JUDGMENT OF THE COURT (FIRST CHAMBER)
22 SEPTEMBER 1983 [1]

Commission of the European Communities v Société anonyme Royale Belge

(Official — Risk of accident)

Case 23/81

In Case 23/81

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by Raymond Baeyens, Principal Legal Adviser of the Commission, acting as Agent, assisted by Marc Godfroid, of the Brussels Bar, with an address for service in Luxembourg at the office of Oreste Montalto, a member of its Legal Department, Jean Monnet Building, Kirchberg,

applicant,

in the presence of

1. Johanna van Rij, widow of the late Gerrit Jan van Kasteel, an official of the Commission of the European Communities, acting on her own behalf and as the legal guardian of her children, Ingeborg, Gerrit Jan, Huberdina and Bastiaan;
2. Henri Tieleman, acting as supervisory guardian of the aforementioned minor children;
3. Johanna Theodora van Kasteel;
4. Hans van Kasteel,

all residing in Brussels and represented by Benoît Humblet and Edmond Lebrun, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Tony Biever, 83 Boulevard Grande-Duchesse-Charlotte,

interveners,

v

1 — Language of the Case: French.

SOCIÉTÉ ANONYME ROYALE BELGE, an insurance company having its registered office at 25 Boulevard du Souverain, 1170 Brussels, acting on its own behalf and as the authorized agent and representative of the following insurance companies:

1. Société anonyme Generali Belgium (Concorde), Brussels,
2. Société anonyme Caisse Patronale, Brussels,
3. Société anonyme Assurantie van de Belgische Boerenbond, Louvain,
4. Société anonyme Winterthur, Brussels,
5. Société anonyme Zürich, Brussels,
6. Société anonyme Assubel, Brussels,
7. Société anonyme Securitas (formerly Le Phénix belge), Antwerp,
8. Société anonyme Rhin et Moselle, Brussels,
9. Société anonyme Le Foyer, Brussels,
10. Nationale Nederlanden, Schadeverzekeringsmaatschappij NV, The Hague, Netherlands,
11. Société anonyme Phoenix Continental, Brussels,
12. Top International Insurance Co. Ltd, Ballerup, Denmark,
13. Excess Insurance Company Ltd, c/o Glanvill, Enthoven and Company Ltd, London, England,
14. Allianz Versicherungs-Aktiengesellschaft, Munich, Federal Republic of Germany,

represented by François van der Mensbrugghe, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Jean Hoss, 15 Côte d'Eich,

defendant,

APPLICATION under Article 181 of the EEC Treaty for an order requiring the defendant to pay the principal sum and interest payable by the Commission under Article 73 of the Staff Regulations of Officials of the European Communities as a result of the death by accident of Gerrit Jan van Kasteel, an official of the Commission,

THE COURT (First Chamber)

composed of: A. O'Keeffe, President of Chamber, G. Bosco and T. Koopmans, Judges,

Advocate General: Sir Gordon Slynn
Registrar: P. Heim

gives the following

JUDGMENT

Facts and Issues

The facts of the case, the course of the procedure and the conclusions, submissions and arguments of the parties may be summarized as follows:

I — Facts and written procedure

A — The provisions applicable

Article 73 (1) of the Staff Regulations of Officials of the European Communities reads as follows:

"An official is insured, from the date of his entering the service, against the risk of occupational disease and of accident subject to rules drawn up by common agreement of the institutions of the Communities after consultation of the Staff Regulations Committee ... Such rules shall specify which risks are not covered."

Pursuant to that provision Rules on the Insurance of Officials of the European Communities against the Risk of Accident and of Occupational Disease (hereinafter referred to as "the joint rules"), which define the circumstances in which officials are insured against the risk of accident, were adopted by common agreement of the institutions, recorded by the President of the Court of Justice on 22 December 1976. Article 4 thereof sets out the various cases in which officials are not covered under Article 73 of the Staff Regulations:

"1. Accidents shall not be covered by Article 73 of the Staff Regulations if they are due to the following causes:

(a) ...

(b) Manifestly reckless acts;

Participation by means of motorized equipment in sporting contests, races and official trials;

Practice of sports regarded as dangerous, such as boxing, karate, parachuting, speleology, underwater fishing and explo-

ration with breathing equipment including containers for the supply of air or oxygen;

. . .".

On 28 January 1977 the institutions of the Communities signed a collective insurance agreement against accidents and occupational disease with the defendant insurance companies. According to Article 1.1 thereof, the purpose of the insurance was to "cover the financial consequences of the obligations which the Communities assume under their Staff Regulations for accidents and occupational disease befalling or contracted by the persons to whom the provisions of Article 73 of the Staff Regulations . . . and the rules made thereunder apply." The agreement includes an arbitration clause which provides that: "Failing an amicable settlement any dispute relating to the performance of this contract or annexes hereto may be submitted to the Court of Justice of the European Communities" (Article 5). Relying on Article 181 of the EEC Treaty the Commission referred this dispute to the Court pursuant to that arbitration clause.

