A.57/81. The proceedings were transferred to the Christchurch Registry on 13 September 1982. In Action A222/82 U.D.C. claims to recover from the First Defendant, Aviation and General, the amount owing under its loan to Opossum Exports Limited as at 8 March 1980 (the date of the helicopter accident) plus interest to date of judgment. The Second Defendants in A.222/82 are the insurance companies named in the policy as principal insurers.

Action A.108/81 was commenced on 4 June 1981. Opossum Exports Limited claims to recover from Aviation and General the full amount of the loss less policy excess for "rotors in motion" and salvage. The claim is for $138,841.30 plus interest, as follows:-

Value of helicopter		$180,00.00
Less recovery for -		
(a) engine	$21,000.00	
(b) airframe	6,000.00	27,000.00
		$153,000.00
Less rotors in motion excess		18,000.00
		$135,000.00

Brought forward	$135,000.00
Salvage and storage expenses	2,239.00
Recovery of wreck	1,602.30
	$138,841.30

Plus interest on $138,841.30 at 11% from 8.3.80 to date of judgment or payment.

Plus further interest on $68,988.58 at 9.5% from 8.3.80 to date of payment or judgment. ($68,988.5is the amount owing to UDC as at the date of the accident: the additional 9.5% is classed as damages as being the difference between interest at 11% and interest at 20.5% - the rate payable to UDC.)

A third action, A.108/83, was commenced on 4 April 1983. U.D.C. claimed to recover from Opossum Exports Limited as principal debtor and from Mr Bushby as guarantor the amount outstanding in respect of the $70,000 loan. The claim is for $78,087.21 plus interest from 28 February 1983.

During the course of the trial, the parties to A.108/83 effected a settlement, evidenced by Terms of Settlement dated 28 May 1984. Opossum Exports Ltd and Mr Bushby jointly and severally admitted liability to U.D.C. for the sum of $75,000 plus interest at 12% per annum, undertook to pay the amount by monthly instalments, and executed a confession of judgment. Opossum Exports Ltd further agreed, as a term of the settlement, to grant to U.D.C. a lien over the net proceeds of Action A.108/81. U.D.C. agreed to accept these terms in full satisfaction of all its claims against Opossum Exports Ltd and Mr Bushby.

The settlement between Opossum Exports Ltd and U.D.C. was of concern to Aviation and General as it was apprehended that the settlement deprived or partially deprived Aviation and General of its rights of subrogation in respect of any amount which it should be adjudged liable to pay under the breach of warranty endorsement. In the circumstances I reserved the question whether the Defendants in A.222/82 should have leave to file an amended statement of defence alleging, inter alia, that by settling A.108/83 U.D.C. is in breach of its duty to the insurers not to prejudice the insurer's rights of subrogation (expressly provided for in the breach of warranty endorsement) and to counterclaim against U.D.C. for any sum in respect of which the insurers are held to be liable to U.D.C.

Aviation and General seeks to avoid liability (whether to Opossum Exports Ltd or to U.D.C.) on the ground that it was induced to issue the policy by material misrepresentations and non-disclosures on the part of Mr Bushby, when he arranged the insurance on behalf of Opossum Exports Ltd.

Before it becomes necessary to look at the consequences of the settlement of A.108/83, there are two questions to be answered.

The first is whether, as between Opossum Exports Ltd and the insurer, the policy is invalidated by misrepresentations made by Mr Bushby either in the proposal or orally to Mr Harrison - who, in terms of s.10, of the Insurance Law Reform Act 1977 is deemed to be the agent of the insurer.

The second is whether, in the event that it is found that the policy is invalid as between Opossum Exports Limited and Aviation and General, U.D.C. can nevertheless recover from the insurers in reliance on the "breach of warranty" endorsement.

Aviation and General contends that the proposal form signed by Mr Bushby on behalf of Opossum Exports Limited contained a material misrepresentation as to the experience of the pilot who was to fly the helicopter. The form, which is dated 24 January 1980 nominates "W. Lusty" as the pilot who will operate the aircraft during the policy period and specifies the pilot's flying experience as follows:-

"Hours all aircraft"	1,COO
"Hours this type"	700.

