

# In the Privy Council.

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## ON APPEAL

FROM THE SUPREME COURT OF NOVA SCOTIA EN BANCO.

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BETWEEN

MARITIME NATIONAL FISH LIMITED (Defendant) *Appellant*

AND

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

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## Case for the Respondent.

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RECORD.

10 1. This is an appeal from an Order of the Supreme Court of Nova Scotia En Banco dated 9th June, 1934, allowing the Respondent's appeal from a Judgment and Order of Mr. Justice Doull in the Supreme Court of Nova Scotia, dated 19th January, 1934, whereby the Respondent's action was dismissed. The Supreme Court of Nova Scotia En Banco, in allowing the appeal, rescinded the Judgment and Order of Mr. Justice Doull and ordered that the Respondent should recover against the Appellant the sum of \$590·97. p. 57. p. 45.

20 2. The Respondent is a company incorporated in 1928 and carries on the business of a shipowner in Halifax, Nova Scotia. The Appellant is a company which began to carry on business in 1931, and acquired and has since operated the business of the production and wholesale distribution of fish formerly carried on by two companies, Maritime Fish Corporation, Limited, and National Fish Company, Limited. In the action the Respondent (Plaintiff) claimed from the Appellant (Defendant) \$590·97, as the sum due as hire for the Respondent's trawler "St. Cuthbert," for the month ending the 25th May, 1933. The "St. Cuthbert" had been chartered by the Appellant under an agreement made between the parties on or about the 6th July, 1932, renewing, with p. 39, l. 30. p. 14, l. 4. p. 1. pp. 24, 25.

p. 19.  
p. 3. some variations, for a year from the 25th October, 1932, a charterparty made between the Respondent and the National Fish Company, Limited, on or about 25th October, 1928. The Appellant contended that by operation of law the adventure covered and represented by the said agreement and charterparty had been frustrated and that it was therefore discharged from all liability under the said contracts.

p. 59. 3. By Order dated the 16th June, 1934, the Supreme Court of Nova Scotia En Banco, after hearing argument, gave the Appellant conditional leave to appeal to His Majesty in Council and by Order dated the 30th June, 1934, gave the Appellant Final Leave to appeal to His Majesty in Council. The Court granted leave to appeal as of right on the ground that, although only one month's hire, amounting to a sum less than £500 in value, was claimed by the Respondent in the action, the substantial issue between the parties was the liability for the hire of the " St. Cuthbert " for a period of six months, and that the appeal therefore involved a civil right amounting to and of the value of £500 sterling and upwards, within the meaning of Rule 2 (A) of the Rules regulating appeals to His Majesty in Council from the Province of Nova Scotia, made the 5th July, 1911. (Statutory Rules and Orders, 1911, No. 663.) 10

4. The two main questions for decision are :—

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(A) whether the Supreme Court of Nova Scotia En Banco rightly granted the Appellant leave to appeal as of right ; and

(B) whether the agreement between the parties had been discharged, as contended by the Appellant, by frustration of the commercial purposes of the adventure covered thereby.

p. 19,  
ll. 1-20. 5. The history of the dispute begins with a charterparty dated the 25th October, 1928, whereby the Respondent chartered to the National Fish Company Limited the steam trawler " St. Cuthbert " for twelve calendar months, commencing when the trawler should be ready to sail from Grimsby, England, and from year to year thereafter until one of the parties should give to the other three months' notice to terminate, such notice to be effective only at the end of one of the years of the charterparty. It was agreed that the trawler should be employed in the fishing industry only, and, by clause 3, that the Charterers should pay annually for her use and hire twenty per centum of the cost to the Owner including not only the purchase price but all travelling and agency expenses and the cost of incorporating and organising the Owner and the cost of equipping and making the trawler ready for delivery. Payment of the hire was to be made in Halifax, Nova Scotia, monthly, in advance. By clause 9 the Charterer was given the option at any time after the expiration of one year from the commencement of the hiring to purchase the trawler for the price thereof to the Owner plus fifteen per centum. 30

p. 19, l. 37.

p. 19, l. 45.  
p. 20, l. 27. 40

6. The Charter was varied by a memorandum of agreement dated the 6th December, 1928, by which it was agreed that the National Fish Company Limited should not at any time except with the consent of the Respondent purchase any steam trawler excepting the "Good Hope" and "Vierno" unless and until it exercised the charterparty option to purchase the "St. Cuthbert." p. 21.

7. In the year 1929 The Fisheries Act (Revised Statutes of Canada, 1927, Chapter 73), was amended by 19 and 20 George V (Statutes of Canada 1929) Chapter 42. This amendment provided (inter alia) that every person should be guilty of an offence, who at any time, except under licence from the Minister, should with intent to fish with a vessel using an "otter" or other trawl of a similar nature leave or depart from any port in Canada for the purpose of such fishing. It also gave the Minister power to determine the number of such vessels that should be eligible to be licensed. The "St. Cuthbert" was at all times fitted with an "otter" trawl. p. 40, ll. 7-20.

