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UNIVERSITY OF LONDON
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INSTITUTE OF ADVANCED
LEGAL STUDIES

In the Privy Council.

No. 41 of 1954.

ON APPEAL FROM THE SUPREME COURT OF
CANADA

BETWEEN

WILLIAM D. BRANSON LIMITED ... (*Plaintiffs*) APPELLANTS

AND

FURNESS (CANADA) LIMITED (In Liquidation)
(*Defendants*) RESPONDENTS.

CASE FOR THE APPELLANTS

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1.—This is an appeal from a judgment of the Supreme Court of Canada (The Chief Justice, Taschereau, Rand, Locke and Fauteux, JJ.) dated the 6th October, 1953, varying a judgment of the Exchequer Court of Canada, Quebec Admiralty District (Smith, J.) pronounced on the 4th April, 1952.

2.—The Appellants' claim against the Respondents was for damages for loss arising from damage to a cargo of potatoes carried by the Respondents in their steamship "Fort Columbia" from Halifax, N.S., to Rio de Janeiro in November, 1947.

10 3.—Smith, J., held the Respondents liable to the Appellants for the damage and assessed the amount of the damages at \$44,677.81. On appeal by the Respondents to the Supreme Court of Canada that Court affirmed the decision of Smith, J., on liability but reduced the amount of the damages to \$5,000. It is against that reduction in the amount of damages that the Appellants now appeal, asking that the judgment of Smith, J., be restored.

4.—The only question involved in the appeal is whether it was established by the evidence which was adduced before the Exchequer Court of Canada that the loss which the Appellants suffered by reason of the damage to the potatoes was \$44,677.81.

20 5.—The Appellants' case on damages was that the cargo shipped by them consisted of 11,770 bags each of 100 lbs. with a sound arrived value Vol. I, p. 2, para. 8

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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 ; that the average overall depreciation in value of the cargo by reason of the damage sustained in transit was 25 % ; and that accordingly the loss suffered by the Appellants was a quarter of \$178,711.25, that is to say \$44,677.81.

6.—The quantities of bags shipped and the sound arrived values thereof mentioned in the preceding paragraph were admitted by the Respondents at the trial and therefore the only question which had to be determined on the issue of damages was the extent to which the goods had depreciated in value by reason of the damage sustained in transit. 10

7.—Upon this question the Appellants called a number of witnesses whose evidence was taken on Rogatory Commission in Rio de Janeiro between the 21st July and the 4th August, 1950, and whose depositions formed part of the evidence at the trial on the 30th and 31st May, 1951. These witnesses were two surveyors, Mr. Nogueira and Dr. Sodre, and three merchants whose firms were receivers of various parcels of the cargo, Mr. Merhy, Mr. Rios and Mr. Galdeano.

8.—There were also exhibited to the depositions taken on commission three Lloyds survey reports dated the 2nd January, 1948, and relating to the parts of the cargo destined for each of the three receivers referred to above. Each of these reports was signed by Mr. Nogueira and had annexed to it a Schedule in which was included a report signed by Dr. Sodre describing the damage to the goods and assessing the consequent loss at 25 % of the entire cargo. 20

9.—Mr. Nogueira said that he was a surveyor with some experience in examining shipments of potatoes and identified the three survey reports referred to above as reports made by him. He said that he attended on behalf of receivers on the 27th and 28th November, 1947, when the " Fort Columbia " was discharging her cargo of potatoes and examined potatoes both in Nos. 1 and 2 holds of the ship and in the warehouse to which they were being transferred by wagon after discharge. The bags from Nos. 1 and 2 holds were wet and sprouting with some bad potatoes exposed to view. The bags from other holds were in sound condition. He recommended the removal of the damaged potatoes to the warehouse and the calling in of Dr. Sodre, as an expert agronomist, to make a survey of the damage. He later attended when Dr. Sodre made his survey. He saw Dr. Sodre open up several bags and examine the quantity of spoilt potatoes. According to his recollection these bags were taken from the centre of the pile. 30 40

