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BETWEEN:

THE SHIP *TRADE WIND* .....APPELLANT;

AND

DAVID McNAIR & COMPANY LIMITED .....RESPONDENT.

*Shipping—Damage to cargo—Measure of damages.*

*Held:* That the amount of damages recoverable for delivery of a cargo in a damaged condition is the difference between the cargo's arrived sound wholesale market value and its arrived damaged wholesale market value.

Decision of Sidney Smith, D.J.A. [1954] Ex. C.R. 450 affirmed.

APPEAL from the judgment of the District Court in Admiralty for the British Columbia Admiralty District.

The appeal was heard before the Honourable Mr. Justice Fournier at Vancouver.

*V. R. Hill* and *J. R. Cunningham* for the appellant.

*C. C. I. Merritt* for the respondent.

FOURNIER J. now (February 7, 1956) delivered the following judgment:

This is an appeal from the judgment of the District Judge in Admiralty for the British Columbia Admiralty District (1), dated June 30, 1954, by which he allowed the plaintiff's claim for damages arising out of the fact that the defendant wrongfully and in breach of contract did not deliver at its destination a shipment of mandarin oranges in good order or condition, but delivered part thereof damaged, whereby the plaintiff sustained a loss.

The facts are simple and are herein summarized. The ship *Trade Wind* is the property of Pacific Far East Line, Inc., of San Francisco, California, U.S.A. The defendant contracted with the plaintiff, for reward, to carry on board its ship from Japan to Vancouver and Victoria in the province of British Columbia, Canada, a certain quantity of mandarin oranges. The oranges were duly delivered to the ship in Japan in good order and condition and were to be delivered to the plaintiff in like good order and condition at the ports of Vancouver and Victoria, B.C. When the ship *Trade Wind* arrived in Vancouver, it was obvious that damage had been done to the oranges as a consequence of overheating. The plaintiff brought action against the defendant to recover damages.

The defendant in its proceedings and at the trial admitted that the plaintiff was the holder in due course of the bills of lading covering the shipment and was the owner of the cargo. It also admitted that it was bound by contract to deliver the oranges in good condition and that by reason of its fault and negligence part of the shipment was delivered in a damaged condition. The defendant agreed that the plaintiff had done its best to minimize and restrict the

(1) [1954] Ex. C.R. 450.

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damage to the shipment. In other words, the defendant admitted being liable for damages caused and offered plaintiff some compensation for the loss sustained.

At the trial the sole dispute between the parties was the question of the quantum of the damages and the rule to be followed in determining the amount of the said damages. The learned trial judge held that the measure of the damages in this case was the difference between the sound, wholesale, market value of the shipment and the damaged, wholesale, market value at the date and place of the breach of the contract. He then pronounced in favour of the plaintiff's claim and condemned the ship *Trade Wind* and its bail in the amount to be found due to the plaintiff, plus costs, stating that the above rule should be the test in assessing the damages. The defendant (appellant herein) appealed from the judgment to this Court.

The only question to be determined in the present appeal is the quantum of the damages and the rule as to the measure of damages in a case of this kind.

The appellant submits that the determination of the damages to be awarded in this instance should have been based on the principle of *restitutio in integrum,* which is quoted in Vol. 10 of Halsbury's *Laws of England,* 2nd. Ed., at page 82 in the following words:

> The great underlying principle by which the Courts are guided in awarding damages is *restitutio in integrum.* By this is meant that the law will endeavour, so far as money can do it, to place the injured person in the same situation as if the contract had been performed, or in the position he occupied before the occurrence of the tort which adversely affects him.

On the other hand, the respondent contends that the amount of the damages to which it is entitled for the loss sustained should be the difference between the sound, wholesale, market value of the shipment and the damaged, wholesale, market value at the date and place of delivery and that any further dealings it may have had with the shipment were irrelevant to the question of the quantum of damages.

In reply to this, the appellant argued that the above rule would apply in a case when the goods were lost or not delivered but not when they were delivered in a damaged condition. If this principle were applied in the present

case, the basis of the measurement of damages would be the wholesale market value instead of the cost, expenses and commission. Thus, the claimant herein, being an importing agent rather than a wholesaler, would be in a better position than that in which he would have been had the event giving rise to the action not occurred.

Before making findings, I think it would be useful to refer to the authorities and decisions dealing with these contentions. In the case of goods lost or not delivered, the rule as to the measure of damages applicable is well defined in *Scrutton on Charterparties,* 15th edition, article 168, page 432, under the heading "Damages for Failure to carry safely". I quote:

> Where goods are not delivered by the vessel contracting to carry them, the damages will, in the absence of special circumstances in the contract, be the market value of the goods when they should have arrived, less the sums which the cargo-owner must have paid to get them, such as freight.

And when the goods have been damaged the rule is:

> Similarly, if goods are delivered but in a damaged condition, the damages, in the absence of special circumstances in the contract, will be the difference between the market value the goods would have had on arrival, if undamaged, and their value in the damaged condition.