B — Summary of the facts

Gerrit Jan van Kasteel, who was an official in Directorate-General XV of the Commission, hired a Piper Cherokee aircraft, registration number OO-JPM, from European Air Transport SA at Brussels. Two of his colleagues, Daniel Chabert and Filippo Turli, also hired light aircraft at the same time. They planned to make a private trip together to Greece with various passengers, all officials of the European Communities. Starting from Brussels National Airport, the three aircraft took off on the morning of 29 April 1978 for Lyon where they landed at about 13.45 hours local time.

The three pilots took off one after the other from Lyon-Bron Airport at 14.30 hours for Cannes whence they were due to fly on to the Greek Islands via Rome and Corfu. During the flight the aircraft piloted by Mr van Kasteel with two passengers on board crashed into Mont Sainte-Victoire in the Commune of Vauvenargues at a height of 960 metres at about 17.00 hours. The three occupants of the aircraft were killed in the accident which was investigated by the Gendarmerie of Aix-en-Provence and was the subject of a report drawn up by the French Ministry of Transport.

That report and the minutes of the inquiry may be summarized as follows.

Mr van Kasteel held a private pilot's licence restricted to flights by day only under visual flight rules in single-engined aircraft. The aircraft piloted by Mr van Kasteel was single-engined. Its logbook shows that instrument flying by day or night was not permitted. The aircraft in question was not equipped with instruments for non-visual flight but besides having an altimeter and a variometer (which indicates whether the aircraft is climbing or descending) it had an artificial horizon enabling the aircraft to be kept in a horizontal position if visual meteorological conditions are lost.

Before leaving Lyon Mr van Kasteel and the other two pilots went along together to the meteorological office where they were informed *inter alia* that visibility on the route to Cannes was 10 to 15 kilometres and that a vigorous disturbance resulting in heavy local rain beyond Montélimar was forecast

together with strong turbulence. The three aircraft then took off from Lyon for Cannes. No flight plans were filed. Mr van Kasteel had told the other two pilots that he was going to take the direct route by heading straight for Cannes once past Avignon. The other two pilots decided after taking off from Lyon to follow the Rhône valley and then to try to reach Cannes by the coast.

The last radio contact between Mr van Kasteel and Marseille Airport was at 16.52 hours. The pilot stated that he was heading for St Tropez, maintaining a height of 4 500 feet (1 500 metres) and that he was in cloud. The control tower at Marseille Airport instructed him to maintain good visibility. After that message had been repeated to him Mr van Kasteel replied: "Affirmative, sir, but I am in a shower". When asked: "Have you the ground in sight?" he replied: "Sometimes, yes". At 17.24 hours Marseille Airport attempted to contact the aircraft again, but without success. The report drawn up by the Gendarmerie states that the aircraft had been in a layer of cloud in the Vauvenargues region and crashed into the Sainte-Victoire mountainside at a height of 960 metres approximately two and a half hours after its departure from Lyon, that is to say at about 17.00 hours local time. The inspector who drew up the report on the instructions of the French Minister for Transport, Mr Grimaud, assumed that Mr van Kasteel had attempted to descend below the cloud-layer and that in doing so he probably saw the ground in front of him but not soon enough to be able to avoid the crash.

C — Written procedure

Relying on Article 73 (2) of the Staff Regulations Mr van Kasteel's survivors requested the Commission to pay the benefits guaranteed in the event of the accidental death of an official. By an application lodged at the Court Registry on 16 October 1979 they asked the Court to annul the Commission's decision refusing their request (Case 805/79, pending). The Commission asked for an unlimited extension of the period for the submission of the defence in order to be able to resolve the problem arising from the insurers' refusal to cover the Commission against the consequences of Mr van Kasteel's death. That request was granted by the President of the First Chamber on 3 June 1980.

The insurers had been informed by the Commission of Mr van Kasteel's accident of 29 April 1978 in a telex message of 3 May 1978. By a letter of 31 October 1978 they declined to accept liability relying on Article 4 of the joint rules and in particular the exclusion of risks of accidents caused by manifestly reckless acts. After receiving from the Commission details of the circumstances of the accident, the insurers, by a letter dated 22 January 1980, confirmed their refusal to cover the consequences of the accident.

By an application lodged at the Court Registry on 5 February 1981 the Commission sought an order from the Court requiring the insurers, acting through their authorized agent, Royale Belge SA, to pay the principal sum and

interest payable by the Commission to those beneficially entitled to Mr van Kasteel's estate.

