In the Privy Council

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

CANADA RICE MILLS LIMITED
(Plaintiff) APPELLANT,

AND:

THE UNION MARINE AND GENERAL INSURANCE COMPANY LIMITED
(Defendant) RESPONDENT.

CASE FOR THE APPELLANT

WALSH, BULL, HOUSSER, TUPPER, RAY & CARROLL,
Solicitors for the (Plaintiff) Appellant:

MESSRS. BOURNE & DESBRISAY,
Solicitors for the (Defendant) Respondent:

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No 25 of 1939.

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CASE FOR THE APPELLANT

RECORD

1. This is an appeal by the Appellant from a decision of the Court of Appeal of British Columbia whereby an appeal from Robertson, J., sitting with a Special Jury, was allowed, and the Appellant's action dismissed; McQuarrie, J. A., dissented. p. 409. p. 386.

2. The Appellant is a Company engaged in the manufacture and wholesaling to the trade in Canada of white rice. For this purpose it imports rice from the growing countries, principally in Asia, and after putting the rice through a process in its mill on Lulu Island, ships it to its customers.

3. When rice is harvested in the country of origin it is in a form known as "paddy," which consists of the central kernel, a thin covering skin, and over all, a hard shell. The first process to which it is put (and this is usually done in the country of origin) is to convert it from paddy into "brown rice" or loonzain.

4. The Appellant buys brown rice in the country of origin, and in its mill on Lulu Island it puts that brown rice through a process which removes the thin skin by friction, and the resulting product is the central kernel which is known as white rice. The process breaks some of these kernels, which are then known as "brokens" and are sold to a different trade at a lower price. An additional by-product is known as "rice meal" and consists of a sort of powder or flour made out of the pulverized skin which has been removed. This skin is also known as the "bran." p. 202, line 41 to p. 203, line 19.

RECORD

p. 203, line 41 to p. 204, line 4.

5. If the rice is damaged by heat, the white rice produce is darkened in colour, it is impossible to remove all the bran from the kernel, and extra breakage in the milling process occurs, all of which have the effect of reducing the value of the rice.

p. 413.

6. By a valued floating policy of marine insurance dated the 19th day of December, 1929, the Respondent insured the Appellant against loss or damage to shipments of rice imported by the Appellant as from time to time declared under the policy where such loss arose, inter alia, from perils of the sea.

p. 133, lines 3 to 18.

7. On or about the 23rd day of April, 1936, the Appellant shipped a full cargo of 50,600 bags of rice in the motor vessel "SEGUNDO" at Rangoon for their dock on the Fraser River. The shipment consisted of 7,500 bags of rice known as "Interco Brose" and bearing the shipping marks 163 and 102 (hereinafter known as 163 and 102); 20,000 bags marked "Steel Loonzain K.G." (hereinafter called K.G.); 7,500 bags marked "Interco Brose A.L.Z." (hereinafter called ALZ) and 15,600 bags marked "Selected Delta N.L.Z." (hereinafter called NLZ).

Messrs. Blackwood Ralli and Company of Rangoon were the shippers of the said 163 and 102.

p. 348, lines 4 to 7.

8. Pursuant to a declaration made on or about the 17th of March, 1936, the Respondent held such shipment covered by the policy. The Respondent admits that it insured the rice under the policy pursuant to said Exhibits 2 and 5, and in addition on June 4th, 1936, the Respondent issued a Certificate of Insurance (Exhibit 3) in respect of the whole shipment. It appears from Exhibit 2 that pursuant to clause 6 of the policy, the value of the 7,500 bags of 163 and 102 was declared at $30,798.00

p. 116, line 11, to p. 117, line 15.

9. The "Segundo" arrived in the Fraser River on May 28th 1936, and when discharge commenced it was found that the whole cargo of rice had heated, and temperatures ranging up to 106 degrees Fahrenheit were encountered in all marks of rice.

p. 232, lines 29 to 43.
p. 121, lines 28 to 30.
p. 472.

10. The Respondent's local agents, Macaulay Nicolls, Maitland & Company Limited, were immediately notified, and they sent their representative, Captain A. B. Watson, Surveyor to the Board of Marine Underwriters of San Francisco to investigate the matter on their behalf.

11. Captain Slater, the Port Warden of New Westminster, also made a survey.

12. The unloading occupied five days, namely May 29th and 30th, and June 1st, 2nd and 3rd. During that time temperatures were taken from time to time of the various marks, and the following temperatures recorded: RECORD

Date 1936	Mark	Temperature
May 29th	163	94 to 96
June 1st	163	94, 96, 98
June 1st	ALZ	94, 98, 100
June 1st	163	103, 103½ 104 & 106
June 1st	NLZ	106
June 1st	KG	105½ to 106½

p. 118, lines 40 to 46.
p. 119, lines 29 to 37.

13. The detailed temperatures of the various marks are here set out in full because the Respondent at the trial attempted to set up that no rice was damaged except that marked 163 and 102.

14. The 163 and the ALZ were meant for the high-class trade hereinbefore referred to and required close milling. The NLZ and KG being lower class rice did not require fine milling.

p. 203, lines 19 to 24.
p. 204, lines 4 to 16.

