

1962
 *Feb. 14
 Apr. 24

JOHN C. JACKSON LTD. (*Plaintiff*) APPELLANT;

AND

SUN INSURANCE OFFICE LIMITED, THE HOME
 INSURANCE COMPANY, THE ROYAL EX-
 CHANGE ASSURANCE, PROVIDENCE WASH-
 INGTON INSURANCE COMPANY, THE PRU-
 DENTIAL ASSURANCE COMPANY LIMITED
 (*Defendants*) RESPONDENTS.

ON APPEAL FROM THE COURT OF APPEAL FOR
 BRITISH COLUMBIA

Insurance—Marine—Motor vessel partially submerged—Cargo of fish rendered valueless by decomposition—Policy insuring “against loss or damage by . . . sinking . . . while being transported in any . . . motor vessel . . .”—Meaning of “sinking”.

The motor vessel *Mina C* while carrying a cargo of herring encountered heavy weather; water entered the engine room and was thrown on to the generator, thereby causing a short circuit, with the result that the vessel's electrical equipment including the pumps that pumped out the bilges in the cargo holds would not work. The water continued to rise, but with help obtained from another vessel the *Mina C* remained afloat and was pushed into a neighbouring bay where she was pumped out. When the vessel eventually arrived at its destination it was found that the cargo was in an advanced stage of deterioration as a result of water having entered the hold. In an action on a policy of insurance the trial judge held that the damage to the cargo was directly caused by the fact that the *Mina C* was “sinking” within the meaning of the policy. The Court of Appeal did not find it necessary to deal with the meaning of the word “sinking” and disposed of the matter on the ground that the loss was not directly caused by a peril insured against. An appeal from that judgment was brought to this Court.

Held: The appeal should be dismissed.

“Sinking . . . while being transported in any . . . motor vessel” was one of the perils against which the cargo was specifically insured and this meant the sinking of such a vessel from any cause whatever including a leak and failure of pumps. The insurer was not entitled to sever the cause of the sinking from the sinking itself and to say that no indemnity was provided against damage directly caused to the cargo in the course of the process which culminated in the sinking on the ground that that process was initiated by a peril against which the cargo was not insured.

However the words “this policy insures against loss or damage by . . . sinking . . . while being transported in any . . . motor vessel . . .” could not be construed as intending to afford indemnity against loss or damage to cargo while transported in a motor vessel which was in fact saved from sinking, as the *Mina C* was, by the timely action of others.

*PRESENT: Locke, Abbott, Martland, Judson and Ritchie JJ.

The additional contention that the policy should be construed as affording indemnity against loss or damage by the sinking of the raw fish as distinct from the sinking of the vessel in which it was being transported and that the insurer was, therefore, liable for damage sustained by the cargo being submerged in sea water while in the holds, also failed.

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APPEAL from a judgment of the Court of Appeal for British Columbia¹, allowing an appeal from a judgment of Macfarlane J. in an action on a policy of insurance. Appeal dismissed.

D. McK. Brown, Q.C., and *D. E. Jabour*, for the plaintiff, appellant.

W. J. Wallace, for the defendants, respondents.

The judgment of the Court was delivered by

RITCHIE J.:—This is an appeal from a judgment of the Court of Appeal of British Columbia¹ allowing an appeal from a judgment of Macfarlane J. and dismissing the appellant's claim for the loss of a cargo of 400 tons of raw herring by sinking while being transported in a motor vessel for which loss the appellant alleges that indemnity is provided by the terms of a policy of insurance issued by or on behalf of the respondents. The policy in question afforded wide coverage by no means confined to marine risks, but the provisions sought to be invoked by the appellant, which have been treated throughout as constituting marine insurance, read as follows:

On Stock consisting principally of Raw Fish, Fish in process, Fish Meal, Fish Oil and Packing Materials, whilst in the building situate—Shingle Bay, North Pender Island, B.C., and anywhere else in Canada or Continental United States of America.

THIS POLICY INSURES AGAINST LOSS OR DAMAGE BY:

* * *

- (j) Stranding, sinking, fire or collision, capsizing, careening or upset including general average or salvage charges and risks of loading and unloading while being transported in any coastwise steamer and/or motor vessel and/or approved barge or scow conveyance except as provided in sub-section (iii) hereof.

The provisions of subs. (iii) are not pertinent to this appeal.

