Privy Council Appeal No. 25 *of* 1939

Canada Rice Mills Limited - - - - *Appellant*

v.

The Union Marine and General Insurance Company Limited *Respondent*

FROM

THE COURT OF APPEAL FOR BRITISH COLUMBIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 24th SEPTEMBER, 1940.

Present at the Hearing :

VISCOUNT MAUGHAM
LORD RUSSELL OF KILLOWEN
LORD WRIGHT
LORD PORTER

[*Delivered by* LORD WRIGHT]

The appellants claimed in this action as assured under a floating policy of marine insurance dated the 19th December, 1929, upon shipments of rice imported by the appellants to their rice mills in British Columbia, as from time to time declared under the policy. The policy covered (among other risks) perils of the seas, and also, under what are often described as the general words, all other perils losses and misfortunes that have or shall come to the hurt or damage of the subject matter of the insurance. The goods were warranted free of particular average under 3 per cent. on each package. The seaworthiness of the ship as between the assured and the assurers was admitted. Under this policy the appellants duly declared a full cargo of 50,600 bags of rice weighing 5,080 tons shipped on or about the 23rd April, 1936, in the motor vessel " Segundo " at Rangoon for their dock on the Fraser River. The bags were valued in all at $191,922. Included in the shipment so declared were 7,500 bags of brown rice valued at $30,798 marked 163 and 102. The shippers were Blackwood Ralli & Co. of Rangoon. The claim is made in respect of the rice declared under these two marks which are compendiously referred to as 163. No claim is made in respect of the other marks shipped, which bore respectively the marks K.G., A.L.Z., and N.L.Z. The respondents issued a certificate of insurance in respect of the whole shipment.

The " Segundo " was a motor vessel of 4,414 tons gross and 2,668 tons net, registered at Oslo. She had five holds. The bags of the marks 163 and 102 were stowed, partly in No. 2 hold, which was forward of the engine and boiler space

and partly in No. 3 hold which was aft of that space. The cargo throughout was well dunnaged and was stowed with adequate air spaces. There were also vertical wooden trunk ventilators and ordinary wooden rice ventilators in each hold. The system of ventilators throughout consisted of cowl ventilators with in addition Samson post ventilators at each hold. These latter were always open, but it was necessary that the cowl ventilators should be also open to ensure a through current of air in the holds. There is no complaint of the sufficiency of the ventilation system.

The "Segundo" arrived at Fraser River on 28th May, 1936. It was then found that all the rice had heated, but by reason of the franchise of 3 per cent. in the case of particular average and also because the rice in the bags marked 163 and 102 was of finer quality, it was decided that the claim against the respondents as insurers should be limited to these marks.

A primary issue in the action was what was the condition of the rice on shipment, since it was contended that the damaged condition of the rice was not due to perils insured against but to the inherent vice of the goods when shipped. On that issue a commission to take evidence went to Rangoon where a large number of witnesses gave evidence. At the trial which took place in the Supreme Court of British Columbia before the Honourable Mr. Justice Robertson and a special jury and lasted for seven days, the jury, as will appear later, found that the rice was in good and sound condition when shipped. No complaint has been made of the summing-up. There was abundant evidence to justify the jury's finding on that issue, which was accordingly concluded in the appellants' favour. The question therefore remained whether the appellants had established that the damage was due to perils insured against. The appellants' case was that the damage was due to interference with the ventilation consequent on bad weather during the voyage which caused the closing of the cowl ventilators which it was necessary to keep open to ensure through ventilation. The evidence was that rice is a commodity very liable to heat if not fully ventilated while being carried in the ship's hold. It has a considerable moisture content, and has a capacity of absorbing further moisture. If this moisture is not carried off by ventilation a process of fermentation sets in and damages the grain. The heating thus caused when the ventilation was shut off, would tend to develop even after full ventilation was restored. The ventilators have to be closed when water would get to the cargo if they are not closed. When the ventilators are again opened the cooler air circulating through them also sets up a condensation in the hot, moist and humid atmosphere of the hold, and precipitates moisture on the rice. If a process of fermentation is thus started it may go on for the rest of the voyage even though the ventilators are not again closed.

In a case of damage to cargo such as the present, the evidence from those in the ship of what happened during the voyage is vital and is generally given by the ship's officers. But in this case, a translation of the ship's log

was accepted as the sole evidence from the ship. It is necessarily very brief in its narrative, and might well have called for explanation on many points. But, such as it was, it was put to the jury as the material for their decision on this aspect of the case. They were called upon to make such findings or draw such inferences of fact from the log as seemed to them to be right with the aid of such expert evidence as was laid before them.

