
 BRITISH COLUMBIA ADMIRALTY DISTRICT

1955
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 Dec. 14, 15,
 16, 19
 1956
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 Feb. 17
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 1956
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 June 13
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BETWEEN:

EASWEST PRODUCE COMPANY
 and MACDONALDS CONSOLI-
 DATED LIMITED

PLAINTIFFS;

AND

THE SHIP S.S. *NORDNES* and the
 OWNERS OF THE SHIP S.S.
NORDNES and UNION STEAM-
 SHIP COMPANY OF NEW ZEA-
 LAND LIMITED

DEFENDANTS.

Shipping—Damage to cargo—Bills of lading—Australian Sea Carriage of Goods Act, 1924—Cargo not fit for voyage—Onus on defendants discharged—Risk not contemplated by Act—No liability on part of defendants.

In an action for damages brought by the owners of a cargo of onions shipped from Melbourne, Australia to Vancouver, British Columbia, against the steamer, her owners and time-charterers, in which breach of contract contained in the bills of lading and negligence were alleged, the Court found that defendants had discharged the onus to show there was no want of care on the part of the ship and that they had exercised due diligence as required by Article III of the Australian Sea Carriage of Goods Act, 1924.

Held: That the nature of the onions, which were damaged was such, that they could not stand the voyage and they decayed, not because of the ship or of the sea, or of the route, but because they were onions which were not fit to make the voyage in the ordinary way, and this is the kind of risk which the Act does not call on the shipowner to bear.

ACTION for damages to a cargo of onions.

The action was tried before the Honourable Mr. Justice Sidney Smith, District Judge in Admiralty for the British Columbia Admiralty District, at Vancouver.

A. C. Des Brisay, Q.C. and *J. A. Bourne* for plaintiffs.

Vernon R. Hill for S.S. *Nordnes*.

W. J. Wallace for Union Steamship Company of New Zealand Limited.

1956
 EASTWEST
 PRODUCE Co.
et al.
 v.
 THE SHIP
 S.S. *Nordnes*
et al.

SIDNEY SMITH D.J.A. now (June 13, 1956) delivered the following judgment:

This is an action by the owners of cargo against the Norwegian steamer *Nordnes* and against her owners and time-charterers respectively. The action was framed in breach of contract contained in the Bills of Lading and, alternatively, in negligence against all defendants. In addition the statement of claim set up a plea of common carrier against the time-charterer but nothing more was heard of this.

The cargo consisted of two shipments of onions (4,610 bags) under two Bills of Lading for carriage from Melbourne, Australia, to Vancouver, British Columbia via intermediate ports. On discharge the onions were found in bad order. There was some dispute as to the legal ownership of the goods but that is not now important. The Bills of Lading were made subject to the Australian Sea Carriage of Goods Act, 1924, and the rules thereunder, which are similar to the kindred Acts and rules in operation throughout the Commonwealth. They were issued and signed by the time-charterers and stated that the onions were shipped in apparent good order and condition by (the shippers) on board the ship *Nordnes* now lying in the Port of Melbourne and bound for Vancouver via intermediate ports—to be delivered—in the like good order and condition at the aforesaid port of Vancouver to (the plaintiffs).

As they were not delivered in like good order the onus rests on the ship (using that term to include one or other or all defendants as the context indicates) to show that there was no want of care on the part of the ship; and to prove that the defendants had exercised “due diligence” as required by Article III of the Act, and moreover that the damage fell within one of the exceptions contained in Article 4, Rule 2; Carver’s Carriage by Sea, 9th Ed. p. 69; Scrutton on Charter Parties, 15th Ed. p. 169; *Toronto Elevators Limited v. Colonial Steamships Limited* (1). Defendants say the damage was due to “inherent—quality or vice”.

(1) [1950] Ex. C.R. 371.

1956
 EASWEST
 PRODUCE Co.
et al.
 v.
 THE SHIP
 S.S. *Nordnes*
et al.
 ———
 Smith D.J.A.

There was a good deal of evidence taken on commission both in Australia and Norway and again before me at the trial. It is not without significance that the Bills of Lading are dated June 24, 1948 and that the vessel did not arrive at Melbourne for loading until June 26. Loading of the onions was commenced on the 27th and completed on the 28th. I need not enquire into this further in the present case. The vessel sailed on June 28, 1948 and arrived Vancouver on August 13, 1948, thus taking 47 days on the voyage. The trial occupied five days, viz. December 14 to 19, 1955 and February 17, 1956. Thus over seven years intervened between the discovery of the damage and the trial. As the commission evidence was taken only some months before the trial it is not surprising that the recollection of witnesses was not always reliable.

The testimony at Melbourne showed the onions in good order—that is to say in good surface condition with nothing to create suspicion. As I have said they were not in good order on discharge, but they were not in such bad order as some of the Vancouver testimony indicated. However there is no doubt that they were damp and showed signs of heating. The question is what caused this deterioration? One may draw reasonable inferences from the facts disclosed in the evidence.

The Master of the ship, Captain Hysing-Dahl, was asked the question:

What may in your opinion be the cause of the onion cargo in spite of all arriving in poor condition?

and replied

Grounds were onions had probably been stored in Australia from January to June. Long voyage through tropics with long stays at ports in Fiji Islands, totalling 48 days from the time of loading at Melbourne to unloading of onions in Vancouver where arrival was made in the summer.