10.—Dr. Sodre said that he had been a surveyor of fruit and vegetable cargoes on behalf of Lloyd's and other similar institutions for 20 years, and

- that during this period he had examined on an average 6-10 shipments of potatoes a year. He identified the three reports bearing his signature referred to above, which showed that he had gone to No. 19 warehouse on the 6th December, 1947, and there held a survey of part of the potatoes discharged from the "Fort Columbia." He said that there were in the warehouse on that occasion a large quantity of potatoes in bags which were piled in rows about 15-20 bags high. He made a general visual examination of the entire quantity and a detailed examination of about 100 bags taken from the top, middle and bottom of each pile. In the case of these particular
- 10 bags he first looked at the outside, then he looked inside and finally he examined the contents emptied on to the floor. This method of survey followed the practice adopted by him over many years and he believed it to be the best. It was also in accord with the instructions of Lloyds. As a result of his survey which lasted 1-1½ hours he found that there were in each bag some potatoes in good condition and others in a damaged condition and that this was general throughout all the bags in the warehouse. He cut up a number of potatoes to ascertain their condition and removed some to the laboratory for later microscopic examination. Such examination confirmed the opinion which he had already formed at the time of his survey
- 20 that the nature of the damage to the potatoes was a disease known as "Black-Heart" arising from a lack of proper ventilation at an earlier stage. Asked about the estimate of depreciation given in his three reports, which was 70% for the part of the cargo he examined and 25% for the whole of the cargo, he explained that according to his information, which was derived from the consignees, the storekeeper, the checking clerks and the foreman of the stevedores, the part of the cargo surveyed by him consisted of 15,300 bags from Nos. 1 and 2 holds and the rest of the cargo from other parts of the ship, being in sound condition, had already been cleared to the market by the time of his survey. He had arrived at the
- 30 figure of 70% depreciation for the 15,300 bags by taking into account both the extent of the damage and the prevailing market conditions, and he had then calculated the corresponding figure for the whole cargo.
- 11.—Mr. Merhy said he was a member of a firm which was one of the receivers of the potatoes. He attended on board the "Fort Columbia" during discharge and saw that in some of the holds which he was not able to identify, but not in all, there were potatoes in a deteriorated condition with a large number of soiled bags. Several bags were torn or burst and on picking up potatoes which had fallen from them he found some in good condition and others so spoiled that they broke up in his hand. In view
- 40 of the rotten condition of part of the potatoes his firm applied to Lloyds for a survey. When the survey took place in the warehouse he accompanied the surveyor. He saw him turn out and examine the contents of a large number of bags taken from various parts of what he described as "the mass of 43,000 bags." Bags on top of the pile were lifted and bags taken from the middle of it examined.
- 12.—Mr. Rios said he had been until 1948 a member of a firm which

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Vol. I, p. 40,
 QQ. 32-6
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Vol. I, p. 40, Q. 39

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 QQ. 61-6

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Vol. I, p. 44, Q. 62

Vol. I, p. 46, Q. 79

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Vol. I, p. 41,
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Vol. I, p. 53,
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 QQ. 73-4
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 QQ. 19-20

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 Vol. I, p. 59, QQ. 7-8
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 Vol. I, p. 63, QQ. 10-13
 Vol. I, p. 63, Q. 14
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was (like Mr. Merhy's firm) one of the receivers of the potatoes. He attended on board the "Fort Columbia" during discharge and watched the unloading of Nos. 1 and 2 holds. He saw that the bags were wet from which he inferred deterioration of the potatoes. He picked up potatoes which had fallen from torn or burst bags and found some in good condition, some damaged and some sprouting. The potatoes in Nos. 1 and 2 holds were discharged into wagons and transferred in them to No. 19 warehouse. In view of the damage his firm called for a Lloyds' surveyor. According to him all the holds contained some damaged potatoes and none of the sound potatoes were cleared from the warehouse before the survey, which he attended, began. At the survey, many bags were opened, some potatoes being found in good condition and others damaged. The damaged ones were rotten and sprouting and many of the bags had burst. Mr. Galdeano, a member of the third firm of receivers, said that he went on board the "Fort Columbia" while she was discharging and saw that many bags were wet and some torn. He knew about a survey being held but could not say whether he had been present or not. His firm had not cleared any goods from the warehouse before the survey. 10