15. Tests were made to ascertain the damage by milling some of each lot into white rice, and it was decided by the Appellant that while all lots showed damage it would only be necessary for them to claim against the Respondent in respect of 163 and 102, as the remaining marks could be used for the purpose intended.

p. 122, line 32 to p. 123, line 3.
p. 160, lines 19 to 25.

16. Rice is a commodity very liable to heat if not fully ventilated during carriage, as it contains a considerable moisture content, and has an ability to absorb further moisture. If this moisture is not carried off by ventilation, a process of fermentation sets in and damages the grains.

17. During the voyage from Rangoon the vessel encountered from time to time very severe weather, which, particularly for the 55 hour period between May 8th and May 11th, necessitated the closing of the hatches and cowl ventilators, thereby shutting off all ventilation of the cargo. Other stoppages of ventilation occurred at other times during the voyage.

p. 442 to 445.

18. The Appellant claimed that the damage to the rice was caused by the stoppage of ventilation hereinbefore referred to, and therefore was damaged by a peril of the sea, but the Respondent refused to agree to this contention and maintained that the damage was due to inherent vice in the rice itself, or in other words that before shipment the heating had commenced.

RECORD

19. The parties being unable to agree on the cause of the damage, this action was commenced on the 23rd of July, 1937, and
p. 1. by the Amended Statement of Claim the Appellant claimed the sum of $8,071.64 against the Respondent.

20. Evidence as to the condition of the rice before shipment was taken on a Commission issued to Rangoon, when all the wit-
p. 19 to 90. nesses who saw the rice testified that it was in good condition when shipped, and the action came to trial before a special jury on the 19th day of May, 1938, and after a 7-day trial the jury returned
p. 371. a verdict in favour of the Appellant, and the Appellant recovered 10
p. 386. judgment in the full amount of its claim.

21. On appeal by the Respondent to the Court of Appeal the appeal was allowed, McQuarrie, J.A., dissenting, and the Appellant's action was dismissed, the majority of the Court consisting of Martin, C.J.B.C., and Sloan, J.A., being of the opinion that on the facts of this case it could not be said as a matter of law that the loss was caused by a peril of the sea, and that in any event the jury did not find as a fact that a peril of the sea was the proximate cause of the loss.

22. The relevant Section of the Marine Insurance Act, 20 R.S.B.C. 1936, Chapter 134, is as follows:

> 57. (1) Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against.
>
> (2) In particular:
>
> (a) The insurer is not liable for any loss attributable to the wilful misconduct of the assured, but, unless the policy otherwise provides, he is liable for 30 any loss proximately caused by a peril insured against, even though the loss would not have happened but for the misconduct or negligence of the master or crew;
>
> (b) Unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against;
>
> (c) Unless the policy otherwise provides, the insurer is not liable for ordinary wear and tear, ordi- 40 nary leakage and breakage, inherent vice or nature of the subject-matter insured, or for any loss proxi-

RECORD

mately caused by rats or vermin, or for any injury to machinery not proximately caused by maritime perils.

23. By its statement of Defence and by evidence adduced at the trial the Respondent raised several issues of fact. The Respondent pleaded generally that the loss was not by the perils insured against, but it did not specifically plead nor contend on the trial that, assuming that a peril of the sea existed which necessitated the closing of ventilators which caused the rice to heat with the ensuing damage thereto, the loss was not proximately caused by a peril of the sea.

p. 3.

p. 4, line 31.

24. The Respondent contended and led evidence at the trial designed to show that the rice was not damaged during the voyage, but was shipped in a damaged condition, or was a "bad carrier," and that if it became heated during the voyage such heating was due to inherent vice therein.

p. 252, line 36 to 42.

25. The presiding judge on the trial of the action intimated throughout the trial that he expected Counsel to agree on the questions which should be submitted to the jury in respect of the issues of fact arising on the trial. Questions were drafted by Counsel for both parties, and after full discussion thereon and on further questions drafted by the learned Judge the issues of fact were settled and submitted to the jury. The questions and the answers of the jury thereto are as follows:

p. 8, lines 19 to 21.
p. 254, lines 30 to 32.
p. 343, lines 3 to 8.
p. 346, lines 30 to 34.
p. 346, lines 38 to 40.
p. 347, line 2.
p. 347, lines 31 to 33.
p. 348, lines 13 to 16.
p. 371.

"1. Was the cargo of rice of 50,600 bags loaded on board the Motor Vessel "Segundo" at Rangoon between April 13th and 23rd, 1936, for carriage to the Plaintiff's dock on the Fraser River, B. C., included in which were 7,500 bags of rice marked "Interco Brose 163"?
Answer: Yes.

2. Did the defendant insure the said cargo under policy of insurance marked Exhibit I in this action?
Answer: Yes.

3. Was the said rice in good and sound condition when shipped?
Answer: Yes.

This may be said to have been a real and substantial issue between the parties.

4. If the answer to No. 3 is in the negative, in what respect was such rice not in good and sound condition?
No answer.

RECORD

5. Was the value of the said shipment, 7,500 bags, including freight, declared by the Plaintiff to the Defendant at $30,798.00?
Answer: Yes.

