

Present : Ennis and De Sampayo JJ.

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AMJEE v. THE QUEENSLAND INSURANCE CO., LTD.

398—D. C. Colombo, 1,195.

Consignment of sugar—Insurance against the perils of sea and fire, &c.—Sugar damaged by salt water and heat—Is damage covered by policy?—Burden of proof.

The plaintiff insured with the defendants a consignment of sugar against the perils of the sea, fire, and all other perils, losses, and misfortunes. When the sugar was landed in Colombo, it was found to be damaged by salt water and damaged by heat, so that some of the bags were charred, and the contents more or less solidified.

Held, that in the circumstances the onus of proof was on the defendant company to show that the charring and the damage by sea water was not the result of a peril of the sea or of fire against which they had insured.

There was a condition of things on board which caused the charring of the bags of sugar, but did not go to the extent of causing an actual outbreak of fire.

Held, that in the circumstances the loss, although, strictly speaking, not a loss by fire, was a loss *ejusdem generis*, and would come under the general clause in the policy of insurance.

¹ 1 Bal. Reports 1.

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THE facts appear from the judgment of the District Judge (L. Maartensz, Esq.) :—

The plaintiff in this action took out an insurance policy for 9,000 dollars signed by the defendant company in respect of 360 bags of white sugar shipped at Singapore for Colombo on board the ss. Meidai Maru. The sugar was insured against, *inter alia*, perils of the seas, fire, and all other perils and misfortunes.

The sugar was damaged in transit, and the plaintiff is seeking to recover the loss, Rs 7,249·50, sustained by him by reason of the damage to the sugar

The claim is repudiated by the Insurance Company, and I tried the following issues :—

1. Was the cargo of sugar consigned to defendant by the ss. Meidai Maru damaged on the voyage ?
2. Was the said damage covered by the policy of insurance ?
3. What damage, if any, is plaintiff entitled to ?

Plaintiff's counsel stated that he relied on the part of the policy protecting the sugar against perils of the seas, fires, and all other perils and misfortunes. The following issues were suggested by defendant's counsel :—

4. If the damage was caused by perils of the seas or fire, was it due to any inherent vice of any part of the cargo ?
5. Was the said cargo improperly stored, if so, are the defendants liable ?

That the cargo of sugar was damaged by heat and moisture cannot be disputed. It was surveyed by Mr. Howard Smith, one of Lloyd's surveyors, who is also an assistant in the firm of Aitken, Spence & Co., local agents of the Insurance Company.

Mr. Smith states in his report : " I found 360 double bags of white sugar more or less badly stained and discoloured, some bags having the appearance of having been charred. The sugar in these latter bags was caked and more or less solid, whilst it was more or less moist in the remainder. A strong smell of pepper pervaded the majority of the bags. In subsequently applying the usual test, I found evidence of salt water. The vessel noted protest. The papers were produced for inspection. I am of opinion that the damages to a portion of the above sugar was, in the first place, due to very great heat, if not actually fire, and the damage by salt water may possibly have been caused by the use of same in either preventing a fire or quenching it. The protest states that the ss. Meidai Maru arrived in the harbour of Colombo on January 16, having experienced heavy weather and high seas between Singapore and Colombo, causing the vessel to ship water and rendering it impossible to open the hatches."

According to Mr. Smith, the Captain of ship note protest even if the sea is quite smooth to protect themselves against any damage to the cargo. He added that if there was a fire, it would have been noted in the protest, and a general average declared.

The bags were charred or scorched, but there were no holes in them, so that they had not actually come in contact with fire.

In cross-examination Mr. Smith stated that the moisture might have been due to sweating of the sugar and the drip from the roof of the hold and the stanchions supporting the hold, the result of heat engendered by the sugar itself. * Some pepper carried on the same ship was damaged,

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and Mr. Smith said that the damage might have been the result of the heating of the pepper—pepper being a commodity very liable to develop extreme heat. There is no evidence as to how the damage was caused. The moisture might have been caused by seas shipped on board. It might have been the result of the sweating of the sugar. It might have been caused by the drip from the stanchions and roof of the hold. The charring might have been caused by the heat engendered by the sugar owing to inherent vice. It might have been due to the heating of the pepper. It might have been due to heat engendered by the closing of the hold owing to heavy weather.

On the evidence I find it impossible to say that the damage was the result of perils of the seas, fire, or other perils, losses, and misfortunes.

I answer the first issue in the affirmative.

I answer the second issue in the negative, and dismiss plaintiff's action, with costs.

The evidence as to damages is not satisfactory, as the plaintiff was not in a position to produce his books in Court.

The policy of insurance was as follows :—

P	Claims payable in Colombo,
Goods Policy.	By Messrs. Aitken, Spence & Co., Ltd.
	Queensland Insurance Company, Ltd.