In its defence the defendant requested that the case be joined to Case 805/79 on the ground that the cases were related. That request was refused by decision of the Court notified to the parties on 23 April 1981.

By an application lodged at the Court Registry on 2 June 1981 the applicants in Case 805/79 sought leave pursuant to the second paragraph of Article 37 of the Statute of the Court to intervene in this action in support of the Commission. That application was lodged in accordance with Article 93 of the Rules of Procedure. By order dated 15 July 1981 the Court granted leave to intervene.

By order dated 9 December 1981, made pursuant to Article 95 (1) and (2) of the Rules of Procedure the Court decided to assign the case to the First Chamber.

By order dated 9 December 1981 the Court (First Chamber) decided to initiate measures of inquiry. First it decided to hear of its own motion an aviation expert to be nominated by both parties within a period of one month, or, failing agreement within that period, two experts, one to be nominated by each side, on the question as to the conclusions which an airman might have drawn from the weather information provided by Lyon-Bron Airport for a flight from that airfield to Cannes. It also ordered Mr Turli and Mr Chabert to be examined as witnesses as to the reasons, referred to above, which led them to decide at the time against taking the direct route to Cannes and to take the Lyon—Marseille route and Mr Grimaud, Inspector at the French Ministry of Transport and author of the aforementioned report, to appear in order to provide any comments on his report which might be of use. In accordance with Article 45 (3) of the Rules of Procedure the First Chamber assigned the task of examining those witnesses to the Judge-Rapporteur.

Since an agreement on the nomination of a single aviation expert could not be reached the Commission, by letter of 29 March 1982, proposed to the Court that it should hear S. Thouvenot, an expert on air transport whose name appears on the list of aeronautical experts maintained for the Court of Appeal, Paris. By a letter of 1 April 1982 the defendants proposed R. Auffray, an aeronautical expert residing at Bretigny in France.

The examination of the witnesses and experts, in which the Advocate General participated, took place on 2 July 1982 at the Court.

After the hearing on 2 July 1982 the Court (First Chamber), by letter dated 14 December 1982, requested the defendants to reply to certain questions and gave the Commission and the interveners the opportunity to submit their observations on the answers. The answers and the observations were received at the Court within the periods allowed.

Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General the Court (First Chamber) then decided to open the oral procedure.

II — Conclusions of the parties

The Commission of the European Communities, the *applicant*, claims that the Court should:

1. Declare the action admissible and well founded and accordingly order Royale Belge SA, acting on its own behalf and on behalf of the other companies which signed the insurance policy of 28 January 1977, to pay the principal sum and interest payable by the Commission under Article 73 of the Staff Regulations of Officials of the European Communities to the persons beneficially entitled to the estate of Mr van Kasteel following his death by accident on 29 April 1978;

2. Order Royale Belge SA to pay the costs.

The *interveners* claim that the Court should:

1. Declare the intervention in this action admissible;

2. Grant the order sought by the Commission after ordering if necessary D. Chabert and F. Turli to be examined as witnesses;

3. Order the defendant to pay the costs of the intervention.

The *defendant* contends that the Court should:

1. Declare the action inadmissible or in any event unfounded;

2. Order the applicant to pay the costs;

In the alternative, before arriving at a decision on the substance of the case,

1. Appoint one or three specialist experts in aviation matters to give their opinion, after studying the evidence before the Court, on the question whether between the time of his departure from Lyon-Bron Airport on 29 April 1978 to the time of his fatal accident Mr van Kasteel committed one or more manifestly reckless acts resulting in the accident and to specify them;

2. Reserve the costs.

III — Submissions and arguments of the parties in the written procedure

In its application the applicant, the *Commission of the European Communities*, states that the issue of fact and law in this case is whether or not Mr van Kasteel's fatal accident was due to a manifestly reckless act within the meaning of Article 4 (1) (b) of the joint rules. The burden of proving that such an act was committed is on the defendant. In its view there can be no question of such an act unless Mr van Kasteel's conduct demonstrated a total conscious lack of care. "Reckless" acts are foolhardy acts, committed with the knowledge of the risks involved so that it may be said there is a willingness to accept risks. The meaning of the adverb "manifestly" is that in addition such recklessness excludes insurance cover only if it is immediately obvious to anyone that the official's conduct is a sure indication of recklessness.

