

Privy Council Appeal No. 41 of 1954

William D. Branson Limited - - - - - *Appellants*

v.

Furness (Canada) Limited (In Liquidation) - - - *Respondents*

FROM

THE SUPREME COURT OF CANADA

**JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 27TH JULY 1955**

Present at the Hearing :

VISCOUNT SIMONDS

LORD OAKSEY

LORD RADCLIFFE

LORD TUCKER

LORD COHEN

[*Delivered by* LORD TUCKER]

In July 1948 the appellants sued the respondents in the Exchequer Court of Canada for damages in respect of their failure to carry and deliver in good order and condition in their vessel the s.s. "Fort Columbia" a cargo of potatoes shipped by the appellants in November 1947 for carriage from Halifax, N.S. to Rio de Janeiro under three bills of lading issued by the respondents which provided for delivery of the goods to the order of the appellants.

The respondents by their defence denied that the cargo was not delivered in good order and condition and further pleaded in the alternative that any damage or deterioration was due to inherent vice or in the further alternative to perils of the sea. They further alleged that any damage or deterioration occurred after the cargo had been discharged at Rio.

The trial Judge, Smith J., decided all the issues on the question of liability in favour of the appellants and awarded them \$44,677.81 by way of damages. On appeal by the respondents the Supreme Court of Canada sustained all the trial Judge's findings as to liability but reduced the damages to \$5,000.

From this judgment the appellants appeal as of right to Her Majesty in Council asking that the trial Judge's award of damages be restored. There is no cross appeal.

The cargo shipped in the s.s. "Fort Columbia" consisted of 11,770 bags each of 100 lbs. with a sound arrived value of \$5.00 per bag and 31,963 bags each of 75 lbs. with a sound arrived value of \$3.75 per bag making a total of 43,733 bags with a sound arrived value of \$178,711.25.

The vessel had 5 holds and potatoes were stowed in all holds except No. 3. The stowage was as follows:—

No. 1 Lower Hold	...	...	3,843	100lb. bags
No. 1 Tween Deck	...	...	1,411	100lb. bags
			11,500	75lb. bags
No. 2 Tween Deck	...	...	885	100lb. bags
			12,381	75lb. bags
No. 4 Tween Deck	...	...	700	100lb. bags
			5,432	75lb. bags
No. 5 Lower Hold	...	...	1,777	100lb. bags
No. 5 Tween Deck	...	...	3,154	
			2,650	75lb. bags

Total ... 43,733 bags

The "Fort Columbia" sailed from Halifax on the 5th November, 1947. She arrived at Rio on the 24th November and berthed on the 25th. Unloading started early on the 26th and finished at 6 p.m. on the 28th. She appears from her log to have left on the 29th.

Representatives of three firms who were the consignees of the cargo went on board during discharge and according to their evidence, which was taken on commission, found signs of deterioration in the potatoes and accordingly applied to Lloyds for a survey.

A Mr. Nogueira was appointed by Lloyds and his evidence was that he found the bags which were being discharged from holds 1 and 2 were wet and the potatoes were sprouting. The bags from the other holds were sound. He recommended that Dr. Sodre, an expert agronomist be called in. This was done and Dr. Sodre made his survey of the potatoes in warehouse No. 19 on the 6th December. It is on the reliability of Dr. Sodre's report and evidence that this appeal depends. In this connection the dates are of considerable importance. Dr. Sodre's report is embodied in three Lloyds survey reports, all in identical terms, relating to the three different consignments signed by Mr. Nogueira and dated the 2nd January, 1948. The portions of these reports incorporating Dr. Sodre's report are each also signed by him. The evidence given on commission was that of Mr. Nogueira, Dr. Sodre, and the three representatives of the consignees named Merhy, Rios and Galdeano. This evidence was taken at Rio between the 21st July and the 4th August, 1950. The trial took place on the 30th and the 31st May, 1951. It is obvious that, assuming good faith on the part of all the witnesses, this is a case where contemporary documents are of great importance.