The log shows that from the 24th April, 1936, the day on which the "Segundo" sailed from Rangoon, until the 27th April, 1936, when she was in the Straits of Malacca, the ventilators were not closed. On that day for some short period the ventilators were covered "on account of unsettled weather," and later in the day they were again covered on account of rain, until the next day. Then for a few hours on the night of the 30th April, 1936, they were again covered on account of rain and yet again covered on account of heavy showers for a few hours on the 1st May, 1936. Thereafter there is no entry of any moment until the 8th May, 1936.

The learned Judge, in summing up, told the jury that the case of the appellants which was that the damage was caused by the closing of the cowl ventilators and hatches during the voyage, really came down to the question of the period from the 8th to the 13th May. The 13th it is clear should read as the 11th. Either the Judge made a momentary slip or he was misreported. It is therefore necessary particularly to examine the log entries from the 8th to the 11th May. The vessel was on the 8th driving against heavy head seas, with much pitching. At 19.30 (or 7.30 p.m.) the covers were put on the ventilators owing to rain. On the 9th, the log records heavy head seas, pitching and spray over decks and hatches and similar entries throughout the day with half a gale or a fresh gale. On the 10th there are similar entries, continuous heavy head seas, spray over fore deck, and later in the day the entry was that she was shipping some seas over the forepart of vessel. About mid-day the wind became a strong gale with hurricane-like squalls at times. The vessel was driving into a head wind and sea, with pitching and rolling, at times described as tremendous. At 1 a.m. on the 11th the covers were removed from the hatches. It is this period in particular, the 9th and 10th May, which the appellants rely on as involving a long continuous interruption of ventilation and as causing the heating and fermentation which was eventually discovered at the end of the voyage. Captain Brown Watson an expert called on behalf of the respondents agreed that on the 9th and 10th there was reason for closing the ventilators at least on the forward end to prevent damage to cargo, that is, to prevent the cargo getting wet. He did seem disposed to draw a distinction between the forward end and the after end of the ship, but no attempt was made to distinguish different parts of the damaged rice and the jury with the material they had before them were entitled to find, if so minded, that the

ventilators were properly closed on the 9th and 10th for the safety of the cargo and to reject the distinction between the different holds suggested by Captain Brown Watson. On the 15th there is an entry that covers were put on the ventilators owing to humidity or fog, but only for a few hours, and similarly for a few hours on the 16th and on the 17th. Later on that day the vessel ran into bad weather, and shipped some spray over the decks, but the wind was a following wind and the ventilators were not closed, except for a brief period on the 18th, when there was a heavy sea and a gale, that again was a case of a following sea and gale. On the 25th and 26th for about 21 hours, the ventilators were closed on account of rain. On the 28th the vessel arrived at Fraser River. It thus appeared that for about 50 odd hours on the 9th and 10th there was a continuous closing of the ventilators and evidence on which the jury might find that it was due to conditions of wind and sea, and that it was the cause of the damage. The closing of the ventilators on account of rain was for brief periods. Rain is not a peril of the sea, but at most a peril on the sea. But there is now no real issue that the damage was due to rain.

At the conclusion of the case after lengthy arguments, the jury were required to give a special verdict on specific questions. Question 3 dealt with the condition of the rice on shipment. It was answered in favour of the appellants as already stated. Questions and answers 6 to 10 should be set out in full:—

> "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.
>
> 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.
>
> 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."

Some discussion took place both in the Courts of British Columbia and before their Lordships on the form of questions 7 and 8, in particular in regard to the word "proximate" in 7, and in regard to the omission to ask the jury if the peril of the sea was the cause of the closing of the ventilators and hatches. On this latter point their Lordships would feel justified, if it were necessary, to act upon Order LVIII, r. 4 of the Rules of Court of British Columbia. That Rule is identical with Order LVIII, r. 4 of the Rules of the Supreme Court in England which gives the Court of Appeal power (inter alia) to draw inferences of fact and to give any judgment and make any