The Commission then states that the weather information given to Mr van Kasteel before he left Lyon-Bron was such that it was reasonable for him to decide to fly to Cannes by the direct route. It was only once he was in the air that Mr van Kasteel was confronted by suddenly deteriorating weather and whilst he succeeded in maintaining visual meteorological conditions his aircraft was caught in downdraughts which caused it to crash into Mont Sainte-Victoire. The Commission further believes that Mr van Kasteel did not follow the route he had originally planned to take, since in view of the sudden deterioration in the weather he changed direction, probably with the intention of reaching the coast or an emergency landing place. In such circumstances there can be no presumption of a manifestly reckless act.

In their defence the *defendant* places a different interpretation on the expression "manifestly reckless act" and the events leading to Mr van Kasteel's fatal accident. As far as concerns the meaning of the word "reckless", it states that, failing any other rule of interpretation, the word should be given the meaning which it has in ordinary usage. After referring to several dictionaries it takes the view that a "reckless" act may be defined as the act of a person who, overestimating his chances, pursues a course of action with such audacity that he fails to foresee the dangers to which he exposes himself and of which he could not have been unaware. The defendant points out that the words used in the German text of Article 4 (1) (b) of the Community rules are "offensichtlich waghalsiger Handlungen", which literally mean acts which are obviously those of a "daredevil". An act is "manifestly" reckless when the audacity involved is foolhardy to an extent which is clear and certain beyond any possible doubt.

For its interpretation of the events preceding the accident of 29 April 1981 the defendant refers to the report of the inquiry drawn up by the French Ministry of Transport and written by Mr Grimaud. One of the conclusions reached in the report reads as follows:

"The initial cause of the accident resides in the pilot's decision to fly direct from Lyon to Cannes. A contributory cause was that he did not maintain VMC (Visual Meteorological Conditions) even if this meant a diversion. The determining cause was that he began to descend ... without knowing the cloud base when the route between Carpentras and Saint Tropez passes over relatively high ground."

In the defendant's view, only one of those three causes need be the result of a manifestly reckless act for Article 4 (1) (b) of the joint rules to apply. It contends that each of the three causes was the result of unquestionable recklessness.

In the first place the decision to fly direct from Lyon to Cannes was foolishly reckless because Mr van Kasteel knew from the information given to him just before his departure from Lyon-Bron that weather conditions on that route

were adverse in the extreme. What is more, Mr van Kasteel knew that when given the same information other pilots had decided to go down the Rhône valley where visual flight was still possible over the entire route.

The second point made by the defendant is that when Mr van Kasteel reached the disturbance and the 8/8 cloud cover he could have undertaken a diversion as the other two pilots had done. Instead of doing so he continued to fly into increasingly thicker cloud in technical conditions which did not allow visual flight to be maintained and in disregard of the most elementary requirements of prudence.

Thirdly, Mr van Kasteel decided to fly below 1 500 metres in the hope of getting below the cloud base when the sky was absolutely full of cloud between 800 and 2 500 metres and visibly was reduced or even non-existent. Such a descent in those conditions verged on stupidity, first because Mr van Kasteel did not know the height of the cloud base or therefore how far he should come down and secondly because his route lay over relatively high peaks. In this regard the defendant contests the Commission's view that the aircraft became caught in downdraughts which caused it to crash into Mont Sainte-Victoire. The defendant maintains that there is no evidence to suggest that the accident was due to a downdraught.

In its reply the *Commission* first of all denies that the weather information provided by Lyon-Bron Airport was such that any pilot given that information could have realized that visibility was nil between Lyon and Cannes. On the basis of the information which he had received Mr van Kasteel could set out on that route without infringing visual flight rules because visibility was reported as 10 to 15 kilometres and there was ample space between the two layers of cloud situated at 600 to 1 000 metres and 2 400 metres to fly by sight.

The Commission then makes the point that the route followed by Mr van Kasteel was one recommended by the French aviation authorities to pilots flying under visual flights rules. Only shortly before the accident did he cease to keep precisely to that route. Moreover, towards the end of their flight the other two pilots also encountered weather conditions which were at times difficult. On this point the Commission refers to a statement by Mr Turli explaining that after reaching the coast he was obliged to fly on instruments from La Ciotat and managed to land at Toulon only with assistance from the radar there. The criticism made of Mr van Kasteel regarding his choice of route is therefore irrelevant.

The Commission attaches importance to the last radio contact between Mr van Kasteel and Marseille Information a few minutes before the accident. In its view that message does not indicate, as the defendant contends, that at that moment Mr van Kasteel was flying in 8/8 cloud. Mr van Kasteel said in fact that he was passing through a "shower". What is more, that conversation did not indicate any kind of anxiety or especially any need to descend. In this regard the

Commission claims that there is no evidence to support the assertion that Mr van Kasteel decided to descend below 1 500 metres, the level at which he was flying at the time of the last radio contact. Although his aircraft crashed into the mountain at a height of approximately 960 metres, the existence of a downdraught would be sufficient to explain the loss of altitude.