On February 19, 1958, the motor vessel *Mina C*—a former Royal Canadian Navy Minesweeper—which was then under charter to the appellant, was packed with a full load of

¹ (1960-61), 33 W.W.R. 420, 25 D.L.R. (2d) 604.

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herring, the property of the appellant, in the two cargo holds and departed from the fishing grounds in the Queen Charlotte Islands on a voyage to the appellant's fish processing plant at Shingle Bay which would ordinarily have taken approximately two days. On the afternoon of the departure fairly heavy weather was encountered and it was found that the forward compartment of the vessel forward of the forward hold was partially filled with water, and it was necessary to put into Thurston Harbour where the compartment was pumped out and the cause of the leak repaired. The vessel put to sea again on the 20th and on the afternoon of the 22nd it was found that water had entered the engine room and that the action of the flywheel on the main engine had thrown water on to the generator which had shorted out all the vessel's electrical equipment including the pumps that pumped out the bilges in the cargo holds. As the auxiliary diesel pump ultimately gave out and the water continued to rise so that it was hopeless to try to control it with the hand pump, distress rockets were fired and the *Island Prince*, a coastal vessel, answered the call, but, as she had no pumps aboard, the *Island Prince* went off to obtain help from the *Island Sovereign* which was nearby.

At the time when the *Island Prince* arrived, the condition of the *Mina C* was described by the master as follows:

I don't think at the time that the *Island Prince* came along there was any water on the deck although there was a little breeze at that time and there may have been a certain amount of slop on the deck. The vessel fully loaded has not too much freeboard.

Q. Had it lost some freeboard?

A. Yes, definitely.

It was evening before the *Island Sovereign* came alongside to transfer its three portable gasoline pumps to the *Mina C*, and by that time the weather was freshening and there was almost a foot of water on the deck amidships although the forecastle head was completely out of the water. The *Island Sovereign* pushed the disabled vessel into Hardy Bay where it tied up alongside a barge, and being sheltered from the bad weather the water was pumped out and repairs effected to the leaking stern gland through which it had been entering. The following day another vessel arrived and took the *Mina C* in tow to Shingle Bay, arriving on February 24 where it was met by Mr. Jackson, the president of the appellant and an insurance adjuster, in whose presence the

hatches were opened, and it was found that the cargo was in an advanced stage of deterioration conservatively described by the master as being "a little ripe".

It is apparent that when such a cargo is being loaded, the squashing of the fish on top of each other results in blood and entrails exuding from them and that this material which is commonly called "gurry" is washed down into the bilges with the water that enters while loading where it is normally pumped off, but that if, as in the present case, the pumps cease to work and water comes into the hold the fish are not only reimmersed in water which of itself has a bad effect, but the gurry is raised with the water which is acid from the decomposing fish; it floats the gurry up through the fish and greatly hastens the action of the decomposition. There is no doubt that the cargo in question was rendered valueless as a result of this having happened.

The appellant's claim is asserted in paras. 10, 11 and 12 of the statement of claim in the following terms:

10. The said goods were duly shipped in the said motor vessel on the 19th day of February, 1958, but during the currency of the said policy and while so insured as aforesaid, namely on the 19th day of February and/or on the 22nd day of February, 1958, the said goods and all of them became a total loss by one or more of the aforesaid perils insured against in that on the 19th day of February, 1958, and on the 22nd day of February, 1958 the said motor vessel developed a leak and on both occasions was sinking thereby flooding the holds of the said motor vessel and causing the said goods becoming a total loss by deterioration.
11. Alternatively the said goods were damaged and became a total loss by reason of the deterioration caused by the delay in continuing the said voyage, such delay being a direct result of a peril insured against, namely sinking.
12. Alternatively, the said goods were damaged and became a total loss in that the incursion of sea water from the said leak flooded the engine room of the said vessel, thereby stopping the hold pumps and allowing the body acid of the said herring contained in the fluid excreted therefrom to accumulate in the holds such body acid causing the total deterioration of the said goods.

In holding that the damage complained of was directly caused by the fact that the *Mina C* was "sinking" within the meaning of the policy, the learned trial judge said:

If then, applying the principles of interpretation I have set out above, there has been no judicial definition of the word "sinking" and if the word is to be construed in its popular sense and the collocation of the words here is to be our guide, I think it may include the partial submersion of

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the ship. I do not think anyone can contend that when a ship becomes submerged to the extent that if help does not arrive, it will be entirely submerged that it is not sinking. If there is an ambiguity then I think the word should be construed . . . against the person responsible for its insertion.

and he concludes:

I think that the direct cause of the damage to the goods here was the intrusion of sea water in such quantities that it put the generator and pumps out of commission and that . . . the failure of the pumps to work was simply an incident caused by that event and not a separate occurrence. I think that the plaintiffs should succeed . . .