The proposal contains the usual provision to the effect that the proposal and the answers given shall be the basis of and incorporated in the contract of insurance.

Apart from the alleged misrepresentation as to "pilot hours" in the proposal, the insurers allege that Mr Bushby orally represented to Mr Harrison that Mr Lusty had two years experience flying in live deer recovery operations: that Mr Bushby did not disclose to the insurers that at the date of the proposal Mr Lusty had never flown a Hughes 500C helicopter and had no type rating for that helicopter.

It is not disputed that "pilot hours" are misrepresented in the proposal.

The evidence is that at the date of the proposal Mr Lusty's helicopter experience was limited to flying a Bell 47, which is a very different machine from a Hughes 500C. So that, if "hours this type" means hours flying a Hughes 500C, the fact is that Mr Lusty had never flown that type of helicoptrr at the date of the proposal. The Bell 47 has a piston engine and is comparatively unsophisticated: the Hughes 500C has a turbine engine and hydraulically assisted controls. Mr Lusty said in evidence that the two machines handle differently and that it takes a number of hours to get used to each machine. On the other hand, if "hours this type" is meant to refer to hours flying helicopters of any sort, the fact is that Mr Lusty's hours of flying helicopters (all in a Bell 47) were only 116.

As to the alleged oral representations, except for a short period between 15 December 1979 and 17 January 1980, Mr Lusty had never done any deer recovery work in his life. At the date of the proposal Mr Lusty held a commercial pilot's licence with a rating certificate for the Bell 47 helicopter but no type rating for the Hughes 500C.

Mr Bushby gave in evidence an elaborate explanation of how he came to represent that Mr Lusty had 700 hours of helicopter flying. He said that the original source of his misinformation was a builder, Mr Whiting, who was engaged in building a garage for Mr Bushby and who was a friend of Mr Lusty's. It was through the good offices of Mr Whiting that Mr Bushby came to select Mr Lusty to be the pilot of his company's helicopter. It was Mr Bushby's evidence that in September 1979 Mr Whiting told him that Mr Lusty then had 800 hours total flying time, 600 of which were in "choppers". Mr Bushby said that when he came to supply the information for the proposal form he used the hours given to him by Mr Whiting as a basis for calculating that, at the date of the proposal, Mr Lusty would have completed about 950 hours of flying, of which 728 would be on helicopters. He understood "hours this type" to mean hours flying helicopters of any kind. He says that he pointed out to Mr Harrison, that Mr Lusty had no rating for the Hughes 500 and that he was unsure of Mr Lusty's exact helicopter hours; but, he says, Mr Harrison

led him to believe that, although the pilot's total flying hours were important, his helicopter hours were unimportant -"purely incidental." So, to be on the safe side, Mr Bushby says he rounded off his calculation of 728 hours helicopter flying to 700.

Mr Bushby's evidence on this point was as follows:-

> "I knew the consequences of not giving correct hours and I went out of my way to impress on Harrison that I was unaware of Lusty's hours....I told Harrison he had no rating, didn't know his helicopter hours, Harrison said to me that was purely incidental, total flying time which mattered only and consequently with that I didn't proceed to find out what Lusty's actual chopper hours were because broker deemed it unnecessary."

As to the argument as to whether "Hours this type" on the proposal form was a question directed to hours flying any kind of helicopter or whether it related specifically to the Hughes 500C, Mr Harrison agrees that it is possible that Mr Bushby understood "Hours this type" to refer to helicopters in general and not necessarily to the Hughes 500C in particular.

Otherwise Mr Harrison contradicts Mr Bushby's evidence in almost every particular. Mr Bushby did not, he says, refer to the fact that Mr Lusty did not have a Hughes 500 rating. He says he at no time made the suggestion that the pilot's helicopter hours were "purely incidental". It

was Mr Harrison's evidence that the flying hours appearing on the form were simply those given by Mr Bushby, without comment or elaboration, when he was asked by Mr Harrison for the particulars to be included in the proposal.

Mr Bushby does not dispute the fact that he told Mr Harrison that Mr Lusty had two years experience of flying on deer recovery operations.