The Commission's conclusion is that none of the three alleged reckless acts has therefore been proven by the defendant.

In its rejoinder the *defendant* maintains that the information given to Mr van Kasteel before his departure from Lyon-Bron was an imperative warning to any pilot that it was quite unsafe to set out to fly to Cannes by the route chosen by Mr van Kasteel. This was also one of the conclusions reached in the report of the inquiry drawn up by the French Ministry of Transport. That report also established that the loss of height shortly before the accident could only have been due to a decision to descend. If that explanation — provided by an expert in such matters — is right, Mr van Kasteel was reckless. However, the alternative explanation advanced by the Commission, namely that the aircraft was caught in a downdraught, does not rule out recklessness either. Before leaving Lyon-Bron Mr van Kasteel knew that he would be flying into a vigorous disturbance and that there would be swirling winds and strong turbulence. It would be the height of folly to venture into such a situation, in an aircraft of the type he was flying, above a mountain range as high as that where the accident occurred.

IV — Summary of the statements of the experts and witnesses

The evidence of *Daniel Chabert*, who himself flew an aircraft on 29 April 1978, may be summarized as follows. The three pilots all went to the meteorological office at Lyon-Bron and they discussed together the information which they were given. As regards the visibility, type of cloud and altitude at which it was expected to be, there was nothing alarming in the information given. In those cicumstances there was no reason to expect any particular danger in the direction of Provence. Before his departure from Lyon-Bron Mr Chabert decided to follow the Rhône valley for Cannes because he usually followed that route which was more pleasant and more enjoyable. A flight plan was not filed as such action was not compulsory in France. Near Carpentras Mr Chabert decided not to continue to Cannes but to land at Marseille. That decision was forced upon him by two reasons. The first was that he encountered an unexpected deterioration in the weather which had not been forecast as being so bad; there were squalls which, though not dangerous from the point of view of the pilot were uncomfortable for the passengers. The second reason was that he had to cut short the flight because two passengers became airsick so that the position was extremely unpleasant. Mr Chabert therefore decided to land at Marseille so as not to continue the flight in uncomfortable conditions.

The evidence of the other pilot, *Filippo Turli*, may be summarized as follows.

The weather forecast by the meteorological office at Lyon-Bron was not very good. However, they were told that it was "flyable" and that aircraft were arriving from and leaving for Cannes. Neither Mr Turli nor the other two pilots were warned that there might be serious danger. Initially, that is to say on take-off from Lyon-Bron, Mr Turli intended to follow the same route to Cannes as Mr van Kasteel; that is, in fact, the normal route which pilots are advised to follow. However, 20 kilometres beyond Lyon he decided to follow the Rhône valley. At that time he could not tune in to Montélimar to obtain information with a view to taking a more direct route. The route to the south along the Rhône valley also had the advantage of providing a greater margin of height above the ground and, should turbulence occur, which he habitually fears, of enabling him to lose altitude without danger. Mr Turli stated that he was habitually frightened of turbulence and that his fear was strictly a personal idiosyncrasy. He had always feard turbulence even when not serious. For that reason he continued flying south until abreast of La Ciotat at which point he found himself in very low cloud. He then radioed for assistance, reporting that he was unable to find an airfield. In the end Toulon-Hyères helped him to land by radar.

The evidence of *Edmond Grimaud*, who upon the instructions of the French Minister for Transport prepared the technical report on the circumstances of the accident in 1978, may be summarized as follows. As far as concerns the normal route for flying from Lyon-Bron to Cannes, there is no prescribed or recommended route for the type of aircraft flown by Mr van Kasteel. A pilot of that type of aircraft may choose his own route. There is no established practice of choosing one route or another. Mr van Kasteel was entitled to file a flight plan although he was not obliged to do so. As for Mr van Kasteel's decision to fly direct from Montélimar to Cannes, Mr Grimaud explained that he did not state in his report that it was madness to fly that route. The weather information provided by Lyon-Bron Airport might have persuaded the pilot not to take that route but it was not of such a nature as to justify the conclusion that it would be abnormal to fly straight to Cannes. As regards the loss of altitude after the last radio contact, that might have been due to turbulence. It is not possible to confirm that, however. By comparing the position of the wreckage with the route which Mr van Kasteel had been following at the time of the last radio contact it is possible to deduce that he had changed course before the accident. There are two possible explanations: either Mr van Kasteel deliberately changed course in order to follow a different route or he veered away to avoid an obstacle which he suddenly saw looming up in front of him. In Mr Grimaud's view there is no evidence to support one theory rather than the other. Only one thing is certain; it is very unlikely that a squall could have made the aircraft alter course, even in the case of a very light aircraft like a Piper Cherokee.

