

In the Privy Council.

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No. 103 of 1934.

ON APPEAL FROM THE SUPREME COURT OF
NOVA SCOTIA EN BANCO.

BETWEEN :—

MARITIME NATIONAL FISH LIMITED - (*Defendant*) *Appellant*.

AND

OCEAN TRAWLERS LIMITED - (*Plaintiff*) *Respondent*.

CASE FOR THE APPELLANT.

- RECORD
1. This is an appeal by the Defendant (under an Order dated the 30th day of June, 1934, granted by the Supreme Court of Nova Scotia *en banco*) from a Judgment of that Court dated the 9th day of June, 1934, unanimously reversing the Order of the Trial Judge, Doull, J., dated the 19th day of January, 1934, whereby the Respondent's action had been dismissed. p. 63.
p. 57.
p. 45.
 2. The Respondent, a body corporate carrying on business at Halifax, Nova Scotia, is and was at all material times the owner of the Steam Trawler "St. Cuthbert." p. 19, l. 7.
p. 19, l. 8.
 3. The Appellant is also a body corporate carrying on business at Halifax aforesaid as a producer and wholesale distributor of sea fish. p. 5, l. 28.
p. 5, l. 31.
 4. By a Charter Party dated October 25th, 1928, made between the Respondent, as owner, and The National Fish Company Limited, a body corporate, as charterer, the Respondent chartered to The National Fish Company Limited the said Steam Trawler "St. Cuthbert" upon the terms and conditions in said Charter Party fully set forth. pp. 19-21.
 5. At the time of entering into the said Charter Party The National Fish Company Limited was engaged generally in the fish business and for the purpose of its business was engaged in fishing with steam or beam trawlers, and this fact was well known to the Respondent. p. 2, l. 22.
p. 12, l. 39-
p. 13, l. 13.

RECORD

- p. 13, ll. 1-7. 6. Prior to the entering into of the Charter Party in question the Steam Trawler "St. Cuthbert" had been purchased by the Respondent for the express purpose of being chartered by it to the The National Fish Company Limited to be used by the Company as a steam trawler in carrying on its said business.
- p. 19, l. 25. 7. It was one of the express conditions contained in the Charter Party that the Steam Trawler "St. Cuthbert" should be employed in the fishing industry only.
- p. 19,
ll. 12-20. 8. By the terms of the Charter Party the hire of the said Steam Trawler was for the term of twelve calendar months to commence when the Steam Trawler was ready to sail from Grimsby, England, and thenceforth fully to be completed and after the expiration of twelve calendar months for a further period of twelve calendar months and from year to year thereafter until one of the parties thereto should give to the other party three calendar months' notice to terminate the said charter, such notice to be effective only at the end of one of the years of the charter thereby agreed upon. 10
- p. 19,
ll. 27-46. 9. In and by the said Charter Party it was provided that the Charterer should pay operating expenses generally and should also pay for the use and hire of the said Trawler annually twenty per centum of the cost to the owner of the said Trawler to be determined in the manner in the said Charter Party provided, payment of the said hire to be made in Halifax, Nova Scotia, monthly in advance. 20
- p. 8,
ll. 30-34.
p. 14, l. 3. 10. Delivery of the said Trawler in accordance with the terms of the Charter Party was made to the The National Fish Company Limited and the said Steam Trawler was operated by the The National Fish Company Limited in its fishing business up to and until December 9th, 1931, when the Appellant Company took over the fishing business of the said The National Fish Company Limited and all the assets thereof.
- p. 8,
ll. 18-34.
p. 2, l. 39. 11. It is common ground that upon taking over the assets of the said The National Fish Company Limited the Appellant became bound by and entitled to the benefits of the said Charter Party. 30
- pp. 21-22. 12. In the meantime by a Supplementary Agreement dated 6th December, 1928, the said Charter Party had been amended to provide that the said The National Fish Company Limited would not at any time except with the consent of the Respondent purchase any steam trawler excepting the "Good Hope" and "Viernoe" unless and until the said The National Fish Company Limited exercised the option to purchase the said Steam Trawler "St. Cuthbert" contained in the said Charter Party.
- p. 20, l. 27. 13. At the time of entering into the said Charter Party and until June 14th, 1929, there were no statutory or other restrictions upon the use of steam or beam trawlers in the fishing business, but by Chapter 42 of the Statutes of Canada for the year 1929, which received the Royal Assent on 40
- p. 40, l. 1.
p. 40, l. 6.