Mr Bushby and Mr Harrison were in conflict as to the date when the proposal form was signed. Mr Harrison says the form was signed on 24 January 1980 (it is so dated). Mr Bushby says it was signed before Christmas 1979. The significance of the conflict is that for a short period before Christmas 1979 Mr Lusty was working at Karamea on deer recovery and, according to Mr Bushby it was difficult for Mr Bushby to communicate with Mr Lusty to obtain particulars of his flying experience: but on 24 January 1980, Mr Lusty was in Auckland taking part in the assembling and testing of the helicopter and was then in regular communication with Mr Bushby.

Why Mr Bushby should have supplied important information pertaining to the pilot's flying experience in reliance on what a building contractor had told him some months earlier, and without reference to the pilot himself, seems to defy explanation. Although Mr Bushby claims to have had difficulty in communicating with Mr Lusty at the

relevant time, he was able to supply Mr Harrison with the number of Mr Lusty's commercial flying licence - a piece of information which he certainly did not obtain from Mr Whiting.

Mr Whiting gave evidence. He confirmed that he gave Mr Bushby some information about Mr Lusty's flying experience but could not recall the number of hours he had mentioned. Mr Whiting said he had become friendly with Mr Lusty in 1977 and saw a lot of him during the Christmas holidays of 1978/79, when Mr Lusty was working at the Nelson airport. Mr Whiting maintained that, at that time, he believed that Mr Lusty was engaged almost full time in flying helicopters engaged in live deer recovery work. How Mr Whiting gained that impression is difficult to perceive because, at that time Mr Lusty was working as an aircraft engineer for P.M. Lacey Ltd, a company which neither owns nor flies aircraft of any kind. He was employed solely in servicing and maintaining light aircraft; his commercial flying, which was only a side line under the auspices of an aero club, was confined to fixed wing aircraft. At that time, he had no qualifications whatever to fly helicopters and he had never taken part in live deer recovery operations.

Mr Lusty, who is now flying helicopters for a firm operating in New Guinea, also gave evidence. He said that during the period referred to by Mr Whiting (Christmas

1978) he was not engaged in deer recovery work, had never done any such work, and did not hold a commercial helicopter licence. He obtained a basic commercial helicopter licence in February 1979 (with a type rating for the Bell 47,) but was still under tuition at the time when Mr Whiting visited him at the airport during the Christmas period of 1978/79. Mr Lusty was at a loss to know how Mr Whiting came by the idea that he was engaged in flying helicopters on deer recovery work. As to the suggestion that he showed Mr Whiting the equipment, such as dart pistols and net guns used for capturing wild deer, Mr Lusty said "It must have been someone else".

In fact Mr Lusty had his first experience of deer recovery flying in December 1979. That was after Mr Bushby agreed to employ him, and involved about 25 to 30 hours flying a Bell 47 helicopter from Karamea. No doubt Mr Lusty was glad of some deer recovery experience, albeit on a much less sophisticated machine, before taking charge of the Opossum Exports, Hughes 500C helicopter.

Mr Lusty produced his log book which records that as at 24 January 1980 he had 959 hours total flying time, of which 116 hours were flying a Bell 47 helicopter.

I find, that Mr Bushby supplied his pilot's flying hours for the proposal form without expressing any reservation as to their accuracy, and that he told Mr Harrison that Mr

Lusty had two years experience flying helicopters on deer recovery work. I find that Mr Harrison did not, as Mr Bushby asserts, lead Mr Bushby to believe that the information as to helicopter experience was of no importance.

I am satisfied that Mr Bushby may have assumed, and if so, was justified in assuming that "Hours this type" meant hours in a helicopter (in contradistinction from fixed wing aircraft). Even so the discrepancy between the 700 hours stated in the proposal and the 116 hours actually flown is substantial - it amounts to a representation that the pilot's helicopter experience was six times greater than in fact it was.

The question, then, is whether the misrepresentation was material, as that term is defined in s.6(2) of the Insurance Law Reform Act, 1977.