Vol. I, p. 5, para. 14
 Vol. I, p. 4, para. 13

14.—The Respondents, who did not admit that the potatoes had been damaged in transit at all, called no direct evidence upon the question of the amount by which the potatoes, if damaged in transit, had depreciated in value in consequence. They complained that they had had no notice at the time of any claim for damage and were not given the opportunity of being present or represented when Dr. Sodre made his survey. Certain evidence, however, given by the Respondents' witnesses was indirectly material to the question of the quantum of damage. 20

Vol. I, p. 193, ll. 9-35

15.—Evidence was given by Captain Gaffney, who superintended the loading of the potatoes at Halifax, that they were stowed as follows:—

<i>Hold or compartment</i>		<i>100 lb. bags</i>	<i>75 lb. bags</i>	
No. 1 lower hold	3,843	—	30
'tween deck ...	...	1,411	11,500
No. 2 'tween deck ...	...	885	12,381
No. 4 'tween deck ...	...	700	5,432
No. 5 lower hold ...	...	1,777	—
'tween deck ...	...	3,154	2,650
Totals	<u>11,770</u>	<u>31,963</u>	

Vol. I, p. 135, ll. 20-3
 Vol. I, p. 136, ll. 1-2

16.—The Chief Officer of the ship, who was examined before trial, said that on arrival at Rio de Janeiro he saw no deterioration of the potatoes in the after holds but he did see signs of deterioration in No. 1 hold port side forward. He also saw signs of wetness in the bags in No. 2 'tween deck. 40

17.—Two witnesses who gave evidence on commission at Rio de Janeiro stated that the height of the piles of potatoes in No. 19 warehouse was as much as 25-30 bags.

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Vol. I, p. 71,
QQ. 48-9
Vol. I, p. 97,
QQ. 23-4

18.—A surveyor, Mr. Crocker, was called at the trial to give expert evidence about the proper method of surveying potato cargoes. He said he had been a cargo surveyor for 25 years. If he were called upon to survey a shipment of potatoes he would make a detailed examination of at least 10% of the bags, segregating the good and bad potatoes in each bag. Examination of as few as 100-150 bags out of 15,000 would not enable him to form a conclusion about the extent of any damage which might be present.

Vol. I, p. 203,
ll. 28-9

Vol. I, p. 204,
ll. 14-22
Vol. I, p. 204,
ll. 23-6

19.—The trial Judge, who as has been stated earlier found for the Appellants on liability, accepted the evidence of Dr. Sodre that the average depreciation in value of the part of the cargo surveyed by him was 70%, and that, having regard to the proportion which this part bore to the whole cargo, namely 15,300 to 43,337, the average depreciation in value of the whole cargo was 25%. Accordingly he awarded the Appellants \$44,677.81, being 25% of the admitted sound arrived value of the whole cargo.

Vol. I, p. 240,
ll. 11-21

20.—On appeal by the Respondents to the Supreme Court of Canada that Court after reserving its judgment unanimously upheld the decision of the trial Judge on liability but found that the evidence about the amount of the loss suffered by the Appellants was unsatisfactory and fixed the damages at the greatly reduced figure of \$5,000.

21.—The leading judgment of the Supreme Court of Canada was delivered by Locke, J. with whom the Chief Justice, Rand and Fauteux, JJ. concurred. He directed a series of criticisms at the Appellants' evidence on damage and concluded that, having regard to those criticisms, it was impossible to sustain the award of damages made at the trial. He went on to say that rather than direct a new trial on the issue of damages it was in the interest of the due administration of justice that the quantum of damages should be fixed by the Supreme Court of Canada. In his opinion, upon the whole of the evidence, a proper allowance for the damage was \$5,000 and judgment for that amount should be entered instead of the sum awarded by the trial Judge.