8. On the 30th October, 1929, an Order in Council (P.C. 2196) was approved by His Excellency the Governor General of Canada providing for certain regulations in connection with the grant of licences under the amending Statute, but on the 9th March, 1931, these regulations were declared ab initio null and void and ultra vires. (1931 C.L.R. Ex. 75.) p. 22.

9. On the 14th August, 1931, an Order-in-Council (P.C. 1917) was approved by His Excellency the Governor-General of Canada rescinding the regulations adopted by Order-in-Council of the 30th October, 1929, and substituting therefor regulations providing (inter alia) that a licence would not be granted for a fishing vessel using an otter or trawl of a similar nature unless the applicant should furnish the Minister of Fisheries with evidence that would satisfy him that the applicant could not obtain an adequate supply of suitable fish to enable him properly to conduct and develop his business from the hook and line fishermen, and that if such licence were to be granted, the extent of his purchase of fresh fish from the said fishermen would not be adversely affected. It was also provided that the fee on such licence should be \$500. p. 23, l. 20. p. 22.

10. It is in the Respondent's submission of some importance to observe that the amending legislation of 1929 and the consequent regulations were the outcome of a long standing controversy as to the desirability of the use of trawlers in the fishing industry. The Reports of the Atlantic Fisheries Commission of 1927-1928 gave rise to a campaign of propaganda for the prohibition of their use which until the legislation of 1929 was unrestricted by any system of licences. The agitation for the prohibition of trawlers continued in 1930 and up to 1932, but by 1932 the Appellant Company, though fully aware of the agitation and of the fact that the use p. 9, l. 6. p. 9, l. 10. p. 9, l. 2. p. 14, l. 23. p. 9, l. 35.

p. 15, l. 2. of trawlers was dependent on the Minister's exercise of his discretion, hoped that the agitation had subsided and that there would be no curtailment of their use of trawlers.

p. 7, ll. 35-42. 11. During the years 1930 and 1931 the Appellant or its predecessors were operating five trawlers, viz., "St. Cuthbert," "Rayon D'Or," "Venosta," "Viernoe" and "Lemberg." The last four named were the property of the Appellant or its predecessors or of subsidiary companies.  
p. 6, l. 12. Licences for all the five were obtained in 1930, 1931 and 1932, the last of which ran to the 31st March, 1933.

p. 19. 12. The charter of the "St. Cuthbert" had been allowed to run 10  
on from year to year and was at some date in 1931, after the incorporation of the Appellant Company to acquire and operate the business carried on by National Fish Company Limited, assigned to the Appellant Company. In July, 1932, the Appellant Company was in a position if it so pleased to determine the charter on the 24th October, 1932, provided such notice were given not later than the 24th July, 1932.

p. 24, l. 20. 13. In these circumstances representatives of the parties met and came to an agreement for a further year from the 25th October, 1932, the terms whereof were put on record. By letter dated the 6th July, 1932, the Appellant Company confirmed the renewal of the charter of the 20  
"St. Cuthbert" then existing between the Respondent and the Appellant for one year from the 25th October, 1932, subject to (A) the charter fee being reduced by 25 per cent., making the monthly fee \$590.97 and (B) an amendment of clause 9 of the charter to the effect that, in the event of the Appellant ever giving notice on or before the 25th July in any one year of its intention not to renew, it would also on or before the 25th July in the same year give further notice as to its intention to exercise the option to purchase or not. By letter dated the 8th July, 1932, to the Appellant  
p. 25, l. 1. the Respondent agreed to renew the charter on the terms stated.

p. 25, l. 20. 14. On the 27th January, 1933, the Appellant notified the 30  
Respondent that it would not renew the charter of the "St. Cuthbert" at the expiration of the then current term, namely the 24th October, 1933.

p. 26.  
p. 6, l. 30. 15. On the 11th March, 1933, the Appellant applied for a renewal of its licence for each of its five trawlers. Receipt of these applications was acknowledged by the Deputy Minister of Fisheries by letter dated the  
p. 28, l. 20. 18th March, 1933.

pp. 29-31. 16. On the 4th April, 1933, the Acting Minister of Fisheries made a statement in the House of Commons in which he reviewed the history of steam trawling in Canada, the legislation of 1929, and the subsequent

Orders-in-Council. After summarising the arguments in favour of and against the permission of licensed trawler fishing he stated that it had been decided to reduce the number of licences to be granted to the Appellant Company from five to three as from the 1st May. p. 31, ll. 21-29.