Mr Paul Murphy, who is the general manager of Allied Reinsurance Corporation of New Zealand and a member of the Insurance Council of New Zealand, gave evidence as to the importance attached by insurers to the experience of the pilot engaged in deer recovery work. Mr Murphy agreed that the form of the proposal was not adapted to the case of helicopter insurance in that it did not call for information as to the particular type of helicopter on which the pilot gained his experience. But, assuming in

the proponent's favour that "hours this type" referred to helicopters in general, it was Mr Murphys evidence that the discrepancy between 700 hours and 116 hours is so material that, had he been asked to insure a helicopter to be used for deer recovery and to be flown by a pilot with only 116 hours helicopter experience he would have declined the risk. He said that if he had been asked to quote for the cover sought by Opossum Exports Limited, he would have quoted on the information presented in the proposal - but that he would have declined the business if the pilot's helicopter experience was in fact only 116 hours.

Mr P.J. Miller, of Sydney, is the aviation underwriter for Aviation and General (Underwriting Agents) Pty Ltd. Mr Miller said that if he had known that Mr Lusty had not had "500 hours plus" on the Hughes 500 at the time of the proposal, the risk would not have been accepted or even quoted on.

Evidence was given by Mr Bushby and Mr Earl, an insurance broker, as to a "test proposal" submitted in March 1981 ostensibly for insurance cover on a Hughes 369 helicopter to be flown by a pilot with 127 hours experience flying a Hughes 500. The purpose of the "test proposal" was to demonstrate that insurers would quote rates similar to those applicable in the present case, notwithstanding that the pilot's flying experience was substantially less than

700 helicopter hours. However, although Mr Earl was able to obtain quoted rates on the "test proposal" only slightly higher than that in the Aviation General policy, there was a substantial difference in the policy excess. Moreover, in seeking quotations on the "test proposal" Mr Earl said he described the pilot as having been engaged for the last three years on deer recovery and commercial work. I am not persuaded that the evidence of the "test proposal" displaces the evidence of the other witnesses as to the attitude of insurers in relation to the experience of the pilot nominated to fly a helicopter engaged in live deer capture.

I am satisfied that Mr Bushby's oral statement as to Mr Lusty's experience in live deer recovery and also his statement in the proposal as to the pilot's helicopter hours were both substantially incorrect and were both "material" as that term is defined in s.6(2) of the Insurance Law Reform Act, 1977 - being statements which "would have influenced the judgment of a prudent insurer in fixing the premium or in determining whether he would have taken or continued the risk upon substantially the same terms".

I find that these misrepresentations were such as to entitle the insurer to avoid the contract. Apart from its relevance to the question whether the premium is

refundable, it is immaterial whether the misrepresentation was innocent, fraudulent, or, as was probably the case here, made recklessly.

It is submitted by Mr Atkinson that, even so, the insurers effectively waived any right of avoidance they might otherwise have possessed. Waiver was not pleaded. There is good authority for the proposition that a plaintiff is not entitled to raise this issue without pleading the facts relied upon to establish the alleged waiver. (Ivamy "General Principles of Insurance Law" 4th Ed. p.316; McGillvray and Parkington on "Insurance Law", 7th Ed. para.800; Brook v. Trafalgar Insurance Co. Ltd (1947) 79 Lloyds Rep. 365, 367). However, pleadings aside, I am not persuaded that there was an effective waiver of the insurer's right to avoid the contract.

The circumstance relied upon as evidence of waiver is that on 27 March 1980 Mr Harrison, acting on instructions received from Aviation & General on 13 March, collected from Mr Bushby a cheque for $26,700 being the balance of the annual premium. On 13 March 1980, a week after the accident, Aviation and General had received notice of the pending claim but had no inkling that the proposal might not be in order. The fact that a claim was pending entitled the insurers to require immediate payment of the outstanding balance of the premium. On the day preceding that on which Mr Harrison collected the cheque for

$26,700, Mr Cooper a claims assessor employed by Aviation & General had reported by telex to Aviation and General that Mr Lusty's total helicopter hours were approximately 210, and on the Hughes 500C approximately 80. Mr Cooper asked for details of the "pilot conditions" of the policy.