In *The Measure of Damages in Maritime Collisions* by E. S. Roscoe, 2nd edition, at pages 112-113 the same rule is expressed in the following terms:

> . . . the object of [assessment of damages recoverable from a wrongdoer when goods are lost or damaged by a collision] is to place the owner of the goods as nearly as may be in the same position as if the collision had not occurred, and therefore the measure of damages "is the difference between the position of a plaintiff if the goods had been safely delivered, and his position if the goods are lost;

Though the authors deal with damages caused by maritime collisions, the principle is the same when the loss or damage is the result of negligence or of tort. The claimant, according to Roscoe, is entitled to recover from the wrongdoer the "market value when the goods ought to have arrived" or, if there is no market value because there is no market price at the place of arrival, then the "real value" must be ascertained as a matter of fact by the Court and the result must be arrived at by an estimate, taking the cost of the goods to the shipper and adding to that the estimated profit he would make at the port of destination. It seems

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to me to be generally accepted that the rule is the same regarding the measure of damages in the case of lost or damaged goods.

To agree with the appellant's contention that the respondent, not being a wholesaler, was entitled to be indemnified only to the extent of placing it in the same financial position it would have enjoyed if the goods had been delivered in first-class condition would be accepting the principle that the measure of the damage could or would depend on circumstances peculiar to the respondent. It would also be setting aside the appellant's admission that the respondent was the owner and consignee of the goods. It would imply that the respondent, though the owner of the goods, was restrained from disposing of its goods on its natural and normal markets. After making the above admission, the appellant, to my mind, cannot deprive the respondent of his right to receive compensation for his loss on the same basis as another owner, wholesaler or not. It is difficult to understand that, being the owner, he would not be entitled to the market value of his goods, but that his damages would be assessed on circumstances peculiar to him or on his dealings with third parties.

In the *Rodocanachi* v. *Milburn* case (1), where the action arose out of the loss of the cargo as the result of negligence, Lord Esher, after laying down the rule as to the assessment of damages being the difference between the position of a plaintiff if the goods had been safely delivered and his position if the goods were lost, then proceeded to explain what that difference was. If the goods were received, he could sell them and get the value of the goods upon their arrival at the port of discharge less what he would have to pay in order to obtain them. The market value or the real value is to be taken independently of any circumstances peculiar to the plaintiff. He then stated at page 77:

> It is well settled that in an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as for instance an intermediate contract entered into with a third party for the purchase or sale of the goods. It is admitted in this case that, if the plaintiffs had sold the goods for more than the market value before their arrival, they could not recover on the basis of that price, but would be confined to the market price, because the circumstance that they had so sold the goods at a higher price would be an

(1) (1886) 18 Q.B.D. 67.

accidental circumstance as between themselves and the shipowners; but it is said that, as they have sold for a price less than the market price, the market price is not to govern but the contract price. I think, that if the law were so, it would be very unjust.

The principles laid down in the above case have been approved and followed in other cases and dealt with at length, especially in the case of *Williams Brothers* v. *Ed. T. Agius, Limited* (1), in which Lord Haldane at page 520 stated:

> In that case it was held that in estimating the damages for non-delivery of goods under a contract the market value at the date of the breach was the decisive element. In the judgment delivered by Lord Esher he laid down that the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, . . . if the plaintiff had sold the goods before the breach for more than the market price at that date, he could not recover on that footing, and that it would therefore be unjust if the market price did not govern when he had sold for less.

Just to complete my authorities, I would like to refer to the case of *Nabob Foods Limited* v. *The Cape Corso* (2).

This was an action by the holder of a bill of lading against a shipowner for damage to a shipment of black pepper in course of a voyage from Liverpool to Vancouver, B.C. The learned judge in that instance held that the rule of assessment of the damages was the difference between the arrived sound market value and the arrived damaged market value and that a provision of a bill of lading lessening the liability of a carrier for loss or damage to goods was void as contravening R. 8 of Article III of the Schedule of the *English Carriage of Goods by Sea Act, 1924*. This decision was given by Honourable Sydney Smith J. who was also the trial judge in the present case.

I believe the evidence and the admissions made by the appellant justify me in finding that the respondent was holder in due course of the bills of lading and owner of the shipment of oranges and had the right to dispose of same. The cargo being delivered in damaged condition, the respondent had the right and duty to take all necessary measures to minimize the damage. It did so by going to the expense of having the damaged goods reconditioned and repacked and put up for sale. The sales of the reconditioned goods were made on their normal wholesale market,

(1) [1914] A.C. 510.

(2) [1954] Ex. C.R. 335, 340.

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that is to say at Vancouver and Victoria, B.C. There was a market price at these two places for the sale of the oranges in good condition. The damaged oranges, after being reconditioned, were sold at lower prices and others were a complete loss. The respondent then claimed as damages for the loss sustained the difference between the proceeds of the sale of the oranges, plus all necessary disbursements involved in making the goods saleable, and the market price of similar undamaged oranges on their normal wholesale market.

I cannot agree with the propositions put forward by the counsel for the appellant in this appeal, and I believe the stand taken by counsel for the respondent was sound in fact and in law.

There is no doubt in my mind that the learned trial judge was right in deciding that the plaintiff was entitled to recover from the defendant, as the amount of his damages, the difference between the sound, wholesale, market value of the cargo and the damaged, wholesale market value at the place and date of the breach. I, therefore, make mine this finding.

The appeal is dismissed with costs.

*Judgment accordingly.*