Dr. Sodre's evidence was directed to four matters (1) the nature of the defects, if any, in the potatoes (2) the place and time when the defects occurred (3) their cause and (4) the assessment of the resulting diminution in value of the cargo as a whole.

Dr. Sodre was a professor of the Rural University who had for many years carried out the duties of Head of the Fruit Supervision of the port on behalf of the Government. He has acted as a Surveyor for Lloyds since 1930, and during this period has carried out from six to ten surveys each year of potatoes arriving from different parts of the world. His qualifications, experience and integrity were not, and could not, be called in question. It is true and unfortunate that there was no representative of the respondents present at his survey and that notification that the survey was to take place does not appear to have been given to them, but this cannot detract from the value of his evidence.

Dr. Sodre's report, as incorporated in the Lloyds survey reports, stated that he examined the goods in warehouse No. 19 on 6th December, 1947, in the presence of the storekeeper, the Customs Inspector and the consignees. He was told that only the cargo carried in holds 1 and 2 was in a wasting condition and that only cargo from these holds had been left in the warehouse to be surveyed. Looking at the piles of bags his first impression was that the wastage could not be heavy as the bags seemed dry and clean, but in removing the bags from the top layers he noticed that the bottom side of the bags were all wet and considerable heat was coming up from the centre of the piles with a strong smell of fermentation.

On opening the bags for inspection he noticed there were rotten potatoes mixed with sound and apparently sound potatoes, as the skin of the apparently sound potatoes was slippery under finger pressure, being waterlogged. This condition was characteristic of wastage in high concentrations if carbon dioxide is produced by sour potatoes and they are not removed from store. He estimated the loss at 70 per cent. representing 25 per cent. of the total shipment.

On this report the matter as between shippers and consignees was settled on the basis of a 25 per cent. reduction in the sound arrived value of the total cargo. It must be remembered that at this stage the precise cause of the deterioration or the place and time at which it had arisen were matters irrelevant to the allowance from the price to be allowed to the consignees.

On the Commission at Rio in July–August, 1950, Dr. Sodre was called as a witness to prove not only what had been set out in his report but also that the condition of the potatoes was due to a type of “black heart” known as “surface breakdown” which causes the exudation of internal water to the outside which would—not with complete accuracy—be called “sweating” by a layman. This condition is due to lack of aeration caused by bad stowage or faulty ventilating appliances. He stated that there was perfect aeration in the warehouse and added “one cannot on any hypothesis assume that the bad storage could be that in warehouse No. 19.” He did not consider that if the potatoes were in good condition when brought into the warehouse there would have been a risk of deterioration during the time they had remained on the premises. He stated that he had confirmed his opinion as to the nature of the defective condition by cutting open some of the potatoes and subjecting them to microscopic examination in his laboratory. His cross-examination was primarily directed to showing that the deterioration occurred or might have occurred after discharge from the ship. He was, however, asked certain questions in examination in chief and in cross-examination relating to the quantity of goods in the warehouse when he carried out his survey and with regard to the nature of his examination. At pages 40 and 41 of Vol. I the following questions and answers appear:—

“Q. 40. Are you able to say whether these potatoes in warehouse No. 19 came from the ship ‘Fort Columbia’?—A. I am, (this was certified by the storekeeper.

Q. 41. Had the storekeeper any official book in which he entered the potatoes received in the warehouse?—A. Yes: and there is the Book of Damage, the Record of Damage and the Book of Discharges, in which he enters all the consignments that come into the warehouse, for his own control and for that of the dockyard.

Q. 42. Did you see these books at the time: did you inspect them?—A. Yes.

Q. 43. And as a result of your inspection did you ascertain that the potatoes in question had been unloaded from the ship ‘Fort Columbia’ and that they constituted a part of the potatoes consigned to the three consignee firms referred to in Exs. 1, 2 and 3?—A. Yes.