The statement of *Raymond Auffray,* an expert witness on aviation before the French Cour de Cassation, may be summarized as follows. From the information given to Mr van Kasteel on 29 April 1978 a pilot of some experience ought to have deduced that it was not possible to pass through the mountains under visual flight rules. When a pilot suddenly encounters a situation not in accord with visual flight rules, he turns round. In Mr Auffray's view, the possibility cannot be excluded that Mr van Kasteel tried to turn back after the last radio contact, which was when he was in cloud. It is also not ruled out that the change of course near Mont Sainte-Victoire was caused by strong gusts of wind. In such circumstances a pilot may in fact lose control of his aircraft.

The statement of *Stéphane Thouvenot,* honorary expert in aviation matters at the Cour de Cassation and Cour d'Appel, Paris, may be summarized as follows. The Provence region in the south of France is an area which, from the point of view of the weather and flying conditions, is more difficult than is commonly believed. On the day of the accident, 29 April 1978, he was on judicial business close to the routes followed by the three pilots. Mr Thouvenot encountered masses of black cloud — to be precise, over the Cévennes — which were all the more disturbing because there were gusts of wind from the south. As regards the weather information provided by Lyon-Bron, Mr Thouvenot explained that the very strong turbulence forecast indicated that the situation would be uncomfortable but not necessarily dangerous. Moreover, a pilot with some experience could deduce from that information that it was possible to make the flight, although in difficult conditions. The weather information which Mr van Kasteel later received from Marseille may also have led him to believe that there would be a certain amount of visibility.

As regards the significance of the last communication between Mr van Kasteel and Marseille, Mr Thouvenot believes that the pilot clearly thought that the cloud in which he was flying was in fact a local shower. He would not have used the word "shower" if that had not been the case. After that last communication Mr van Kasteel suddenly encountered weather much worse than he had expected. However, it was legitimate for him to hope to cross that area of bad visibility if it was limited in extent. If it was not, Mr van Kasteel would have been forced to look for an emergency landing area, which would not be easy because at that point he must have been crossing the mountains.

As regards the change of course before the accident, Mr Thouvenot stated that strong gusts of wind may force an aircraft upwards or downwards for a considerable distance. Consequently, it is not impossible that such a light aircraft may have been blown off course by gusts of wind.

V — Replies to the questions put by the Court

In reply to the questions put by the Court the *defendant* stated that in view of the explanations provided by Mr

Grimaud and Mr Thouvenot it seemed difficult to maintain that an attempt to fly directly to Cannes was "manifestly reckless". Nor did it seem possible to reconstitute exactly the circumstances of the accident or in particular to decide whether between the last radio contact and the time of the accident Mr van Kasteel deliberately chose to descend in the vicinity of the mountain peaks or whether he was caught by a down-draught which propelled him on to the mountain.

Nevertheless, the defendant still believes that nothing can justify Mr van Kasteel's flying into the disturbance during the flight. He could not have been surprised by it because it had been forecast and he knew the dangers which it presented. In those circumstances Mr van Kasteel ought to have turned back. By still continuing his flight direct to Cannes he acted in a manifestly reckless manner.

The *Commission of the European Communities* and the *interveners* in substance contest the view that Mr van Kasteel entered a disturbance which he had already seen and which he knew made visual flying no longer possible. Referring to the evidence of Mr Thouvenot, they claim that Mr van Kasteel may have been surprised because the disturbance was not where it was forecast. What is more, Mr Thouvenot pointed out that, although Mr van Kasteel was in cloud at the time of the last radio contact, he believed that he was flying through a local shower of short duration and not a mass of cloud.

VI — Oral procedure

At the sitting on 7 July 1983 the parties presented oral argument.

The Advocate General delivered his opinion at the sitting on 14 July 1983.

Decision

1 By an application lodged at the Court Registry on 5 February 1981 the Commission of the European Communities, acting pursuant to an arbitration clause as provided for in Article 181 of the EEC Treaty, Article 153 of the EAEC Treaty and Article 42 of the ECSC Treaty, brought an action against Royale Belge SA, a company having its registered office at Brussels, acting on its own behalf and as agent for 14 other insurance companies which had signed the insurance agreement dated 28 January 1977 with the institutions of the European Communities, seeking an order requiring it to pay the principal sum and interest owed by the Commission to those beneficially entitled to the estate of Gerrit Jan van Kasteel as a result of his death by accident on 29 April 1978.

