NOORBHOY *v.* THE FEDERAL MARINE INSURANCE CO.

1904.
April 25.

D. C., Colombo, 17,346.

Marine insurance—Duty of the assured to describe fully the risk—Consequence of failure to do so.

Insurance is a contract upon speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only.

The underwriter trusts to his representations and proceeds upon confidence that he does not keep back any circumstances in his knowledge to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void.

Although the suppression should happen through mistake without any fraudulent intention, yet still the underwriter is deceived and the policy is void, because the risk run is really different from the risk understood and intended to be run at the time of the agreement.

IN this case the plaintiff sued the defendant company to recover the sum of Rs. 6,241·68 on a policy of insurance. The following special case, containing the facts admitted by the parties, was submitted to the District Judge for decision:—

(1) On the 16th day of October, 1901, the plaintiff at Colombo effected a policy of insurance on 1,720 bags of rice valued at Rs. 17,200, and 249 bags of gram valued at Rs. 3,112, shipped in good order and condition in the ss. "Ileafee" from Karachchi to Colombo with particular average, all risks free of 5 per cent. on series of 500 bags.

(2) This policy was underwritten by the defendant company for Rs. 20,312.

(3) On the 16th day of October, 1901, the plaintiff effected a policy on 1,720 bags of rice valued at Rs. 17,200, and 249 bags of gram valued at Rs. 3,112, with marks as per bill of lading in the ss. "Ileafee" from Karachchi to Colombo, free from particular average. This policy was underwritten by the New Zealand Insurance Company for Rs. 20,322.

(4) On the 15th day of October, 1901, the ss. 'Ileafee" sailed from Karachchi to Colombo with the 3,440 bags of rice and 498 bags of gram which are the subject of this action, the amended bill of lading being issued in connection with the same.

(5) On the voyage from Karachchi to Colombo the ss. "Ileafee" encountered heavy weather, and shipped a considerable amount of

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sea water, in consequence of which a large number of the bags mentioned in paragraph 4 of this statement was wetted and damaged.

(6) The ss. "Ileafee" arrived at Colombo on the 24th day of October, 1901, and began to discharge cargo.

(7) On the 29th day of October, 1901, the plaintiff informed the defendant company that some of the bags mentioned in paragraph 4 of this statement were damaged, and requested the defendant company to hold a survey.

(8) On the 30th day of October, 1901, the master, the mate, and the carpenter of the ss. "Ileafee" appeared before Arthur Alwis, Esq., Notary Public, and entered a protest on the damaged cargo.

(9) On the 11th day of November, 1901, a survey of the damaged cargo was made by Messrs. C. E. H. Symons and G. W. Suhren, and it was ascertained by them that 489 bags of rice and 46 bags of gram were damaged by salt water and had to be destroyed.

(10) The plaintiff claims from the defendant company the sum of Rs. 5,465, being the value of the bags of rice and gram so destroyed.

(11) The plaintiff further claims the sum of Rs. 776·68 as expenses incurred by him in connection with the landing, surveying, &c., of the damaged cargo.

(12) In the policy underwritten by the defendant company the bags were not identified by any particular marks, nor was it stated that it formed part of the bags shipped under the said bill of lading mentioned in paragraph 4 of this statement, nor was it stated that the risk shall be on the entire cargo.

(13) In the policy underwritten by the New Zealand Insurance Company the bags were not identified by any particular marks, except as aforesaid, nor was it stated that they formed part of the cargo shipped under the said bill of lading mentioned in paragraph 4 of this statement.

(14) The plaintiff and the defendant company desire the Court to determine—

(*a*) Whether in law the plaintiff can recover from the defendant company any sum whatever in respect of the said policy underwritten by the defendant company.

(*b*) If the Court holds that the plaintiff can recover, whether the defendant company's liability is as regards the whole or the half.

(15) The amount of damages to be fixed, when the question of law has been decided, by a person to be agreed to by the parties, or if no agreement can be come to by the Court.

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The District Judge, after hearing counsel, found in favour of the plaintiff, holding that the defendant company's liability was as regards the whole and not only the half of the bags damaged.

The defendant company appealed. The case was argued on 15th March, 1904.

Van Langenberg, for appellant, cited *Arnold on Marine Insurance, p. 237; Philips on Marine Insurance, p. 217; Roberts v. French, 4 Ves 140;* and *Langhorn v. Cologan, 4 Taunt., 330.*

H. J. C. Pereira, for the plaintiff, respondent, cited *2 Parsons on Maritime Law, p. 197; Smith's Mercantile Law, p. 396; Kewley v. Ryan, 2 Blackst., 343.*

Van Langenberg replied.

Cur. adv. vult.