I think this not far wrong. The Captain might indeed have added that the damage was accelerated by delay at Vancouver in taking steps to mitigate. The time-charterers' submission to the same effect was succinctly put in this way: that the damage was caused "by the inherent defect and vice of the goods shipped when considered with respect

to the season of the year and the nature of the voyage".
 The ship-owners made the same submission in slightly
 different form.

1956
 EASTWEST
 PRODUCE Co.
et al.
 v.
 THE SHIP
 S.S. *Nordnes*
et al.
 Smith D.J.A.

I am by no means satisfied that the good surface condi-
 tion at Australia bespoke good internal condition. The
 onions are normally inspected and packed into bags prior
 to export. But the inspection is only held good for four
 days. If at the end of that period they are still in the
 packing shed they are re-inspected. In the present case
 they were in trucks from June 21 to 27 and even then only
 received a cursory inspection on being loaded. It may well
 be that germs of deterioration were already at work within
 them. The shipment was made unusually late in the season.

Plaintiff contends that the voyage was of unusual length
 —47 days. Assuming, but not deciding this, the ship can-
 not be held at fault. It is not certain that had she gone
 direct from Melbourne to Vancouver the out-turn would
 have been entirely good. As it was 16 days were occupied
 loading and discharging at the intermediate ports. But all
 this was the intended voyage and the route contemplated
 when the Bills of Lading were signed. The parties con-
 cerned knew or should have known of the potential risks
 involved in shipping such a perishable cargo on board a
 vessel with such a comprehensive itinerary. Nothing was
 concealed.

Moreover, in January 1952 the plaintiffs moved to amend
 their statement of claim by adding an allegation that the
 ship had deviated from the contract voyage by calling and
 by loading and discharging at Fiji and certain other islands
 in the South Seas. I held however that this was tantamount
 to setting up a new cause of action and not open to the
 plaintiffs after the expiration of the statutory period of
 limitation.

Plaintiffs' real case as pleaded and sought to be estab-
 lished was (1) bad stowage, (2) lack of ventilation. In
 my opinion, they made good neither issue. The stowage is

1956
 EASWEST
 PRODUCE Co.
et al.
 v.
 THE SHIP
 S.S. *Nordnes*
et al.
 Smith D.J.A.

described in Exhibit 40, a certificate from an independent surveyor, Captain M. H. Longmore at Melbourne. It may be well to set it out in full.

We, the undersigned, under instructions received from The Union Steamship Company of New Zealand Ltd., attended at No. 18 Victoria Dock, from time to time on June 27th, 28th, on board the above vessel for the purpose of supervising the preparations to receive then stow a shipment of Onions, in bags.

Bags were stowed, seven to eight in height, in the upper decks of Nos. 1, 3, 4 holds from a foundation of clean swept compartments dunnaged to a height of three inches by timbers, crossed and well spaced in order to allow the free passage of air between the bags and the deck below.

In the main, bags were stowed fore and aft, one above the other, with a single layer of 6" x 1" flat dunnage between each height, whilst to further the clear flow of air between and through the stacks, fore and aft trunkways were left open to port and to starboard in those instances where the bags were stowed across the deck, and at intervals to the side of the vessel when the bags occupied the wings, only, of the hold.

Bags did not overstow, nor were they overstowed by other cargo.

Bags and contents appeared dry and sound at time of shipment. Care was taken in handling, and in stowage, and as the shipment occupies a position in the holds which will allow a current of air to continually pass through, we consider it a sound risk—it should, given normal conditions, arrive at destination in good order.

M. H. Longmore,
Marine Surveyors.

Melbourne, 28th June, 1948.

An unconvincing attempt was made to show the stowage had been altered at Fiji. Captain Dahl was questioned. The Master could scarcely be expected to be familiar with stowage of a shipment of cargo under normal conditions unless his direction was specially directed to it. That was not so here. Moreover seven years had elapsed and he had left the ship at Vancouver. I am unable to give much weight to the other evidence urged as supporting this submission.

The testimony indicates that the ventilation was by way of Samson posts and the opening of hatches both under way and in port. The testimony shows this was sufficient and that there was no want of care with respect to it. I am satisfied that all proper attention was paid to this important matter and that if the onions suffered in this respect, it was due to the ordinary calling at the ports in the South Sea Islands and not to inattention to ventilation of the cargo.

I need say little about the unloading at Vancouver. There was undue delay on the part of the consignees in accepting the onions and in taking adequate steps to mitigate damages. But this goes rather to the quantum than anything else and need not be further considered.

1956
 EASTWEST
 PRODUCE Co.
et al.
 v.
 THE SHIP
 S.S. *Nordnes*
et al.

On the whole it seems to me that the following concluding passage from the judgment of Lord Sumner in the somewhat similar case of *Bradley and Sons Limited v. Federal Steam Navigation Company Limited* (1), is equally applicable here:

Smith D.J.A.

The other way is to say that the "inherent quality" referred to is not said to be an inherent bad quality and that the words are "resulting from" not "solely resulting from." The nature of the apples, which were damaged—whether they were simply weaker than their neighbours or had some idiosyncrasy—was such, that they could not stand the voyage. They decayed, not because of the ship or of the sea, or of the route, but because they were apples which were not fit to make the voyage in an ordinary way. This is the kind of risk which the Act does not call on the shipowner to bear, for he has had nothing really to do with it and it is, in my opinion, well within the words "resulting from . . . inherent . . . quality or vice."

After full consideration of all the evidence my conclusion is that the defendants have discharged the onus and that neither in contract nor in tort does liability attach to them.

The action is dismissed with costs.

Judgment accordingly.

(1) (1927) 17 Asp. 265 at 270.