order which ought to have been made and to make such further or other order as the case may require, as well as to receive further evidence. The rule is intended to obviate a new trial in cases where such a course can properly be avoided and applies even in cases tried with a jury. In the present case the jury have found that there were perils of the seas during the period while the ventilators were closed. What is wanting is the finding that there was not merely concurrence in time, but that the perils of the seas caused the closing. The connexion is so obvious that if necessary the Court is entitled to draw an inference of fact that the closing was so caused. Their Lordships were referred to a decision of the Supreme Court of Canada *McPhee* v. *Esquimault and Nanaimo Railway Co.* 49 S.C.R. 43 in which the rule was discussed. The English rule has frequently been discussed in English Courts, for instance in *Paquin Ltd.* v. *Beauclerk* [1906] A.C. 148, *Mechanical and General Inventions Co. & Lehwess* v. *Austin* [1935] A.C. 346. In the present case the Court of Appeal in British Columbia regarded themselves as precluded from going beyond a narrow reading of the findings of the jury by a decision of the House of Lords in *McGovern* v. *James Nimmo* 107 L.J. P.C. 82, where Lord Atkin said that the Court cannot itself supply an answer to a missing question. That decision was, however, in an appeal from the Scotch Courts, where there is no rule corresponding to Order LVIII, r. 4 and where the Appellate Court has only the record and verdict before it. In their Lordships' judgment, the decision in *McGovern's* case (*supra*) cannot in view of Order LVIII, r. 4 be applied to English or British Columbia appeals. But in truth their Lordships are of opinion that the difficulty can be more simply dealt with. The jury answered the specific questions put to them. Why there was no express question directed to the causal relationship between the closing of ventilation and the perils of the sea is not material. The Judge is responsible for the questions put and the jury have only these questions before them. It may be that all concerned thought the connection too obvious to call for a special question. No doubt some confusion has been introduced by the form of question 7, was the closing of ventilation the proximate cause of the damage? But if the questions and answers are construed fairly and construed as a whole it is in their Lordships' judgment clear that what was meant by proximate was "last in time." The Judge in summing up directed the jury's special attention by putting Question 8, to the fact that the policy insured the plaintiff against damage to the rice arising from perils of the seas. Thus the idea of causal nexus was brought to their minds. Question 9, or perhaps the answer, is somewhat difficult to understand, but the answer at least deals specifically with the crucial period from the 8th to 11th May, describing it as a period of heavy winds and high seas. The period of the voyage up to the 8th is not treated as material and the subsequent part of the voyage may be disregarded.

On these findings, supplemented by further findings as to the amount of damage, the Judge entered judgment for the appellants. The Court of Appeal by a majority set aside that judgment mainly as it seems on grounds of law. There was it was held no evidence of perils of the seas. The conclusion appears to have been based on a view as to the meaning of perils of the seas. It was held however that even if there were perils of the seas, they did not constitute the *causa proxima* for purposes of insurance law, because the *causa proxima* was the deliberate act of the master in closing the ventilation. These points are fully developed in the judgment of Sloan J.A. Martin C.J. in agreeing with the reasons of Sloan J.A. rather emphasised the purely verbal aspect of the jury's finding as to the proximate cause, and thought that so far from finding that the peril of the seas was the proximate cause of the loss, they had come to the conclusion that the loss was due to something else, namely, the closing of the ventilators. On this matter their Lordships have already expressed their opinion.

Their Lordships are unable with all respect to agree with the reasoning of Sloan J.A. in his careful opinion, and in the arguments advanced before them in support of it. The two main questions must be discussed separately.

The first question, whether on the evidence the jury were justified in finding that there was a peril of the sea depends on the meaning to be attached to those words in a policy of marine insurance. The trial judge directed the jury that the words referred to fortuitous accident or casualty of the seas but did not include the ordinary action of the wind and wave. In British Columbia the law of marine insurance is now to be found in the Marine Insurance Act, R.S.B.C., 1936, ch. 134 which is for all practical purposes the same as the English Marine Insurance Act, 1906, which was a codifying Act. Authorities under the latter Act are properly cited as authorities in respect of the former. The Judge in his direction to the jury was quoting Rule 7 in the First Schedule to the Act. In considering the material questions it is helpful in the first instance to assume that the ventilation was not closed, but that the sea or spray had actually wetted the rice and caused the damage. The other question that of the *causa proxima* can then be considered separately. The view of Sloan J.A. seems to be that there was no peril of the sea because in his opinion the weather encountered was normal and such as to be normally expected on a voyage of that character and that there was no weather bad enough to endanger the safety of the ship if the ventilators had not been closed. But these are not the true tests. In the House of Lords in *Wilson, Sons and Co.* v. *Overseers of Cargo per the Xantho,* 12 App. Cas. 503, which was a bill of lading case but has always been cited as an authority on the meaning of the same words in policies of marine insurance (see *per* Lord Bramwell in *Hamilton, Fraser* v. *Pandorf and Co.* 12 App. Cas. at p. 527) Lord Herschell said at p. 509 " The " purpose of the policy is to secure an indemnity against