17. On the 5th April, 1933, the Deputy Minister of Fisheries by letter informed the Appellant of this decision and asked the Appellant to advise the Department immediately as to which three trawlers of the five for which the Appellant had applied for renewal licences it was desired that such three licences be issued. By letter dated the 10th April, 1933, the Appellant requested that the licences be granted to the "Rayon D'Or," "Lemberg" and "Venosta" and on the 24th April, 1933, licences for the said three trawlers were forwarded to the Appellant. No explanation of the reasons for this particular selection were given at the trial on behalf of the Appellant Company, and it appears reasonably clear that it abstained from applying for a licence for the "St. Cuthbert" in order that as many vessels as possible owned by its subsidiary companies might continue to engage in trawling. p. 31, l. 30.  
p. 32, l. 15.  
p. 34, l. 30.

18. By letter dated the 29th April, 1933, the Appellant informed the Respondent that in view of the reduction in the number of licences it would be impossible for the Appellant to employ the "St. Cuthbert" after the 30th April, 1933, and that the charterparty would therefore be cancelled at that date. The Respondent by letter from its Solicitors dated the 29th April, 1933, refused to agree to the cancellation of the charterparty. p. 36, l. 30.  
p. 37, l. 1.

19. On the 19th June, 1933, the Respondent commenced these proceedings for the recovery of \$590.97 being one month's hire of the "St. Cuthbert" for the month ending the 25th May, 1933. By its Defence the Appellant contended that by reason of the failure or refusal of the Minister of Fisheries to issue a licence for the "St. Cuthbert" it became unlawful from the 30th April for the "St. Cuthbert" to be used as a trawler in the fishing industry, that there was therefore from the said date a complete frustration of the adventure represented and covered by the charterparty and agreement of July, 1932, and that the Defendant was thereby discharged from all liability under the said contracts. p. 1.  
p. 3, l. 18.

20. The action came on for trial at Halifax before Mr. Justice Doull on the 5th December, 1933, and a reserved Judgment was delivered on the 22nd December, 1933. The learned Judge found as a fact that the Appellant could not use the "St. Cuthbert" commercially otherwise than as a trawler, and that if the Appellant continued to keep the vessel it would have to lay up the "St. Cuthbert" or one of its own boats in her stead. He was of the opinion that the Act of 1929 and the subsequent regulations completely changed the basis on which the parties were p. 40, l. 34.  
p. 45, l. 7.

contracting, namely that the chartered vessel could be employed as a steam trawler, and he held that it was reasonable to imply a condition to the effect that if the law should prohibit the operation of the boat as a trawler the obligation to pay hire would cease. He also held that although the Appellant could have laid up another boat in place of the "St. Cuthbert" it was not bound to do so by reason of the decision in *Bank Line v. Capel* 1919 A.C. 435.

p. 45, l. 16.

21. The Respondent respectfully submits that the learned Judge was wrong in holding that the Act of 1929 and the subsequent regulations completely changed the basis on which the parties were contracting. The last renewal of the charterparty was effected by the Appellant's letter of the 6th July, 1932, and the Respondent's letter of the 8th July, 1932. These letters constituted a fresh agreement between the parties, subsequent to the legislation of 1929 and the regulations thereunder contained in Order-in-Council dated the 14th August, 1931. The Appellant had full knowledge of the Act and Order-in-Council and the Respondent submits that in entering into the fresh agreement of July, 1932, the Appellant must be held to have contemplated that the number of licences might be reduced. The Appellant could have guarded against or made provision for this possibility but did not do so, and it is submitted that it should be held that in the circumstances the Appellant was willing to take the risk of a reduction of the number of licences and that no term should be implied into the charterparty or agreement to relieve the Appellant from the consequences of an event which must have been contemplated at the time of the contract.

p. 24, l. 20.  
p. 25, l. 1.p. 23, l. 20.  
p. 9, l. 23.  
p. 14, l. 24.10  
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22. The Respondent further respectfully submits that in any event the learned Judge was wrong in applying to the present case the doctrine of frustration since the Appellant could have obtained a licence for the "St. Cuthbert" had it so desired. It is submitted that the Appellant cannot rely on *Bank Line v. Capel* 1919 A.C. 435 as supporting a contention that the non-existence of a licence for which no application has been made amounts to frustration. The Respondent refers to the opinion of Lord Sumner in 1919 A.C. at p. 452 where it is stated that the point was not taken in the Courts below and is therefore not determined in the House of Lords but that the principal of frustration of an adventure assumes that the frustration arises without blame or fault on either side and that reliance cannot be placed on a self-induced frustration.

p. 31, l. 42.