25th April, 1904. LAYARD, C.J.—

The risk which forms the subject of the marine insurance in this case must, in the ordinary course of business, have been described by the plaintiff and accepted by the defendant company entirely upon the plaintiff's description. The accuracy and completeness of this description thus becomes an essential condition of the contract. It is essentially a contract *uberrimæ fidei*, and the duty was cast upon the insured to inform the underwriter of every material fact within his knowledge of which the underwriter is not already informed, so as to prevent any ignorance in the latter, and the communication of all material facts is a condition of the validity of the contract. The plaintiff failed to disclose and truly represent to the underwriter, the defendant company, that the risk extended to a partial loss out of 3,440 bags of rice and 498 bags of gram, but left the defendant company under the impression that they were liable to pay for a partial loss of a consignment of only 1,720 bags of rice and 249 bags of gram, and the non-disclosure of the greater extent of the risk gives the defendant company an election to avoid the contract, as in the case of fraud, although not accompanied with any fraudulent intention (see *Carter v. Boehm, 3 Burr. 1905; Bates v. Hewitt, L.R. 2, Q.B. 604; and Ionides v. Pender, L.R. 9, Q. B. 531*). In his judgment in the first case above cited Lord Mansfield lays down—

"Insurance is a contract upon speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only. The underwriter trusts to his representations and proceeds upon confidence that he does not keep back any circumstances in his knowledge to mislead the underwriter into a belief that the circumstance does not exist and to induce him to estimate the risk as if it did not

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exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake without any fraudulent intention, yet still the underwriter is deceived and the policy is void, because the risk run is really different from the risk understood and intended to be run at the time of the agreement. "

The risk intended and understood by the defendant company to be run at the time the defendant company entered into the contract of insurance is clearly different from the risk in respect of which the plaintiff now brings action. The plaintiff suppressed from the defendant company that the liability he wished defendant company to undertake, and in respect of which he now attempts to enforce payment was for a partial loss, out of 3,440 bags of rice and 498 bags of gram, instead of out of only 1,720 bags of rice and 249 bags of gram, and the defendant company never undertook the larger risk. As the defendant company never accepted the greater risk, the plaintiff cannot succeed in this action. I would set aside the judgment of the District Judge and dismiss the plaintiff's action with costs in both Courts.

MONCREIFF, J.—

On 15th October, 1901, the " Ileafee " sailed from Karachchi carrying 3,440 bags of rice and 498 bags of gram to be delivered at Colombo to the order of the plaintiff. The bags were in each case undistinguishable one from the other. On arrival at Colombo it was found that 489 bags of rice and 46 bags of gram were damaged and they were destroyed. On the 16th October the plaintiff insured with the defendant Company 1,720 bags of rice and 249 bags of gram for Rs. 20,312 " with particular average, all risks free of 5 per cent. on series of 500 bags." The remainder of the consignment—1,720 bags of rice and 249 bags of gram—was insured for Rs. 20,322 with the New Zealand Insurance Company, " warranted free from particular average, unless the vessel be sunk, burnt, stranded, or in collision. " The plaintiff says to the defendant company: " Under the particular average clause your contract was to pay for partial loss on a consignment of 1,720 bags of rice and 249 bags of gram. 489 bags of rice and 46 bags of gram were lost, and for these you must pay. " The defendants reply: " Our contract was to pay for bags lost out of a consignment of 1,720 bags of rice and 249 bags of gram. Your consignment was one of 3,440 bags of rice and 498 bags of grain, and you are trying to make us pay for any bags which may have been lost out of these larger quantities. " The plaintiff retorts: " That was your contract.

I know and you did not know that the quantity of undistinguishable bags was double of what I insured with you, and you must pay on the loss of any bags from the total consignment so long as the loss falls within the limit of your liability. This has come about because I am so much more clever than you. You will readily understand why I took no steps to earmark the cargo I insured with you, and why I did not tell you that the consignment of undistinguishable bags was twice as great as you thought. If I had earmarked the bags I insured with you, I could only have claimed against you for loss occurring among those bags. And if I had told you the true quantity of the total consignment, you would have refused the risk or demanded a higher premium." This is not a good answer. The contract of insurance is *uberrimæ fidei*. If the insurers had known the truth, I think they would have been bound to pay. But no instance has been cited in which a party, having insured a specified quantity and quality of cargo, contended that the insurers were liable to pay for a loss out of double the specified quantity of cargo of the same quality. Nor does any such contention appear to have been held to be sound. Unless they have contracted to be otherwise bound, insurers can only be liable to pay for goods which are ascertainable. In this case it is impossible to identify the lost goods as part of the cargo insured with the defendants. If the defendants were to be fixed with the liability set up by the plaintiff, it was material to them to know the true quantity of the consignment before undertaking the risk. We have been given no reason for thinking that when one insures 1,720 bags he is insuring any bags of that number forming part of a consignment of (say) 20,000 bags. The practical result of the plaintiff's astuteness is that the defendants are not liable under this policy for partial loss. It is impossible to identify the goods which are the subject of a partial loss. as being part of the goods insured with the defendants.

I think that the plaintiff's action should have been dismissed.