" accidents which may happen, not against events which " must happen. It was contended that those losses only " were losses by perils of the seas which were occasioned by " extraordinary violence of the wind or waves. I think " this is too narrow a construction of the words and it is not " supported by the authorities or by common understanding. " It is beyond question that if a vessel strikes upon a rock in " fair weather and sinks, this is a loss by perils of the seas." In *Thames and Mersey Marine Insurance Company* v. *Hamilton, Fraser and Co.*, 12 App. Cas. at p. 502 Lord Macnaghten said that it was impossible to frame a definition of the words. In *Hamilton, Fraser and Co.* v. *Pandorf* (*supra*) where a rat had gnawed a hole in a pipe, whereby seawater entered and damaged the cargo, there was no suggestion that the ship was endangered, but the damage to the cargo of rice was held to be due to a peril of the sea. There are many contingencies which might let the water into the ship besides a storm and in the opinion of Lord Halsbury in the case last cited any accident that should do damage by letting in sea into the vessel should be one of the risks contemplated.

Where there is an accidental incursion of seawater into a vessel at a part of the vessel and in a manner where seawater is not expected to enter in the ordinary course of things and there is consequent damage to the thing insured, there is prima facie a loss by perils of the seas. The accident may consist in some negligent act, such as improper opening of a valve, or a hole made in a pipe by mischance, or it may be that sea water is admitted by stress of weather or some like cause bringing the sea over openings ordinarily not exposed to the sea or, even without stress of weather, by the vessel heeling over owing to some accident or by the breaking of hatches or other coverings. These are merely a few amongst many possible instances in which there may be a fortuitous incursion of seawater. It is the fortuitous entry of the seawater which is the peril of the sea in such cases. Whether in any particular case there is such a loss is a question of fact for the jury. There are many deck openings in a vessel through which the seawater is not expected or intended to enter and, if it enters, only enters by accident or casualty. The cowl ventilators are such openings. If they were not closed at the proper time to prevent seawater coming into the hold and seawater does accidentally come in and do damage, that is just as much an accident of navigation (even though due to negligence, which is immaterial in a contract of insurance) as the improper opening of a valve or other sea connection. The rush of seawater which but for the covering of the ventilators would have come into them and down to the cargo was in this case due to a storm which was sufficiently out of the ordinary to send seas or spray over the orifices of the ventilators. The jury may have pictured the tramp motor vessel heavily laden with 5,000 tons of rice driving into the heavy head seas, pitching and rolling tremendously and swept by seas or spray. Their Lordships do not think that it can properly be said that there was no evidence to justify their finding. On any

voyage a ship may, though she need not necessarily, encounter a storm, and a storm is a normal incident on such a passage as the "Segundo" was making, but if in consequence of the storm cargo is damaged by the incursion of the sea it would be for the jury to say whether the damage was or was not due to a peril of the sea. They are entitled to take a broad commonsense view of the whole position. How slight a degree of the accidental or unexpected will justify a finding of loss by perils of the sea is illustrated by *Mountain* v. *Whittle* [1921] 1 A.C. 615, where a houseboat, the seams of which above the waterline had become defective, was towed in fine weather and in closed water in order to be repaired. A powerful tug was employed and this caused a bow wave so high as to force water up into the defective seams. There was no warranty of seaworthiness. "Sinking by such a wave," said Lord Sumner (p. 630) "seems to me a fortuitous casualty; "whether forced by passing steamers or between tug and "tow, it was beyond the ordinary action of wind and wave, "or the ordinary incidents of such towage." In the same way storms at sea may be frequent, in some cases seasonal, like typhoons in the China Seas, a ship may escape them and they are outside the ordinary accidents of wind and sea. They may happen on the voyage but it cannot be said that they must happen. In their Lordships' judgment it cannot be predicated that where damage is caused by a storm even though its incidence or force it not exceptional, a finding of loss by perils may not be justified.

There remains the second question whether the damage which was caused not by the incursion of sea water, but by action taken to prevent the incursion is recoverable as a loss by perils of the seas. It is curious that, so far as their Lordships know, there is no express decision on this point under a policy of marine insurance. But in their Lordships' judgment the question should be answered in the affirmative, as they think the jury did. The answer may be based on the view that where the weather conditions so require, the closing of the ventilators is not to be regarded as a separate or independent cause, interposed between the peril of the sea and the damage, but as being such a mere matter of routine seamanship necessitated by the peril that the damage can be regarded as the direct result of the peril. In *The Thrunscoe* [1897] P. 301 where a cargo of oats and maize had been damaged by the closing of the ventilators owing to heavy weather, it was held that the damage was caused by perils of the sea. The severity of the weather, (there referred to as exceptional, though the adjective is immaterial) was described by Jeune P. as the proximate cause of the damage because the closing of the ventilators was due to that cause, and Gorell Barnes J. described it as the direct cause. It is true that the case dealt with the exceptions in the bill of lading, to which the doctrine of *causa proxima* does not apply in the same way as in insurance law. But it is now established by such authorities as *Leyland* v. *Norwich Union Fire Insurance Society* [1918]