No. 45. 29,830. Amount insured Rs. 9,000. Payable at Exchange.	Whereas Ranchordass Purshotum, Esq., hereinafter termed the Assured, has represented to the Queensland Insurance Company, Ltd., that he is interested in or duly authorized as Owner, Agent, or otherwise to make the Insurance hereinafter mentioned and described with the said Company.
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Now this policy of insurance witnesseth that in consideration of the premises and of the sum of as arranged, paid, or agreed to be paid by the said assured to the said company as a premium at and after the rate of as arranged . . . per cent. for such insurance, the said Queensland Insurance Company, Ltd., does covenant with the said assured that the said company shall be subject and liable to pay and make good and shall be applied to pay and make good all such losses and damages hereinafter expressed as may happen to the subject-matter of this policy, and may attach to this policy in respect of the sum of dollars Nine thousand only hereby insured, which insurance is hereby declared to be upon A C A & Co., 360 bags white sugar warranted with average including war risk as per clause attached in the ship or vessel called the ss. Meidai Maru, whereof is at present Master (or whoever else with the approval of the said company when practicable shall go as Master) of the said ship or vessel lost or not lost at and from Singapore to Colombo.

And the said company does promise and agree that the insurance aforesaid shall commence upon the said ship at and from as aforesaid, and shall continue until she hath moored at anchor in good safety at her place of destination, and for such period afterwards not exceeding twenty-four hours from such mooring, and upon the freight and goods or merchandise on board thereof from the loading of the said goods or merchandise on board the said ship or vessel at as aforesaid, and

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until the said goods or merchandise be discharged and safely landed at as aforesaid. Including the risk of craft to and from the ship or vessel. In event of the goods being carried beyond their port of destination or transhipped, it is agreed to hold the assured covered for such deviation in terms of the policy, provided the consignee gives due notice in writing to the representative of the said company at the port of destination of such over-carriage, and pays an extra premium to be arranged for such deviation.

In witness whereof, the undersigned, McAlister & Company, I limited, being duly authorized by the Directors of the said company and on behalf of the said company, have hereunto set their hands at Singapore, this 8th day of January, One thousand Nine hundred and Nineteen.

For McALISTER & Co., LTD.,
 Agents, Queensland Insurance Co., Ltd.
 (Signed) ———.

Hayley, for plaintiff, appellant.

Samarawickreme (with him *Keuneman*), for defendants, respondents.

August 2, 1921. ENNIS J.—

This was an action against an Insurance Company in respect of injury to 360 bags of sugar on a voyage from Singapore on the ss. Meidai Maru. The policy of insurance is dated May 19, 1919, and insures against perils of the seas, fire, and all other perils, losses, and misfortunes. When the sugar was landed in Colombo, it was found to be damaged by salt water and damaged by heat, so that some of the bags were charred and the contents more or less solidified.

At the request of the plaintiff Mr. Howard Smith held a survey. Mr. Howard Smith is Lloyd's Agent in Colombo, and is an assistant in the Insurance Department of the Agent of the defendant company in Colombo. He signed a certificate that he found sea water damage, and that some of the bags had an appearance of having been charred. Mr. Howard Smith gave evidence in the case and swore to the correctness of his report. On this evidence, as to the condition of the commodity on arrival in Colombo, the onus of proof would be shifted on the defendant company to show that the charring and the damage by sea water was not the result of a peril of the sea or of fire against which they had insured.

It appears from the evidence that the Captain of the boat did not declare a general average, as in all probability he would have done had there been a fire on board and he made no mention of fire in the protest which he made. The learned Judge has found that there can be no dispute that the cargo of sugar was damaged by

heat and moisture, but he came to the conclusion that there was no evidence as to how the damage was caused, and therefore it was impossible to say the damage was the result of perils of the sea, fire, or other perils or misfortunes. He accordingly dismissed the plaintiff's claim, and the plaintiff appeals.

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It appears from the evidence that alongside the sugar a shipment of pepper was stowed. Mr. Howard Smith saw this pepper some time after he had made his report, and he says that the pepper was more damaged than the sugar, it was scorched. It would seem, therefore, there was a condition of things on board which caused the charring of the bags of sugar and scorching of the pepper, but did not go to the extent of causing an actual outbreak of fire. It has been held that in such circumstances a loss, although, strictly speaking, not a loss by fire, was a loss *ejusdem generis*, and would come under the general clause in the policy of insurance (*The Knight of St. Michael*).¹

For the respondent it was contended that the state of heat may have originated in the consignment of sugar owing to an inherent vice in the consignment. When, however, we find from the evidence that some other consignment was more badly damaged from the same cause, I would prefer to draw the inference that the state of heat originated in that consignment rather than in the consignment of sugar.

In the circumstances the defendant has not rebutted the presumption, which arises from the charring and salt water damaged state of the goods, that the damage was caused from one or other of the perils insured against. I would accordingly allow the appeal.

The learned Judge has not decided the question of damages.

I would accordingly set aside the decree, and send the case back to the learned Judge to fix the amount of damage. The appellant to have costs in both Courts.

DE SAMPAYO J.—I agree.

Set aside.

¹ (1898) *Probate*, p. 30.