Vol. II, p. 8,
ll. 9-10
p. 8, ll. 11-14

Vol. II, p. 8,
ll. 21-2

22.—Taschereau, J. delivered a short judgment of his own in the course of which he said that the evidence as to the amount of damages to be awarded was very unsatisfactory but instead of sending the case back for a new assessment he would allow the Respondents' appeal and reduce the damages to the figure proposed by Locke, J.

Vol. II, p. 8,
ll. 44-7

23.—No reasons were given by either Locke, J. or Taschereau, J. for arriving at the sum of \$5,000 as the proper amount of damages.

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Vol. II, p. 7,
ll. 18-20

24.—A general observation made by Locke, J. was that the absence of ship's representatives at Dr. Sodre's survey was an added reason for subjecting the Appellants' evidence to a searching scrutiny as to its sufficiency. If the Judge meant by this that the weight to be given to the evidence of a surveyor witness is to be more or less according to whether other surveyors representing different interests are or are not present at the time he makes his survey, it is submitted that he was wrong in law.

25.—The detailed criticisms of the Appellants' evidence made by Locke, J., fell into three categories :—

- (1) Criticisms directed to showing that there was no certainty 10 about the number of bags which were in the warehouse when Dr. Sodre made his survey or about which holds they had come from.
- (2) Criticisms directed to showing that the examination made by Dr. Sodre of such bags as were in the warehouse when his survey took place was not sufficient to enable him to assess with any degree of accuracy the depreciation in value of their contents.
- (3) Criticisms directed to showing that evidence given by Dr. Sodre on issues other than quantum of damages was 20 unreliable.

26.—The criticisms of Locke, J., falling into the first category mentioned in paragraph 25 were as follows :—

Vol. II, p. 3,
ll. 21-35

(A) That Dr. Sodre's evidence that there were 15,300 bags in the warehouse at the time of his examination was hearsay.

Vol. II, p. 7,
ll. 38-43

(B) That the only admissible evidence as to the number of bags in the warehouse at the time of the survey was that of Mr. Merhy and Mr. Galdeano which, if accepted, shewed that the entire cargo of over 43,000 bags was there.

Vol. II, p. 7,
ll. 32-8

(C) That Dr. Sodre's evidence that the bags he examined came 30 from Nos. 1 and 2 holds was hearsay and was inconsistent with the established fact that the number of bags stowed in those holds was 30,020.

Vol. II, p. 3,
ll. 22-32

(D) That Dr. Sodre's evidence that the bags from Nos. 3 and 4 holds had been cleared to the market before his survey was hearsay, and, so far as it related to No. 3 hold, inaccurate, in that it was established that, while potatoes had been stowed in both Nos. 4 and 5 holds, none had been stowed in No. 3 hold.

27.—It is difficult to see how a finding that the number of bags in the 40 warehouse at the time of Dr. Sodre's examination was 43,337, or even 30,020, instead of 15,300, could operate to reduce the damages awarded. The figure of 25% for depreciation in value of the whole cargo was arrived

at on the basis that all but 15,300 of the total number of bags were in sound condition. If in fact the number of damaged bags was 30,020 the corresponding figure for depreciation of the whole cargo would be about 50% and if the number was 43,337 the figure would be 70%.

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28.—While it is true that Dr. Sodre's evidence that the bags he surveyed came from Nos. 1 and 2 holds was hearsay, Mr. Nogueira gave evidence, the admissibility of which cannot be questioned, that the damage to the potatoes was limited to bags discharged from Nos. 1 and 2 holds. This evidence gained confirmation from that of the Respondents' Chief Officer, which suggested not only that there was no damage in holds Nos. 4 and 5 but that the damage in Nos. 1 and 2 holds did not extend to the whole of the bags there stowed.