6. Was the said shipment damaged by heat caused by the closing of the cowl ventilators and hatches from time to time during the voyage.
Answer: Yes.

7. If the answer to No. 6 is in the affirmative, was the closing of the ventilators and hatches the proximate cause of the damage?
Answer: Yes.

The Respondent throughout contended that the damage was not caused by heat due to the closing of the ventilators and hatches during the voyage, but resulted from damage existing at the time of shipment or to inherent vice.

8. Was the weather and sea during the time the cowl ventilators and hatches were closed such as to constitute a peril of the sea?
Answer: Yes.

The learned Judge was of the opinion that the question of whether or not a peril of the sea existed was one of fact for the jury, and that his duty was to instruct them as to what was in law a peril of the sea.

9. If the answer to No. 8 is in the affirmative, what were the conditions of the weather and sea?
Answer: Heavy winds from 8th to 11th May, with high seas; from 11th to 17th, moderate weather and moderate seas, after which latter date, strong gales and very rough seas up to 20th; variable seas and weather after that date.

10. Did the Plaintiff thereby suffer loss exceeding 3 per cent. on each package?
Answer: No, only on 163.

The answer to Question 10 being a little ambiguous, was referred back to the jury by the presiding Judge in order to make certain that the jury intended to find that each of the 7,500 bags was included in their answer, because the two different marks 163 and 102 had been throughout compendiously referred to as 163. The foreman of the jury made it quite clear that the 7,500 bags were referred to so the answer to Question 10 must be taken to be simply "Yes".

11. If the answer to No. 10 is in the negative, how many packages were damaged less than 3 per cent
Answer: The remaining three. RECORD

12. What was the gross sound value of the 7,500 bags?
Answer: $28,748.35.

13. What was the gross damaged value of the same 7,500 bags? Answer: $21,211.00.

26. At the conclusion of the Appellant's case on the trial, Respondent's Counsel moved for a dismissal of the action on various grounds, but he did not contend, nor suggest, that on the facts proved by the Appellant a peril of the sea was causa remota and not causa proxima. After the jury returned their verdict Counsel for the Respondent in a comprehensive argument submitted to the learned Trial Judge that the Appellant's action should be dismissed notwithstanding the verdict of the jury, but he did not contend that in law a peril of the sea as found was causa remota and not causa proxima, nor did he contend that there was lacking any issue of fact necessary to the Appellant's case. He did not suggest that the jury had found the proximate cause of the damage to be the closing of the ventilators and hatches, and that therefore it could not be said that the loss was due to a peril of the sea. p. 252 to p. 254. p. 373 to p. 385.

It was not until the case was in the Court of Appeal that Counsel for the Respondent argued the ground on which the majority of the Court of Appeal based their judgments.

27. Mr. Justice Sloan in the Court of Appeal, with whom Martin C.J.B.C. agreed, was of the opinion that if the rice had suffered damage during the voyage, such damage was not caused by an insured risk, i.e., a peril of the sea. The majority were of the opinion that because the Jury had said in answer to question 7 that the closing of the ventilators and hatches was the proximate cause of the damage, it could not now be contended that the proximate cause was in fact a peril of the sea. It is submitted that the majority of the Court failed to appreciate that the answers to questions 6, 7, 8, 9 and 10 read fairly together, show a direct chain of causation. p. 399 to 408. p. 391.

28. The majority of the Court of Appeal went farther and decided as a matter of Law that on the findings of the Jury it could not be said that the loss was caused by a peril of the sea because the last event, in point of time, was the closing of the ventilators and hatches, which in their opinion must be taken to be the proximate cause of the loss. It is submitted that the proximate cause is the effective cause and not the last in point of time. p. 407, lines 7 to 13.

RECORD

p. 392 to p. 398.

29. Mr. Justice McQuarrie, who would have dismissed the appeal, was of opinion that the questions submitted by the Learned Trial Judge were the cumulative result of discussion with Counsel, and that the cumulative effect of questions 6, 7, 8 and 9 was conclusive on the question of proximate cause in favour of the Appellant.

30. The Court did not pass on any of the questions of fact decided by the Jury.

31. The Appellant humbly submits that the judgment of the Court of Appeal should be reversed, and the judgment of Robertson J. restored for the following, amongst other

REASONS

1. The issues of fact were in effect agreed upon by Counsel for both parties at the trial, and were put to the Jury with proper directions by the Learned Trial Judge, and the Jury's answers support the judgment pronounced by the Learned Trial Judge.

2. The answers of the Jury fairly construed, result in finding that the Plaintiff's loss was caused by a peril of the sea.

3. The majority of the Court of Appeal erred in deciding that the Jury did not find as a fact that the loss was caused by a peril of the sea.

4. The majority of the Court of Appeal erred in Law in deciding that on the facts found by the Jury it could not be said that the loss was caused proximately by a peril of the sea.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Vancouver, B. C., this 5th day of April, A.D. 1939.

ALFRED BULL,

C. C. I. MERRITT.

Valentine Holmes

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(Defendant) Respondent.

CASE FOR APPELLANT

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