Q. 44. Can you tell me the holds of the ship ‘Fort Columbia’ from which the potatoes in warehouse No. 19 had originated?—A. From the information that I obtained from the consignees and the storekeeper, as well as the checking-clerks who checked the unloading, I reached the conclusion that the potatoes stored for the survey originated exclusively from holds 1 and 2. The storekeeper had already given clearance to all the potatoes unloaded from holds 3 and 4 since they had been removed from the warehouses and (released) for the City’s market.”

These questions were all put and the answers thereto received without any objection either at the time when the evidence was taken on commission or when the deposition was put in at the trial. This is, of course, not unusual in commercial cases of this kind.

He went on to add, after reference to his original report which he evidently had with him, that the figure given him of the number of bags for his inspection in warehouse was 15,300, and it was on this basis that he made his calculation. This figure of 15,300 had not, however, been included in the three Lloyds Survey Reports which had included his

original report. He expressed surprise at finding that this figure had not been reproduced in the Lloyds Reports which had been put in as exhibits without objection and which as mentioned above had stated that he had been informed that only the cargo from holds 1 and 2 had been left in the warehouse.

With regard to his method of examination he stated he examined bags from all the piles, from every corner in order to determine whether the damage was localised or generalised and to verify the cause. He opened bags from all piles from the top, from the middle and from all positions. He found the damage was generalised, in every pile he found damaged and perfect potatoes mixed together and especially in the under part of the bags, nearly all were damaged.

The number of bags examined was 100 more or less—and the time taken about 1½ hours. He had followed his usual procedure which was in accordance with the written instructions received each year from Lloyds.

To meet this evidence the respondents called as an expert at the trial Mr. Crocker, a marine cargo surveyor, who stated that his experience in connection with shipment and carriage of potatoes consisted in having personally supervised the loading of potatoes on behalf of various marine cargo underwriters. He did not say that he had had any experience in examining damaged potatoes on arrival, but it would not be right to put much stress on this omission. His criticism of Dr. Sodre's evidence was that no proper conclusion could be reached from examination of only 100 or 150 bags out of a total of 15,000 and, of course, still less if the total was in fact 43,000.

The trial Judge, as previously stated, found in favour of the appellants on all the issues as to liability and in so doing accepted Dr. Sodre's evidence as to the nature of the defect in the potatoes and that the defect had arisen on the voyage due to faulty ventilation. As to the quantum of damage he said in the concluding paragraph of his judgment:—

“Counsel for the defendant was critical of Dr. Sodre's inspection at Rio de Janeiro. The testimony of Dr. Sodre is that his conclusion was based upon an examination of some 100 bags taken from various parts of the piles of an estimated 15,500 (*sic*) bags. Dr. Sodre, an expert in such matters, considered that what he found justified his conclusion as to the cause and extent of the damage and the undersigned finds nothing in the evidence which would warrant the rejection of his findings. Dr. Sodre's inspection appears to have been adequate to enable him to determine the cause of deterioration and estimate its extent.”

There is nothing in the judgment to indicate that the exact number of bags in the warehouse at the time of Dr. Sodre's inspection was ever seriously challenged at the trial or that any objection was taken to the admissibility of evidence as to the information supplied to him by those in a position to know or as to his inspection of the warehouse books. The real criticism was that 100 or 150 bags out of some 15,000 did not afford sufficient material from which to form a reliable estimate of the condition of the total.

It has been necessary to refer in considerable detail to the evidence of Dr. Sodre because this appeal depends solely upon questions of fact with regard to which the Supreme Court have differed from the trial Judge. It is not a case in which the trial Judge had the advantage of seeing and hearing Dr. Sodre or the consignee witnesses who gave evidence on commission, although he did hear Mr. Crocker, the expert for the defence, so that the Supreme Court—as are their Lordships—were at no appreciable disadvantage compared to the trial Judge. On such an issue as this their Lordships must now form their own view on the material which was before both Courts in Canada.

The Supreme Court, although accepting Dr. Sodre's evidence with regard to the nature of the defect in the cargo its cause and place and time of origin, which must have been largely dependent upon the adequacy of his survey, came to the conclusion it was inadequate for the purpose of estimating the quantum of damage on the basis of Mr. Crocker's criticism as to the number of bags examined.