From the exchange of telexes between Aviation & General and Mr Harrison it is clear that on 26 March 1980, Aviation and General was alerted by Mr Cooper to the fact that Mr Lusty's flying experience appeared not to tally with the proposal form but that this in itself, was not regarded by Aviation and General as sufficient information to warrant rejection of the claim. Aviation & General proceeded to make enquiries from Mr Cooper and Mr Harrison as to the circumstances in which the proposal form was completed. Mr Cooper's report was not, in fact, received by Aviation and General until 12 April 1980. The final decision to reject the claim by Opossum Exports Limited was conveyed to the brokers by telex dated 13 May 1980 and was relayed by Mr Harrison to to Mr Bushby in a letter of the same date. Even at that date Aviation & General was still uncertain as to its position under the "breach of warranty" clause.

On 14 October 1980, the solicitors acting for Aviation and General forwarded to the solicitors acting for Opossum Exports Limited a cheque for $35,600 being a refund of the full premium. The cheque was returned.

Mr Atkinson subnits that the collection of the balance o the premium on 27 March 1980 effected a waiver of the insurer's right to avoid liability under the policy. Waiver, as distinct from estoppel involves an intentional election not to avoid the policy made with full knowledge that there is a vitiating factor entitling the insurer to avoid liability.

In my view the fact that Mr Harrison collected the balance of the premium within a matter of hours after Mr Cooper alerted Aviation & General to the possibility that Mr Lusty's flying hours had been mis-stated in the proposal is not evidence that Aviation & General made an informed election to affirm the policy, with full knowledge of the relevant facts. The acceptance of a premium with actual knowledge of an invalidating circumstance can, of course, effect a waiver; but the onus of proving all the elements of waiver rests upon him who asserts it. The mere fact that on the day preceding that on which the premium was collected by Mr Harrison the insurers had been put on enquiry by Mr Cooper's telex is not sufficient in my opinion, to warrant a conclusion that the insurers intentionally waived their rights to avoid liability in the event of it being established by further inquiries that there had been a misrepresentation in the proposal. Moreover, the Cooper telex did not relate to the oral representation that Mr Lusty had two years experience of live deer recovery.

The election to avoid a policy is a serious decision. The insurers are entitled to make sure of their facts and to a reasonable time to consider their position before they can be held to have made an election; (Locker and Woolf Ltd v. Western Australian Insurance Co. Ltd (1936) K.B. 408; (Nisnar Holdings Pty Ltd v. Mercantile Mutual Insurance Co. Ltd (1976) 2 N.S.W.L.R. 406, 410).

I must conclude that, as between Opossum Exports Limited and Aviation and General (Underwriting Agents) Pty Ltd, the insurers are entitled to avoid liability under the policy on grounds of the misrepresentations made by Mr Bushby and that in this regard, the insurers have not waived their rights.

It remains to consider whether, notwithstanding Mr Bushby's misrepresentations, U.D.C. is able to rely on the so-called "breach of warranty"clause.

The loan of $70,000 from U.D.C. to Opossum Exports Limited is secured by an instrument by way of security in a usual form.

The "breach of warranty" endorsement, which is annexed to the policy is as follows:-

"BREACH OF WARRANTY ENDORSEMENT - HIRE PURCHASE AGREEMENTS.

Attaching to and forming part of Policy No: AVG 79/23055A on aircraft VH-HPU which is encumbered by a lien in the amount of $70,000 payable in instalments.
The said lien is held by United Dominions Corporation.

In consideration of an additional premium as agreed IT IS UNDERSTOOD AND AGREED THAT:

1. The Insurance afforded by the Policy shall not be invalidated as regards the interest of the Lien holder by any act or neglect of the insured except that any change in title or ownership of the aircraft, conversion, embezzlement or secretion by the insured in possession of the aircraft are not covered hereunder:

PROVIDED HOWEVER THAT:

A. If the insured fails, on demand of the Underwriters to pay any premium due under this Policy, the Lienholder shall pay such premiums and,

B. The Lienholder shall notify the Underwriters of any increase of hazard which comes to the Lienholder's attention and if not permitted by the Policy, it shall be endorsed thereon, the Lienholder agreeing to pay any additional premium if the insured shall fail to do so on demand of the Underwriters.

It is however, further understood and agreed by the parties concerned that the protection afforded to the Lienholder by the terms of this endorsement is limited to the perils covered under the Policy and for which a specific premium charge has been made.