The Court of Appeal of British Columbia did not find it necessary to deal with the meaning of the word "sinking", and Davey J.A., speaking on behalf of the Court, disposed of the matter on the ground that the loss was not directly caused by a peril insured against. In so holding, he said:

The danger of sinking only arose because, after the incursion of water had submerged the lower part of the cargo so as to make its loss inevitable, it continued until it greatly impaired the buoyancy of the vessel. Thus the loss of the cargo was directly caused by the leak and the failure of the pumps which allowed the water to well up into the holds; neither is a peril insured against. The sinking condition was only a later incident in the chain of events that led to the loss of the cargo and unrelated to it.

It has now long been recognized that the liability of a marine underwriter is limited to losses caused by the direct operation of one of the perils insured against, and indeed the provisions of para. (iv) of the present policy expressly state that it does not insure against:

Loss or damage by delay, wet or dampness, or by being spotted, discoloured, rusted, moulded, steamed, *except the same is the direct result of a peril insured against.* (The italics are mine.)

As Davey J.A. has said, a leak and failure of pumps are not perils against which this cargo was specifically insured under the policy in question, but "*sinking . . . while being transported in any . . . motor vessel*" is such a peril, and in my view this means the sinking of such a vessel from any cause whatever including a leak and failure of pumps. Under such a policy, if a vessel sinks and the insured cargo is damaged, I do not think that the insurer is entitled to sever the cause of the sinking from the sinking itself and to say that no indemnity is provided against damage directly caused to the cargo in the course of the process which culminated in the sinking on the ground that that process was initiated by a

peril against which the cargo was not insured. With the greatest respect for the view expressed by Davey J.A. on behalf of the Court of Appeal, I am of the opinion that the main question for determination in this case is whether or not there was a sinking within the meaning of the policy.

The circumstances appear to me to justify the conclusion that when the pumps from the *Island Sovereign* were transferred to the *Mina C* the latter vessel was in a condition which would probably have resulted in sinking if no help had been given, but the *Island Sovereign* arrived in time to transfer its gasoline pumps and with their aid the *Mina C* stayed afloat while being pushed into a neighbouring bay where she was pumped out.

Notwithstanding the doubts which have been properly raised as to the true construction to be placed on the language of this policy, I am unable to conclude that the words "THIS POLICY INSURES AGAINST LOSS OR DAMAGE BY . . . sinking . . . while being transported in any . . . motor vessel . . ." were intended to afford indemnity against loss or damage to cargo while being transported in *a motor vessel which was in fact saved from sinking*, as the *Mina C* was, by the timely action of others. I have not failed to consider the argument which is based on the proposition that a ship whose decks are submerged in water is a sinking ship, but I am unable to overcome the difficulty which I find in holding that sinking has occurred in the case of this vessel which remained afloat and was ultimately brought safely to the dockside for unloading and I accordingly find that there was no sinking of the *Mina C* within the meaning of the policy in question.

Counsel on behalf of the appellant, however, contended also that the policy should be construed as affording indemnity against loss or damage by the sinking of the raw fish as distinct from the sinking of the vessel in which it was being transported and that the insurer was, therefore, liable for damage sustained by the cargo being submerged in sea water while in the holds. If this was a policy which simply insured "Raw Fish . . . against loss or damage by sinking . . ." there would undoubtedly be some force in this contention, but under the provisions of clause (j) of the policy the cargo is only insured "while being transported in any coastwise steamer and/or motor vessel and/or approved

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barge or scow . . .” and in my opinion the word “sinking” as used in that clause is so directly associated with other words such as “stranding, careening, etc.” which, in the context in which they are found, can only be meant to apply to the vessel, that it would be extending the language of the policy far beyond its natural and ordinary meaning to construe it as providing insurance against the sinking of the cargo while being transported in a vessel which remains afloat.

For these reasons, I would dismiss this appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Bourne, Lyall, Shier & Davenport, Vancouver.

Solicitors for the defendants, respondents: Bull, Housser, Tupper, Ray, Guy & Merritt, Vancouver.