Their rejection of Dr. Sodre's evidence was based upon the insufficiency of the evidence with regard to the quantity of bags in the warehouse when Dr. Sodre made his survey, upon the fact that he relied upon information supplied to him that all the contents of holds 3 and 4 had already been removed before his survey whereas there were no potatoes stowed in hold 3, and that such evidence as there was negatived the removal of any potatoes from holds 4 and 5 before the survey. Furthermore the figure of 15,300 did not correspond to the total of bags in holds 1 and 2 which was in excess of 30,000. Finally Locke, J., in whose judgment the Chief Justice and Rand and Fauteux, JJ., concurred, said: "It is, in my opinion, obvious that in the length of time spent by Sodre there was not such an examination of the condition of the potatoes as would enable him to estimate the loss with any degree of accuracy, whether the quantity in the warehouse was 15,300 bags or all of the potatoes that had been in holds 1 and 2 or the entire shipment of over 43,000 bags piled in the manner described."

Their Lordships are faced with concurrent findings of fact based upon the evidence of Dr. Sodre on the defective condition of the potatoes and its origin which makes it difficult for them to accept the view that with his experience and competence he had made an inadequate survey of the quantity of potatoes which he saw in the warehouse, or that he could not form a sufficient estimate of the quantity to be able to judge as to the accuracy of the information supplied to him by the storekeeper. It is, no doubt, true that he thought he was examining the total contents of holds 1 and 2 and that this was not correct, but the probabilities are all in favour of the view that the potatoes from holds 4 and 5, as to which there was no complaint, had been released from the warehouse before 6th December and there would be nothing improbable in such of the potatoes from holds 1 and 2 as were undamaged having also been released.

Their Lordships have not overlooked the evidence of the consignees given two-and-a-half years later from some of whose answers it would appear that they were saying none of the cargo had been removed before the survey. What is precisely meant by the word "survey" is however by no means clear. In the Lloyds Survey Reports the answer to question 1 (k) shows the survey as having extended over the period from 27th November to 8th December, so that it is open to doubt whether the witnesses when they refer to "the survey" or "the commencement of the survey" always mean Dr. Sodre's examination on 6th December or include the whole period from Mr. Nogueira's first preliminary examination on board.

The respondents do not seek to suggest that the quantity examined by Dr. Sodre was less than 15,300 bags, which assuming the validity of his examination, is the only basis upon which they could reduce the quantum of damages, but seek to attack his survey on the basis that he in fact examined 43,000 or 30,000 bags. This would, of course, greatly enhance the damages if the survey was adequate, but it is said that accepting his evidence of 100 bags sampled this shows an obviously inadequate survey and accordingly his evidence should not be accepted as a basis for the estimation of damages although the respondents do not seek to cross appeal against the findings of liability based on this witness's evidence.

Their Lordships feel that in the light of the available evidence the issue can best be determined by the contemporary documents, the competence of Dr. Sodre as an expert, and the probabilities. So tested they are of

opinion that there were not sufficient grounds to justify the Supreme Court in rejecting Dr. Sodre's evidence on the quantum of damages.

It should, perhaps, be noted that their Lordships have not overlooked certain minor inaccuracies in the evidence of Dr. Sodre or with regard to the information supplied to him, viz. with regard to the death of a stevedore in one of the holds, the fact that the "Fort Columbia" was not a refrigerated vessel as he had assumed, and that the damage to the ventilators was confined to one hold. These criticisms so far as they have force would appear to be more relevant to the issues of liability than to the quantum of damages.

In the result their Lordships will humbly advise Her Majesty that the appeal be allowed, the judgment of the Supreme Court set aside and the judgment of the Exchequer Court of Canada, Quebec Admiralty Division restored. The respondents must pay the appellants' costs in the Supreme Court of Canada and of this appeal.

In the Privy Council

WILLIAM D. BRANSON LIMITED

v.

FURNESS (CANADA) LIMITED
(IN LIQUIDATION)

[DELIVERED BY LORD TUCKER]