A.C. 350 and many others that causa proxima in insurance law does not necessarily mean the cause last in time but what is "in substance" the cause, per Lord Finlay at p. 355, or the cause "to be determined by commonsense prin- "ciples," per Lord Dunedin at p. 362. The same rule has been reiterated by the House of Lords several times since then, most strikingly perhaps in *Samuel & Co.* v. *Dumas* [1924] A.C. 431, where it was held by a majority of the Lords that where a ship insured by the mortgagee was lost by being scuttled by the deliberate act or procurement of the mortgagor, it was not in insurance law to be deemed a loss by perils of the seas. The proximate cause was the intentional and fraudulent act which let in the seawater and sank the vessel. In cases of fire insurance it has been said that loss caused from an apparently necessary and *bona fide* attempt to put out a fire, by spoiling goods by water, and in other ways, is within the policy (per Kelly C.B. in *Stanley* v. *Western Insurance Co.*, L.R. 3 Ex. 71 at p. 74). Their Lordships agree with this expression of opinion and accordingly are prepared to hold that the damage to the rice, which the jury have found to be due to action necessarily and reasonably taken to prevent the peril of the sea affecting the goods, is a loss due to the peril of the sea and is recoverable as such.

The same result may be reached by a somewhat different approach. It may be held that though such a loss is not strictly recoverable as a loss by perils of the seas, it is within the general words "all other perils losses and mis- "fortunes, etc." which are contained in the policy and have been quoted above. It is true that these general words have to be construed as restricted to cases akin to or resembling or of the same kind as those specially mentioned (per Lord Macnaghten) in *Thames & Mersey Marine Insurance Co.* v. *Hamilton Fraser & Co.*, 12 App. Cas. 484 at p. 501, where they were held not to cover the loss claimed, but subject to that limitation they may be used to give some extension to the specific perils, such as perils of the seas. Thus in *Butler* v. *Wildman*, 3 B. and Ald. 398, a master of a ship in order to prevent a quantity of dollars falling into the hands of the enemy by whom he was about to be attacked, threw them into the sea and was immediately afterwards captured. It was held that the loss came within the general words of the policy, if it did not fall strictly within the specific words, "jettison" or "enemies." The general words had the effect of "including all losses "which are the consequences of justifiable acts done under "the certain expectation of capture or destruction by "enemies" per Best J. at p. 406. The same principle was applied by Gorell Barnes J. in *The Knight of St. Michael* [1898] P. 30, where a cargo of coal had become so heated that the vessel was compelled to put into a port of refuge and a large portion of the cargo was discharged and sold, entailing a loss of freight. No fire had actually broken out. Gorell Barnes J. held that the loss was recoverable if not as a loss by fire, as a loss *ejusdem generis* and covered by the general words.

It is obvious that in these two cases there was no question of turning away to avoid a future peril. If there had been, the loss might properly have been held to be due not to the peril, but to deliberate action to avoid coming into the area of the peril, as in *Becker Gray & Co.* v. *London Assurance Corporation* [1918] A.C. 101 and similar cases. But in *Butler* v. *Wildman* (*supra*) and *The Knight of St. Michael* (*supra*) the subject of the insurance was actually in the grip of the peril, enemies in the one case, fire in the other. The correctness of these authorities has not been doubted and their Lordships think they were rightly decided. Indeed in *Becker Gray and Co.'s* case (*supra*) at p. 118 Lord Sumner expressly cites with approval *The Knight of St. Michael* (*supra*) as a decision on the general words in the policy, and distinguishes it from the case then before him. Similarly in the present case there was an actually operating peril of the sea. There was accordingly a loss either by perils of the seas or a loss within the general words.

In their Lordships' judgment no ground has been shown for setting aside the verdict of the jury and the appeal should be allowed and the judgment of the Supreme Court restored. The respondents will pay to the appellants their costs of this appeal and in the Courts below.

They will humbly so advise His Majesty.

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In the Privy Council

CANADA RICE MILLS LIMITED

v.

THE UNION MARINE AND GENERAL INSURANCE COMPANY LIMITED

DELIVERED BY LORD WRIGHT

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