Privy Council Appeal No. 103 *of* 1934

Maritime National Fish, Limited - - - - *Appellants*

v.

Ocean Trawlers, Limited - - - . - *Respondents*

FROM

THE SUPREME COURT OF NOVA SCOTIA, EN BANCO.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 12TH APRIL, 1935

Present at the Hearing:

LORD ATKIN.
LORD TOMLIN.
LORD MACMILLAN.
LORD WRIGHT.

[*Delivered by* LORD WRIGHT.]

The appellants were charterers of a steam trawler the St. Cuthbert which was the property of the respondents. The charter party, dated the 25th October, 1928, had originally been entered into between the respondents and the National Fish Company, Ltd., but was later by agreement taken over by the appellants. It was for 12 calendar months, but was to continue from year to year unless terminated by 3 months' notice from either party, the notice to take effect at the end of one of the years. It was expressly agreed that the trawler should be employed in the fishing industry only; the amount of monthly hire was to be fixed on a basis to include a percentage of the purchase price, and also operating expenses. There was an option given to the charterers to purchase the trawler.

By letters dated the 6th and 8th July, 1932, exchanged between the appellants and respondents, it was agreed that the charter party as then existing should be renewed for one year from the 25th October, 1932, but at a rate of monthly hire which was 25 per cent. lower than that previously paid: the amount so agreed came to $590.97 per month. It was also then agreed that in the event of the appellants giving notice on or before the 25th July in any year that they did not intend to renew, they should further give notice whether or not they intended to exercise the option to purchase. In

[20]

fact the appellants gave notice on the 27th January, 1933, that they did not intend to renew the charter or to purchase the vessel.

When the parties entered into the new agreement in July, 1932, they were well aware of certain legislation consisting of an amendment of the Fisheries Act (c. 73 Revised Statutes of Canada, 1927) by the addition of section 69A, which in substance made it a punishable offence to leave or depart from any port in Canada with intent to fish with a vessel that uses an otter or other similar trawl for catching fish, except under license from the Minister : it was left to the Minister to determine the number of such vesssels eligible to be licensed, and Regulations were to be made defining the conditions in respect of licences. The date of this amending section 69A was the 14th June, 1929. Regulations were published on the 14th August, 1931, former Regulations having been declared invalid in an action in which the appellants had challenged their validity.

The St. Cuthbert was a vessel which was fitted with, and could only operate as a trawler with, an otter trawl.

The appellants, in addition to the St. Cuthbert, also operated four other trawlers, all fitted with otter trawling gear.

On the 11th March, 1933, the appellants applied to the Minister of Fisheries for licences for the trawlers they were operating, and in so doing complied with all the requirements of the Regulations, but on the 5th April, 1933, the Acting Minister replied that it had been decided (as had shortly before been announced in the House of Commons) that licences were only to be granted to three of the five trawlers operated by the appellants : he accordingly requested the appellants to advise the Department for which three of the five trawlers they desired to have licences. The appellants thereupon gave the names of three trawlers other than the St. Cuthbert, and for these three trawlers licences were issued, but no licence was granted for the St. Cuthbert. In consequence, as from the 30th April, 1933, it was no longer lawful for the appellants to employ the St. Cuthbert as a trawler in their business. On the 1st May, 1933, the appellants gave notice that the St. Cuthbert was available for re-delivery to the respondents; they claimed that they were no longer bound by the charter.

On the 19th June, 1933, the respondents commenced their action claiming $590.97 as being hire due under the charter for the month ending the 25th May, 1933 : it is agreed that if that claim is justified, hire at the same rate is also recoverable for June, July, August, September and October, 1933.

The main defence was that through no fault, act or omission on the part of the appellants, the charter party contract became impossible of performance on and after the 30th April, 1933, and thereupon the appellants were wholly relieved and discharged from the contract, including all obligations to pay the monthly hire which was stipulated.

The defence succeeded before the trial Judge, Mr. Justice Doull. His opinion was that there had been a change in the law, including the regulations, which completely changed the basis on which the parties were contracting. He thought it " not unreasonable to imply a condition to the effect that if the law prohibits the operation of this boat as a trawler the obligation to pay hire will cease." He also thought the appellants were not bound to lay up another boat instead of the St. Cuthbert.

It seems that the learned Judge proceeded on the footing that the change of law was subsequent to the making of the contract, whereas it was in fact anterior to the agreement of 1932 under which the trawler was being employed at the time the licence was refused.

This judgment was unanimously reversed by the Judges in the Supreme Court *en banco*. The Judges of that Court rightly pointed out that the discharge of a contract by reason of the frustration of the contemplated adventure follows automatically when the relevant event happens and does not depend on the volition or election of either party. They held that there was in this case no discharge of the contract for one or both of two reasons. In the first place they thought that the appellants when they renewed the charter in 1932 were well informed of the legislation and when they renewed the charter at a reduced rate and inserted no protecting clause in this regard, must be deemed to have taken the risk that a licence would not be granted. They also thought that if there was frustration of the adventure, it resulted from the deliberate act of the appellants in selecting the three trawlers for which they desired licences to be issued.