the 14th June, 1929, The Fisheries Act, being Chapter 73 of the Revised Statutes of Canada 1927, was amended by adding thereto Section 69A, the relevant provisions of which are as follows :—

“ 69A.—(1) Every person shall be guilty of an offence, and shall incur therefor a penalty of not less than one hundred dollars and not more than two thousand dollars, recoverable with costs upon summary conviction, who at any time, except under license from the Minister,—

10 “ (a) with intent to fish or to cause any other person to fish with a vessel that uses an ‘ otter ’ or other trawl of a similar nature for catching fish in the sea, leaves or departs from any port or place in Canada for the purpose of such fishing; or

20 “ (b) knowingly brings into Canada any fish taken or caught in the sea beyond the territorial waters of Canada with any vessel that uses an ‘ otter ’ or other trawl of a similar nature, or any vessel that uses an ‘ otter ’ or other trawl of a similar nature for catching fish in the sea beyond the territorial waters of Canada, if the leaving or departure from Canada of such vessel constituted an offence under this section, and moreover the fish or vessel so brought in shall be confiscated to His Majesty for violation of this Act, in the manner provided by section eighty-two of this Act.

“ (2) * * * * *

“ (3) * * * * *

“ (4) The Minister may determine the number of such vessels that shall be eligible to be licensed.

30 “ (5) Regulations may be made under the provisions of section forty-six of this Act—

“ (a) prescribing the form of license;

“ (b) specifying the evidence to be submitted with an application for a license;

“ (c) fixing the conditions under which a license shall be issued;

“ (d) making any other provisions respecting licenses.

“ (6) * * * * *

14. This Statute directly applied to the operations of the “ St. Cuthbert ” as she was fitted with and could only operate as a trawler with an otter trawl or other trawl of a similar nature. p. 6, l. 42. p. 7, ll. 7-13.

15. Certain regulations purporting to be made under the authority of Section 69A were made by Order-in-Council dated October 30th, 1929, but these regulations were declared by the Exchequer Court of Canada to be ultra p. 22, l. 30. p. 50, ll. 25-33.