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23. The Respondent appealed from the decision of Mr. Justice Doull to the Supreme Court of Nova Scotia *En Banco*. The appeal came on for hearing at the March sittings 1934 and the Court, having reserved its decision, unanimously gave judgment in favour of the Respondent and allowed the appeal on the 2nd June, 1934. Judgments were delivered

p. 46, ll. 1-20.

p. 46, l. 27.

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by Mr. Justice Ross and Mr. Justice Hall. With the latter judgment Mr. Justice Graham and Mr. Justice Carroll concurred. The learned Judges held that there was no change in the law which completely altered the basis on which the parties contracted and that the possibility of a reduction in the number of licences was within the contemplation of the parties at the date of the renewal of the charterparty. The learned Judges further held that the doctrine of frustration was not applicable to the circumstances of this case by reason of the fact that the Appellant could, if so desired, have obtained a licence for the "St. Cuthbert."

pp. 46, 48.  
p. 46, l. 28.  
p. 56, l. 32.  
p. 47, l. 28.  
p. 57, l. 27.

10 24. The Appellant applied to the Supreme Court of Nova Scotia for leave as of right to appeal to His Majesty in Council and the Court on the 16th June, 1934, gave conditional leave and on the 30th June, 1934, final leave so to appeal. The application was made under Rule 2 of the Rules regulating appeals to His Majesty in Council from the Province of Nova Scotia (Statutory Rules and Orders 1911 No. 663) which is as follows :—

p. 59, l. 30.  
p. 63.

lie, " 2. Subject to the provisions of these Rules an appeal shall

p. 59, l. 6.

20 " (A) as of right from any final judgment of the Court where the matter in dispute on the appeal amounts to or is of the value of £500 sterling or upwards, or where the appeal involves directly or indirectly some claim or question to or respecting property or some civil right amounting to or of the value of £500 sterling or upwards . . . "

30 25. The reasons of the Supreme Court granting conditional leave to appeal as of right were given in the opinion of Chief Justice Chisholm with whom the other learned Judges of the Court concurred. The learned Chief Justice held that although the claim in the present appeal is less than £500 sterling the substantial issue between the parties was whether or not there had been a complete frustration of the adventure covered by the charter-party. He held that the appeal involved a civil right amounting to and of the value of £500 sterling and upwards namely, the question of liability for the hire of the ship for the period of six months.

p. 58, l. 24.

40 26. The Respondent respectfully submits that the Supreme Court of Nova Scotia was wrong in holding that the Appellant was entitled to appeal as of right. The Respondent submits that the words " civil right " in the Rule mean and apply to rights such as those of easements and franchises and similar rights and are not applicable to a claim for debt or damages. The Respondent further submits that the facts that the hire under the charter-party is a recurring obligation and that six months' hire would exceed £500 sterling do not bring the present appeal within either limb of the Rule. The Respondent therefore submits that the appeal is not maintainable, and should not be heard.

27. The Respondent humbly submits that this appeal should be dismissed for the following amongst other

### REASONS.

- (1) BECAUSE the Supreme Court of Nova Scotia was wrong in giving the Appellant leave to Appeal as of right.
- (2) BECAUSE the matter in dispute in this appeal does not amount to and is not of the value of £500 sterling or upwards and does not involve, directly or indirectly, any claim or question to or respecting a civil right 10 amounting to or of the value of £500 sterling or upwards.
- (3) BECAUSE the possibility of a reduction in the number of trawler licences must have been within the contemplation of the parties at the date of the renewal of the charterparty, and could have been provided for or guarded against.
- (4) BECAUSE the true inference from the circumstances of the case is that in July, 1932, the Appellant company took the risk of a reduction in its number of licences.
- (5) BECAUSE the Appellant's contention amounts to the 20 implication of a term that if the number of licences obtainable by the Appellant should at any time be reduced the agreement should be discharged and such implication is not necessary to the reasonableness of the contract.
- (6) BECAUSE the operation of the charterparty or of the commercial adventure covered thereby was not rendered impossible or frustrated by operation of law or otherwise.
- (7) BECAUSE the failure to obtain or refusal of the Minister to grant a licence for the " St. Cuthbert " was due to 30 the Appellant's selection of other vessels for the three licences offered by the Minister.
- (8) BECAUSE the consideration for the charterparty had not wholly failed when the " St. Cuthbert " ceased to be licensed under the Canadian Fisheries Act.
- (9) BECAUSE the Judgments of the Supreme Court of Nova Scotia were right and should be upheld.

H. U. WILLINK.

**In the Privy Council.**

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**ON APPEAL**

*From the Supreme Court of Nova Scotia  
En Banco.*

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**BETWEEN**

**MARITIME NATIONAL  
FISH LIMITED**

*(Defendant) Appellant*

**AND**

**OCEAN TRAWLERS**

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

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**Case for the Respondent.**

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