2 In support of its application the applicant claims that Mr van Kasteel was an official in Directorate-General XV of the Commission when he was killed in an aircraft accident which occurred in the Commune of Vauvenargues in Provence, France, during a flight from Brussels to Greece in a light aircraft which he was piloting himself. Under Article 73 of the Staff Regulations officials are covered against the risk of accident subject to rules drawn up by common agreement of the institutions of the Communities. By signing on 28 January 1977 the collective insurance agreement entered into by those institutions the insurance companies for which the defendant acts as agent undertook to cover the Communities against the financial consequences of the obligations which the latter assumed under the Staff Regulations in respect of accidents befalling the persons to whom Article 73 of the Staff Regulations applies.

3 The defendant does not contest the facts alleged by the Commission. It contents however that in this case the Communities owe no obligation under the Staff Regulations to the persons beneficially entitled to the estate of Mr van Kasteel because his fatal accident was the result of a manifestly reckless act, a risk not covered by Article 73 of the Staff Regulations or by the insurance policy. In this regard it relies upon Article 4 of the joint rules drawn up by the institutions of the Communities pursuant to Article 73; the first mentioned provides that accidents due to manifestly reckless acts are not covered for the purposes of the latter provision.

4 According to the defendant, an act must be regarded as "reckless" where a person, overestimating his chances, pursues a course of action with such audacity that he neglects to make allowance for the dangers to which he exposes himself and of which he could not have been unaware. Such an act is "manifestly" reckless, it states, where the rashness thus shown is clear and certain.

5 In its defence the defendant has explained why Mr van Kasteel's actions in the two and a half hours between his taking off from Lyon-Bron Airport at 14.30 hours local time in 29 April 1978 and the accident evince manifest recklessness.

6 The first evidence to which the defendant points in this regard is the pilot's decision to take the direct route to Cannes — along the Rhône valley from Lyon to a point abreast of Montélimar—Carpentras and then branching off directly to the St Tropez area — in the adverse weather conditions which prevailed over that part of France and which had been reported to him at Lyon-Bron Airport. After studying the same weather information Mr van Kasteel's two coleagues who were in the same group of tourists travelling in touring aircraft from Brussels to the Greek islands and were also flying light aircraft preferred instead to fly down the Rhône valley as far as Marseille and then to follow the coast.

7 The Court has been provided with a summary of the weather information given by the Regional Weather Centre at Lyon-Bron Airport between 14.00 and 14.30 hours on 29 April 1978 to the crews flying to Cannes and has ordered an expert report on the conclusions which an airman ought to have deduced from that information. The Court has also heard the evidence of the two pilots who took the Lyon-Marseille route in order to ascertain the reasons which led them to decide against taking the direct route to Cannes.

8 After the technical experts and witnesses had been examined the defendant indicated that as a result of the explanations given it no longer persisted in its contention that the decision to take the direct route to Cannes was in itself evidence of manifest recklessness.

9 The defendant's second reasons for contending that Mr van Kasteel's actions were reckless is the decision which he is alleged to have taken when his aircraft flew into the disturbance and visibility was suddenly reduced, to descend from an altitude of 1 500 metres to less than 1 000 metres.

10 It is common ground that at 16.52 hours, the time of his last radio contact with Marseille-Marignane Airport, Mr van Kasteel reported his aircraft at an altitude of 4 500 feet or roughly 1 500 metres and that approximately 10 minutes later it crashed into the north slope of Mont Sainte-Victoire at a height of some 960 metres.

11 However, it is not clear from the written evidence, such as the preliminary investigation report drawn up by Mr Grimaud for the French Ministry of Transport or the report of the Gendarmerie Nationale including their various appendices, that the aircraft's loss of altitude was due to a deliberate decision of the pilot to attempt to descend below the cloud. Neither Mr Grimaud, who was examined by the Court, nor the technical experts appointed by the parties, could state with certainty that the loss of altitude was due to a decision taken by the pilot rather than a violent gust of wind. In view of those circumstances the defendant has accepted that the loss of altitude might have been caused by the very strong turbulence through which the aircraft was flying.

12 However, after the witnesses and technical experts had been examined the defendant continued to maintain that the pilot's conduct was manifestly reckless for the third reason which it had advanced. It considered such recklessness obvious from the pilot's decision to enter the disturbance which he saw ahead of him and not to turn back immediately in search of an airfield where he could land.

13 So as to weigh up that argument it is necessary to consider the various undisputed factual circumstances surrounding the last minutes of the flight in question as well as the views which the technical experts have expressed on them.

14 The first point to be made in this regard is that the weather information provided by Lyon-Bron Airport forecast a vigorous disturbance producing heavy local rain beyond Montélimar accompanied by a strong gusting southerly wind with visibility of 10 to 15 kilometres, reduced to 6 to 10 kilometres in rain. There was nothing in that information to indicate that a sudden and considerable reduction in the visibility which is an important factor for pilots flying visually like Mr van Kasteel, would occur. According to the observations made by Marseille-Marignane at 16.00 hours local time, one hour before the probable time of the accident, visibility was 15 kilometres.