RECORD

- p. 23, l. 20. vires, and by Order-in-Council of 14th August, 1931, the former regulations
pp. 23-24. were rescinded and new regulations substituted therefor.
- p. 24, l. 18. 16. By letter dated July 6th, 1932, written by the Appellant to the
p. 25, l. 1. President of the Respondent and concurred in by letter of July 8th, 1932,
addressed by the Respondent to the Secretary of the Appellant the Charter
Party covering the "St. Cuthbert" as then existing was renewed for one year
from 25th October, 1932, subject to a reduction of twenty-five per cent in
the charter fee making the monthly fee payable \$590.97, and subject to a
further amendment that in the event of the Appellant giving notice on or
before the 25th July in any year of its intention not to renew the charter it
would give further notice as to its intention as to whether or not it would
exercise the option to purchase contained in the Charter Party. 10
- p. 25, l. 18. 17. On January 27th, 1933, the Appellant gave to the Respondent
written notice that it would not renew the charter at the expiration of the
p. 25, l. 26. then present term. Such notice expressly stated that it was given at that
time in order that the Respondent might have as much time as possible
to seek a new charterer or purchaser.
- p. 6,
ll. 15-31. 18. On March 11th, 1933, the Appellant duly applied to the Honourable
pp. 26-28. the Minister of Fisheries for a license for the year 1933-1934 under the
provisions of The Fisheries Act and the Order-in-Council of August 14th, 20
1931, in respect of the "St. Cuthbert" being a fishing vessel using an otter
or other trawl of a similar nature, and the Appellant complied with all the
requirements of the said Order-in-Council and duly paid the required fee
p. 26, l. 35; of \$500.00.
p. 28, l. 26.
- p. 6,
ll. 8-11. 19. At this time the Appellant was operating five steam trawlers in its
business including the said Steam Trawler "St. Cuthbert".
- pp. 29-31. 20. On April 4th, 1933, the Honourable the Acting Minister of Fisheries
p. 31, ll. 21-25. announced in the House of Commons a decision under the provisions of
Section 69A of The Fisheries Act that licenses would only be issued to three
trawlers operated by the Appellant and one operated by Leonard Fisheries 30
Limited.
- p. 31, l. 32. 21. On April 5th, 1933, the Deputy Minister of Fisheries advised the
p. 31, l. 41. Appellant of the Minister's decision and asked the Appellant to advise
the Department immediately as to which three trawlers of the five for
which it had applied for renewal licenses it desired to have licenses issued for.
- p. 32, l. 14. 22. On April 10th, 1933, the Appellant replied to the Deputy Minister
asking that licenses be granted to three named trawlers not including the
"St. Cuthbert".
- p. 29, l. 1. 23. The Respondent by a telegram and letter of the 3rd April, 1933,
p. 33, l. 30. and by letters of the 15th and 27th April, 1933, endeavoured to obtain the 40
p. 36, l. 1. issue of a license in respect of the "St. Cuthbert", but such efforts were
p. 35, l. 15. unsuccessful.

24. On April 24th, 1933, licenses were issued by the Department of Fisheries for the three steam trawlers "Rayon D'or", "Lemberg" and "Venosta" operated by the Appellant, but no license was or has been issued authorizing the employment of the "St. Cuthbert" as a trawler. p. 34, l. 26.
p. 35, l. 15.
25. On April 29th, 1933, the Appellant gave notice to the Respondent that it would be no longer bound by the Charter Party, and on May 1st, 1933, gave notice that the "St. Cuthbert" was available for re-delivery to the Respondent. p. 36, l. 27.
p. 37, l. 27.
26. The Respondent commenced this action on June 19th, 1933, claiming \$590.97 being one month's charter fee alleged to be payable for the month ending May 25th, 1933. p. 1.
27. It is common ground that if the Respondent is entitled to succeed in respect of the charter money alleged to be due on May 25th, 1933, it would also be entitled to payment of a similar amount accruing due on the 25th days of each of the months of June, July, August, September and October, 1933, at which date the Charter Party (if not previously determined by the events set out above) was terminated by the notice of January 27th 1933. p. 59, l. 1.
p. 25, l. 18.
28. The Appellant admitted liability for charter hire from April 25th to April 30th, 1933, when the then current license for the "St. Cuthbert" expired, and paid into Court with its Defence the sum of \$98.50 covering the charter hire for that period, and set up as a defence to the rest of the action that there was complete frustration of the adventure represented and covered by the Charter Party on and from April 30th, 1933. p. 2, l. 7.
p. 31, l. 40.
p. 2, l. 8.
p. 3, l. 29.
29. It was established in evidence and not contradicted that it was not commercially possible to use the "St. Cuthbert" in the fishing industry as carried on by the Appellant unless she were licensed as a trawler and further that there was absolutely no purpose for which the Appellant could use her. p. 7, l. 9.
p. 13, l. 18.
p. 7, l. 12.
30. The action was tried on December 5th, 1933, before Mr. Justice Doull without a jury, who gave judgment on December 22nd, 1933. p. 5, l. 1.
pp. 39-45.
31. The learned Trial Judge found as a fact that the Appellant could not use the "St. Cuthbert" commercially otherwise than as a trawler and if it continued liable to keep her it had no alternative but to lay her up or lay up one of its own boats in her stead. He reviewed the relevant authorities and concluded that in the case at Bar there was a change in the law which completely changed the basis on which the parties were contracting which was that the Chartered vessel should be employed as a steam trawler. He held that it was not unreasonable to imply a condition to the effect that if the law prohibited the operation of the boat as a trawler, the obligation to pay hire would cease. He also held that the Appellant was not bound to lay up one of the other trawlers in order that it might use the "St. Cuthbert". On the whole he was of the opinion that the Appellant p. 40, l. 34.
pp. 40-45.
p. 45, l. 7.
p. 45, l. 13.
p. 45, l. 16.
p. 45, l. 19.