2. If the insured fails to render proof of loss within the time granted in the Policy conditions the Lienholder shall do so within 60 days thereafter, in form and manner as provided by the Policy and further shall be subject to the provisions of the Policy relating to appraisal and time of payment and of bringing suit.

3. Whenever the Underwriters shall be liable to the Lienholder for any sum for loss or damage under this Policy and shall claim that as to the insured no liability therefore existed, their liability under the terms of this endorsement shall not in any event exceed the amount of the lien set forth above, less the amount of all matured instalments and less unearned interest or carrying charges an unearned financed insurance premium if any.

4. The Underwriters reserve the right to cancel this Policy at any time as provided by its terms but in such case notification shall be given to the Lienholder when not less than 10 days thereafter such cancellation shall be effective as to the interest of the said Lienholder therein and the Underwriters shall have the right, on like notice, to cancel this endorsement.

5. Upon payment of any sum to the Lienholder as provided hereunder the Underwriters shall to the extent of such payment be thereupon legally subrogated to all the rights of the Lienholder under all securities held as collateral to the debt and the Lienholder shall assign and transfer to the Underwriters all instruments of security pertaining to the aircraft, but no subrogation shall impair the right of the Lienholder to recover the full amount of his claim.

AVIATION & GENERAL (Underwriting Agents) Pty, Ltd. AVG 006."

The central question is whether the effectiveness of the endorsement in favour of U.D.C. is dependent on the validity of the insurance policy taken out by Opossum Exports Limited against loss of or damages to the helicopter.

If an insurer exercises the right to avoid a contract of insurance on grounds of misrepresentation or non disclosure, the policy is treated as void ab initio; (Ivamy, General Principles of Insurance Law, 4th Ed.p.292).

The submission for the insurers is that the policy was void from its inception and that therefore no endorsement of or appendage to the policy can have either force or effect.

The submission for U.D.C. is that the endorsement evidences a separate and distinct contract of insurance between the insurers and U.D.C.: that the insurers have explicitly agreed that, except as provided by Clause 1 of the endorsement, this separate and distinct contract will not be avoided by any act or neglect of Opossum Exports Limited - including, it is submitted, any material misrepresentation in the proposal or in the course of negotiations leading up to the issue of the policy.

For U.D.C. Mr Hancock submits that there are two separate contracts of insurance in which the identity of the insured, the sum insured, the consideration and the purpose of the insurance cover are all different. These features, it is submitted, identify the arrangement between U.D.C. and the insurers as a distinct type of insurance cover, tailored to the particular requirements of lending institutions and not to be confused with cases

where the interest of a third party is only derivative as, for example, when a policy of insurance issued to a proponent owner is assigned for the benefit of a mortgagee or where the interest of a mortgagee is noted on such a policy.

The conflict between these disparate concepts of the status of an arrangement of this sort between a mortgagee and the owner's insurers has not, so far as I am aware, been the subject of any decision of the Courts either in Australasia or in the United Kingdom. The question has been considered on a number of occasions in both the United States and Canada. Unfortunately the American judgments go one way, and the Canadian judgments the other.

The "American" view is that a breach of warranty clause of the type now in issue constitutes an independent contract between mortgagee and insurer and that, according to its terms, no act or omission of the mortgagor, whether before, at the time of, or after the issue of the policy will invalidate that contract. The weight of American authority favours the view that, vis a vis the mortgagee, an insurer who issues a policy endorsed with a clause such as that now in question should be taken "distinctly to declare that the policy is valid and enforceable" when issued and to agree that no act or omission of the mortgagor (including acts and omissions prior to the

issuance of the policy) will invalidate the independent contract of insurance so constituted. This view is exemplified in the following American judgments:-

Fayetteville Building & Loan Association v. Mutual Fire Insurance Company of West Virginia 141 S.E. 634 (1928);

Reed v. Firemen's Insurance Company of Newark (1981) N.J.Law 523;

Goldstein v. National Liberty Insurance Company of America 175 N.E. 359 (1931);

Decatur Federal and Loan Savings Assn. v. York Insurance 250 S.E. 2d, 524;

Aetna Ins. Co. v. Kennedy 301 U.S. 389 (1936);

Mutual Creamery Ins. Co. v. Iowa National Mutual Ins. Co. 294 F. Supp. 337 (1969).