Vol. I, p. 21, Q. 17

Vol. I, p. 22, Q. 28

Vol. I, p. 135,
ll. 20-3Vol. I, p. 136,
ll. 1-2

29.—Unless Dr. Sodre's evidence that all the bags which he saw in the warehouse and was called upon to survey showed similar signs of damage is to be rejected, which the Appellants for reasons appearing later submit it should not, it follows firstly that the sound bags discharged from holds Nos. 4 and 5 had, by the time of his survey, been cleared to the market, and secondly, that the bags examined by Dr. Sodre in the warehouse had come from Nos. 1 and 2 holds.

30.—So far as concerns the evidence of Mr. Merhy and Mr. Galdeano that no part of the cargo had been cleared to the market at the time of Dr. Sodre's survey, it is to be observed that these witnesses, unlike Mr. Nogueira and Dr. Sodre, had no written reports of their own with which to refresh their memory, and may well, giving evidence more than 2½ years after the event, have been mistaken in their recollection of this circumstance. On the evidence of Mr. Nogueira and the Chief Officer of the "Fort Columbia" it was common ground that a large part of the cargo was in sound condition, and it is unlikely that sound potatoes would have been kept off the market for over a week while the remainder which were damaged awaited survey.

Vol. I, p. 22, Q. 28
Vol. I, p. 135,
ll. 20-3

31.—The discrepancy between the figure of 15,300 bags spoken to by Dr. Sodre on the basis of information given him by other persons who might be expected to have knowledge of the matter and the figure of 30,020 bags known to have been in Nos. 1 and 2 lower holds and 'tween decks could be explained on the basis that not only the sound bags in Nos. 4 and 5 holds but also a further quantity of undamaged bags from one or other or both of the forward holds were cleared to the market before Dr. Sodre made his survey on the 6th December, 1947. Such an explanation is consistent with the evidence of the Chief Officer about the limited extent of the damage and wetness in the two forward holds.

Vol. I, p. 135,
ll. 20-3

Vol I, p. 136, ll. 1-2

32.—On a broad view of the matter it has to be borne in mind that Dr. Sodre was an experienced Lloyds' surveyor called in to survey damage on behalf of those interested in the goods. It is in the Appellants' submission unlikely that he could have failed to ascertain properly whether the bags he was examining constituted the whole or only a part of the

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cargo discharged from the ship, and, if only a part, what proportion such part bore to the whole. Moreover the fact that he made a mistake in saying that some of the cargo with which he was not concerned came from Nos. 3 and 4 holds instead of Nos. 4 and 5, should not affect the validity of his evidence about that part of the cargo with which he was concerned.

33.—The criticisms of Locke, J. falling into the second category mentioned in paragraph 25 were as follows :—

Vol. II, p. 4,
ll. 25-6

(A) That in view of the evidence that the bags in the warehouse were piled to a great height, Dr. Sodre's evidence that he had made a general visual examination of all the bags required 10 further explanation before it could be accepted.

Vol. II, p. 8,
ll. 1-6

(B) That it was obvious that in the time spent by Dr. Sodre on his survey he could not have made such an examination of the goods as would enable him to estimate the loss with any degree of accuracy.

Vol. II, p. 8,
ll. 6-10

(C) That in view of Mr. Crocker's evidence that at least 10% of the bags in any parcel subject to survey should be examined to enable the percentage of loss to be ascertained, Dr. Sodre's estimate of the percentage could not be accepted.

Vol. I, pp. 34-5,
QQ. 1-6

34.—With regard to the sufficiency of Dr. Sodre's survey it has to be 20 remembered that he was an experienced surveyor of over 20 years' standing ; that he had performed on an average 6-10 surveys of potatoes upon discharge each year on behalf of Lloyds ; and that according to his evidence, which was not challenged on this point, his surveys were carried out in a manner which was in accordance with the instructions issued by Lloyds. The only evidence upon which a criticism of Dr. Sodre's methods could be based was that of Mr. Crocker. He had been a marine cargo surveyor for about 25 years but when he was asked about his knowledge and experience in connection with the shipment and carriage of potatoes he only said that he had personally supervised the loading of potatoes on behalf of 30 underwriters and did not lay claim to any experience of surveying damaged potatoes after discharge.