RECORD had made out its defence of frustration under the authorities and was entitled to have the action dismissed with costs.

p. 45, l. 21. 32. From this Decision and from the Order based thereon the
 p. 46, l. 1. Respondent appealed to the Supreme Court of Nova Scotia *en banco*, and
 pp. 57-58. the appeal came on for hearing at the March 1934 Sittings before a Court
 composed of Graham, Carroll, Ross and Hall, JJ., who allowed the Appeal
 and ordered Judgment for the Respondent.

pp. 48-57. 33. The Decision of the Court was given by Hall, J., and concurred
 pp. 46-47. in by Graham and Carroll, JJ., While Ross, J., delivered a separate opinion
 arriving at the same conclusion. 10

p. 55, l. 44. 34. Hall, J., was of the opinion that the amending of the original
 Charter Party on July 6th, 1932, in effect created a new contract to become
 p. 55, l. 46. effective on October 25th, 1932, and that it was made by both parties with
 the full knowledge that the Trawler could not operate without an annual
 p. 56, l. 3. license and that the Minister could limit the number of licenses to be issued.
 p. 56, l. 7. He was also of the opinion that the learned Trial Judge had erroneously
 assumed that the change in the statute law was subsequent to the making
 of the contract. In his opinion both parties had adopted the license re-
 quirement when they entered into the new contract and consequently the
 p. 56, l. 45. license requirement was not the change of condition which founded the 20
 claim for frustration. He was not prepared to say that the new contract
 was not made after full contemplation of the trend of trawler regulation
 and the realization of likelihood of reduction in the number of trawlers
 p. 56, l. 47. to be licensed. He thought that probably the Defendant (Appellant) was
 prepared to take its chances and insisted upon a lower rental as an offset
 p. 57, l. 14. to any loss consequent upon such reduction. He held also that the event
 not contemplated that leads to frustration must be a common object, not
 merely the advantage that one party or the other might have gained
 p. 57, l. 18. from the contract, and that this common object must be germane to the
 p. 57, l. 27. contract, and that neither condition prevailed in the case at Bar. On the 30
 whole he was convinced that there had been no frustration in the legal
 sense of the term, but that the alleged frustration was self-induced by the
 Appellant and amounted to straight repudiation of the contract.

35. It is respectfully submitted that the majority of the Supreme
 Court *en banco* erred in treating the letters of July 6th and July 8th, 1932
 as constituting a new contract to become effective on the 25th October
 1932 and that there was no evidence to justify the Supreme Court *en banco*
 in finding that the license requirements, the trend of trawler regulation and
 the possibility of a reduction in the number of licenses were then contem- 40
 plated by the parties and possibly considered in fixing the reduced rate of
 hire or in finding that the Appellant was probably prepared to take its
 chances and insisted upon a lower rental as an off-set to any loss consequent
 on a reduction in the number of licenses. It is submitted that the evidence
 negatives these inferences of fact.