15 The severe disturbance which led to the accident in question was therefore neither forecast nor reported by the weather stations whose information was available to airmen. It is also clear from the evidence of Mr van Kasteel's two fellow-pilots who were also flying light aircraft that the decision taken by each of them to follow the Rhône valley route as far as Marseille was not prompted by the weather information available to them. Moreover, whilst following the coast one of them was caught unawares by very stormy weather at La Ciotat from which he emerged only at some risk.

16 The information provided by Lyon-Bron also reported the sky covered by altostratus at roughly 2 400 metres above 4 to 6/8 stratocumulus between 600 and 1 000 metres. According to the experts' statements, in such atmospheric conditions there is normally a corridor between the cloud masses which is hardly affected by disturbances. Therefore by flying as he did at an altitude of 1 500 metres Mr van Kasteel did nothing contrary to the rules of good airmanship.

17 It is clear from the foregoing that Mr van Kasteel cannot be accused of any rashness as regards his conduct as a pilot until the time at which his aircraft entered the unexpected disturbance in the area of Vauvenargues—Aix-en-Provence. Since that is a mountainous area in which, according to Mr Grimaud, the weather may change very rapidly in certain atmospheric conditions and in which the effects of such changes on aviation may be considerable, the Court accepts the Commission's and the interveners' argument to the effect that Mr van Kasteel could not avoid the disturbance.

18 The only question still to be resolved, therefore, is whether the pilot neglected to turn back immediately after entering the disturbance, as the defendant maintains.

19 In the last radio contact which he had with Marseille-Marignane at 16.52 hours Mr van Kasteel reported: "... I am in a shower". When asked whether he had the ground in sight he replied: "Sometimes, yes". This indicates that at that time he did not regard himself as being in a severe

disturbance. What is more, the content of the conversation does not give the impression that the pilot was afraid of losing visibility completely.

20 According to the estimate of the Gendarmerie Nationale and that made by Mr Grimaud in his report, the accident occurred at about 17.00 hours local time or not more than 10 minutes after the last radio contact. What happened in those last 10 minutes is not known but the aircraft must have changed course as the direction of flight at the time of impact on Mont Sainte-Victoire was at 90° to the line from Montélimar to Cannes.

21 According to the expert's report, it is very unlikely that an aircraft, even a light aircraft, will change course under the influence of a gust of wind. The change of course must therefore have been due either to the pilot's deliberate decision to change course — in order, for instance, to reach the coast as quickly as possible — or to a sudden movement intended to avoid the mountainside which the pilot suddenly saw looming up out of the cloud.

22 Both theories are tenable. Mr Grimaud has stated that examination of the wreckage showed that at the time of impact the engine was running at full speed, which might indicate that the pilot saw the mountainside at the very last moment and increased power in order to be able to manoeuvre the aircraft so as to avoid the crash. However, Mr Grimaud added that there could be no certainty on this point.

23 In those circumstances there is no means of ruling out entirely the possibility that the pilot decided to turn back just before hitting the mountain. It is also possible that he never took such a decision but lost all visibility or even all control of his aircraft only a few moments before the accident.

24 Consequently it has not been established with any certainty whether or not during the last 10 minutes of the flight the pilot committed one or more acts evincing rashness on his part.

25 Because of that uncertainty and in view of the findings regarding the unexpected nature of the disturbance and Mr van Kasteel's conduct as a pilot up to the time at which the aircraft entered the disturbance, the application must be granted. It was in fact for the defendant to show that the facts warranted the application of one of the exemptions set out in Article 4 of the joint rules.

26 It is therefore unnecessary to examine the question of the degree of rashness required for an act to be described as "manifestly reckless".

27 Consequently the defendant, acting on its behalf and as agent for 14 other insurance companies which signed the collective insurance agreement of 28 January 1977 with the institutions of the Communities, must be ordered to pay the principal sum and interest owed by the Commission to the persons beneficially entitled to the estate of Gerrit Jan van Kasteel following his fatal accident on 29 April 1978.

28 Under Article 69 (2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs if the successful party has asked for them. As the defendant has failed in its submissions, it must be ordered to pay the costs, including those of the interveners and the sums due to the witnesses and technical experts.

On those grounds,

THE COURT (First Chamber)

hereby:

1. **Orders the defendant to pay the principal sum and interest owed by the Commission to the persons beneficially entitled to the estate of Gerrit Jan van Kasteel following his fatal accident on 29 April 1978;**

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