Vol. I, p. 44, Q. 68

Vol. I, p. 203,
ll. 28-33

Vol. I, p. 204,
ll. 14-17

35.—Mr. Crocker's evidence was that in his opinion at least 10% of the total number of bags under survey should have been examined. The impracticability of such a method in the case of a large shipment is obvious and it was never put to Dr. Sodre in cross-examination that this was the method he should have adopted.

36.—How long it would take to make a proper survey of 15,000 bags of potatoes was a question of fact and it is submitted that the Supreme Court of Canada was not justified on any evidence which was before it in 40 concluding that the time taken by Dr. Sodre was insufficient, especially as this suggestion also was never put to him in cross-examination.

37.—For these reasons it is submitted that the criticisms made by Locke, J. of the manner in which Dr. Sodre arrived at his conclusion that the loss on the bags which he surveyed was 70% were ill-founded.

38.—The criticisms of Locke, J. falling into the third category mentioned in paragraph 25 were as follows :—

- (A) That because of previous experience with two other vessels called the “Fort McDonald” and “Fort Kilman,” in which damage to potato cargoes had occurred through failure of refrigerating plant, Dr. Sodre erroneously attributed the damage to the potatoes from the “Fort Columbia” to the same cause, whereas in fact the “Fort Columbia” was not a refrigerated vessel. Vol. II, p. 3,
ll. 8-14
- 10 (B) That a passage in Dr. Sodre’s reports about the conditions of ventilation in Nos. 1 and 2 holds and the death of a stevedore was hearsay and inaccurate. Vol. II, p. 4,
ll. 31-6

39.—It is submitted that these errors, which did not prevent either of the Courts below from accepting the broad effect of Dr. Sodre’s evidence that the damage was due to “Black-Heart” arising from insufficient ventilation during the carriage, are no ground for rejecting his evidence on the material issue namely the extent of the damage to the bags which he surveyed.

40.—The figure of \$5000 arrived at by the Supreme Court of Canada as the correct amount of damages was an arbitrary assessment unsupported by any of the evidence in the case. No reasons were given for arriving at this amount and it is submitted that there is no ground upon which so low an assessment can be sustained.

41.—The Appellants submit that the judgment of the Supreme Court of Canada, so far as it relates to damages, should be set aside, and the judgment of the Court of Exchequer Chamber, Quebec Admiralty Division, restored for the following among other reasons :—

REASONS.

- 30 (1) BECAUSE the evidence adduced before the Exchequer Court of Canada established that the loss which the Appellants suffered by reason of the damage to the cargo was \$44,677.81.
- (2) BECAUSE the criticisms directed against that evidence by the Supreme Court of Canada were not justified.
- (3) BECAUSE the Supreme Court of Canada was mistaken in holding that the evidence as to damages was unsatisfactory.
- (4) BECAUSE there was no evidence to justify a finding that the loss sustained by the Appellants was only \$5000.
- (5) BECAUSE the judgment of Smith, J. as to damages was right and ought not to have been disturbed.

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ROLAND ADAMS.
H. V. BRANDON.

In the Privy Council

No. 41 of 1954.

ON APPEAL FROM THE SUPREME COURT OF
CANADA.

BETWEEN
WILLIAM D. BRANSON LIMITED
(Plaintiffs) APPELLANTS
AND
FURNESS (CANADA) LIMITED (In
Liquidation) *(Defendants)* RESPONDENTS.

CASE FOR THE APPELLANTS

CLYDE & CO.,
Shell House,
55 Bishopsgate,
London, E.C.2,
Appellants' Solicitors.