36. Ross, J., was of the opinion that this was not a case where the Defendant could invoke the doctrine of frustration. He disagreed with the learned Trial Judge that there was a change in the law that completely altered the basis on which the parties contracted as when the contract of renewal was completed in July, 1932, the legislation of 1929 and the Order-in-Council made thereunder were before the Appellant. He also held that the officers of the Appellant knew when the "St. Cuthbert" was first chartered all about the agitation current to prohibit trawlers, yet in spite of that and the subsequent legislation and regulations, they renewed the Charter Party without any protecting clause in the agreement. He was of the opinion on a consideration of all the circumstances that the Appellant took its chances, and suggested that there may have existed at the time sufficient reason why the Defendant might have considered it good business to renew the charter and take its chances on getting a license. He asked "What was the event that automatically discharged the contract?" and answered "Not the legislation of 1929, nor the Order-in-Council of August 14th, 1931, nor the letter of the Deputy Minister of April 5th, 1933", and concludes that if there was any frustration it must have been by the deliberate act of the Appellant in selecting the three trawlers for which the Appellant desired licenses to be issued. He also held that there was no law prohibiting the operation of the "St. Cuthbert", but that there was a law well known to the Appellant when the charter was renewed in 1932 that she could not operate without a license. He, therefore, held that the appeal should be allowed and judgment entered for the Respondent.

37. On June 16th, 1934, conditional leave to appeal to His Majesty-in-Council from the Judgment of the Supreme Court of Nova Scotia *en banco* was granted by that Court to the Appellant and on June 30th 1934, final leave to appeal was granted by the said Court.

38. The Appellant humbly submits that this appeal should be allowed and that the Judgment of the Supreme Court of Nova Scotia *en banco* should be reversed and the Judgment of the Trial Judge restored for the following, amongst other,

REASONS .

- (1) Because there was complete frustration of the adventure covered by the Charter Party in question when the "St. Cuthbert" failed to obtain a license on April 30th, 1933.
- (2) Because the Charter Party in question was entered into upon the basis that the "St. Cuthbert" was a steam trawler and under the terms of the Charter Party could only be employed as such in the fishing business as carried on by the Appellant.
- (3) Because there was a condition implied or to be implied in the said Charter Party that if for any reason beyond the control of the parties to it the said "St. Cuthbert" could not be

employed as a steam trawler in the said fishing industry, both parties to the said Charter Party should be released from their obligations there under.

- (4) Because the passing of Chapter 42 of the Statutes of Canada, 1929, the enactment of the regulations made thereunder by the Order-in-Council of August 14th, 1931, the determination of the Honourable the Minister of Fisheries to issue only three licenses in respect of trawlers operated by the Appellant, and the failure or refusal of the Minister to issue a license in respect of the "St. Cuthbert" cumulatively made it impossible for the "St. Cuthbert" to be employed after April 30th, 1933, in the fishing industry as carried on by the Appellant. 10
- (5) Because the lawful act of the Honourable the Minister of Fisheries in determining not to issue and in not issuing a license to the "St. Cuthbert" rendered it legally impossible that the "St. Cuthbert" should be employed after April 30th, 1933, as a steam trawler in the fishing industry carried on by the Appellant.
- (6) Because the fact that the said Minister would or might refuse to issue a license in respect of the "St. Cuthbert" was not a matter contemplated by the parties at the time the said Charter Party was entered into either originally or as amended. 20
- (7) Because the Appellant being able to obtain licenses for three only of the five trawlers previously operated by the Appellant, was under no duty to include the "St. Cuthbert" among the three for which licenses were obtained, and the Appellant by failing to secure a license did not disentitle itself from relying on the frustration of the charter party.
- (8) Because the Decision of the learned Trial Judge (save in so far as he holds that the Contract is avoided only on complaint of the party who is damaged) is right and should be restored. 30

C. B. SMITH.

J. McG. STEWART.

FRANK GAHAN.

In the Privy Council.

No. 103 of 1934.

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Scotia en Banco.*

BETWEEN
MARITIME NATIONAL FISH, LIMITED
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CASE FOR THE APPELLANT.

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