The Canadian courts have taken the opposite view. The Canadian view is that the endorsement relates only to acts and omissions which occur after the policy has been issued - not to pre-contractual breaches of the duty of good faith which render the policy voidable from its inception. Liverpool and London & Globe Insurance Company v. Agricultural Savings & Loan Co. (1903) 33 Can. S.C. 94 was a case in which the Supreme Court of Canada held unanimously that where a policy is void by reason of material non-disclosure, the mortgagee cannot rely on the "breach of warranty" clause. This judgment followed the earlier Canadian case of Omnium Securities Company v. Canada Fire & Mutual Insurance Company (1882) O.R. 494 when the Queens Bench Division of the Ontario Supreme

Court declined to follow the American decisions. More recently, in Chemier v. Madill (1974) 2 D.L.R. (2d) 361, Galligan, J. approved of Omnium Securities Company v. Canada Fire & Mutual Insurance Company and Liverpool & London & Globe Insurance Company v. Agricultural Savings & Loan Co. and said at p.365 of the report:-

> "If either of the defences of misrepresentation or fraudulent omission ... succeed the defendant would be justified in denying liability to the mortgagees ... If a mortgagee relies upon the insurance obtained by the mortgagor he subjects himself to the risk that such a policy may be voidable..."

The learned authors of MacGillivray and Parkington on "Insurance Law" (7th Ed. para.1647) submit that the Canadian judgments should be followed.

It is my opinion that the "Canadian" view is to be preferred. I have reservations about the validity of the "American" concept of a separate and distinct contract of insurance concluded between insurer and mortgagee. In this country the Contracts (Privity) Act, 1982 renders it unnecessary to invoke what seems to be me to be a strained interpretation of the relationship between the parties. But even if the separate contract concept is accepted, it by no means follows that the wording of the endorsement means that the contract cannot be impeached if it appears that it was entered into in reliance on the proponent's misrepresentations affecting the risk.

There is a distinction to be drawn between pre-contractual misrepresentations and post-contractual breaches of policy conditions.

If initially there is a contract formed between insurer and mortgagee, it is a contract entered into by the insurer on the pre-contractual representations of the proponent, who must be taken to make those representations not only on his own behalf but also on behalf of his mortgagee. The mortgagee takes no part in the formation of the contract except through the agency of the proponent. Subsequent breaches of the policy conditions by the mortgagor are on a different footing - they are made by the mortgagor without the privity of the mortgagee.

I can well understand that the insurer, in consideration of the mortgagee's undertaking to answer for the premium, may agree that as between insurer and mortgagee the mortgagee's cover is not to be invalidated by such breaches. But as regards pre-contractual misrepresentations, I think the position must be that a mortgagee who chooses to allow insurance arrangements to be concluded through the agency of the mortgagor has to be answerable in the ordinary way for his agent's misrepresentations. In my view, it is inconceivable that an insurer would agree to be bound, in any way or to any party, by a contract of insurance irrespective of whether

or not the insurer was induced to enter into the contract by misrepresentations made by the proponent.

Accordingly I find for the Defendants in A.222/82 and for the Defendant in A.108/81. I am not prepared to find that Mr Bushby's misrepresentations were made fraudulently and it follows (although there is no prayer for relief in this respect) that Opossum Exports Ltd will be entitled to a refund of premium.

There will be judgment for the Defendants in both actions.

In these circumstances, the question whether the settlement of A.108/83 affects the Defendants' right of subrogation does not require determination.

As the issues in both actions are identical (apart from the question of law arising under the breach of warranty endorsement), I think there should be only one award of costs and some apportionment between U.D.C. and Opossum Exports Ltd. At this stage all questions of costs are reserved.

Solicitors:
Messrs Meares Williams, Christchurch, Solicitors for Opossom Exports Ltd;

Messrs Bell Gully Buddle Weir, Wellington, by their Agents Messrs Duncan Cotterill & Co., Christchurch, Solicitors for First and Second Defendants;

Messrs Watts & Patterson, Wellington, Solicitors for U.D.C.