Their Lordships are of opinion that the latter ground is sufficient to determine this appeal. Great reliance was placed in the able argument of Mr. Smith for the appellants on the *Bank Line* v. *Capel* [1919] A.C. 435, and in particular on the judgment of Lord Sumner in that case. That case was in principle very different from this, because the vessel which was chartered in that case was actually taken from the control of the shipowners for a period such as to defeat the contemplated adventure: it was in consequence impossible during that time for the shipowners to place the vessel at the charterers' disposal at all. In the present case the St. Cuthbert was not requisitioned: it remained in the respondents' control, who were able and willing to place it at the appellants' disposal: what happened was that the appellants could not employ the St. Cuthbert for trawling with an otter trawl. No doubt it was expressed in the charterparty that the St. Cuthbert should be employed under the charter in the fishing industry only, but the respondents did not warrant the continued availability of the vessel for that employment nor was payment of hire made dependent on that condition. The St. Cuthbert was available for the appellants to make such use of her as they desired and were able to make. This case is more analogous to such a case as *Krell* v. *Henry*

[1903] 2 K.B. 740, where the contract was for the hire of a window for a particular day: it was not expressed but it was mutually understood that the hirers wanted the window in order to view the Coronation procession: when the procession was postponed by reason of the unexpected illness of King Edward, it was held that the contract was avoided by that event: the person who was letting the window was ready and willing to place it at the hirer's disposal on the agreed date; the hirer, however, could not use it for the purpose which he desired. It was held that the contract was dissolved, because the basis of the contract was that the procession should take place as contemplated. The correctness of that decision has been questioned, for instance, by Lord Finlay, L.C., in *Larrinaga* v. *Société Franco-Americaine des Phosphates*, 29 Com. Cases 1 at p. 7: Lord Finlay observes:—

> "It may be that the parties contracted in the expectation that a particular event would happen, each taking his chance, but that the actual happening of the event was not made the basis of the contract."

The authority is certainly not one to be extended: it is particularly difficult to apply where as in the present case, the possibility of the event relied on as constituting a frustration of the adventure (here the failure to obtain a licence) was known to both parties when the contract was made, but the contract entered into was absolute in terms so far as concerned that known possibility. It may be asked whether in such cases there is any reason to throw the loss on those who have undertaken to place the thing or service for which the contract provides at the other parties' disposal and are able and willing to do so. In *Hirji Mulji* v. *Cheong Yue Steamship Co.* [1926] A.C. 497, Lord Sumner at p. 510 speaks of frustration as "a device by which the rule as to absolute contracts are reconciled with a special exception which justice demands." In a case such as the present it may be questioned whether the Court should imply a condition resolutive of the contract (which is what is involved in frustration) when the parties might have inserted an express condition to that effect but did not do so, though the possibility that things might happen as they did, was present in their minds when they made the contract.

This was one of the grounds on which the Judges of the Supreme Court were prepared to decide this case. Their Lordships do not indicate any dissent from the reasoning of the Supreme Court on this point, but they did not consider it necessary to hear a full argument, or to express any final opinion about it, because in their judgment the case could be properly decided on the simple conclusion that it was the act and election of the appellants which prevented the St. Cuthbert from being licensed for fishing with an otter trawl. It is clear that the appellants were free to select any three of the five trawlers they were operating and could, had they willed, have selected the St. Cuthbert

as one, in which event a licence would have been granted to her. It is immaterial to speculate why they preferred to put forward for licences the three trawlers which they actually selected. Nor is it material, as between the appellants and the respondents that the appellants were operating other trawlers to three of which they gave the preference. What matters is that they could have got a licence for the St. Cuthbert if they had so minded. If the case be figured as one in which the St. Cuthbert was removed from the category of privileged trawlers, it was by the appellants' hand that she was so removed, because it was their hand that guided the hand of the Minister in placing the licences where he did and thereby excluding the St. Cuthbert. The essence of " frustration " is that it should not be due to the act or election of the party. There does not appear to be any authority which has been decided directly on this point. There is, however, a reference to the question in the speech of Lord Sumner in the *Bank Line* v. *Capel* (*supra*) at p. 452. What he says is

> " One matter I mention only to get rid of it. When the shipowners were first applied to by the Admiralty for a ship they named three, of which the *Quito* was one, and intimated that she was the one they preferred to give up. I think it is now well settled that the principle of frustration of an adventure assumes that the frustration arises without blame or fault on either side. Reliance cannot be placed on a self-induced frustration ; indeed, such conduct might give the other party the option to treat the contract as repudiated. Nothing, however, was made of this in the courts below, and I will not now pursue it."

A reference to the record in the House of Lords confirms Lord Sumner's view that the Court below had not considered the point, nor had they evidence or material for its consideration. Indeed in the war time the Admiralty, when minded to requisition a vessel, were not likely to give effect to the preference of an owner, but rather to the suitability of the vessel for their needs or her immediate readiness and availability. However the point does directly arise in the facts now before the Board and their Lordships are of opinion that the loss of the St. Cuthbert's licence can correctly be described, *quoad* the appellants as " a self induced frustration." Lord Sumner in *Hirji Mulji* v. *Cheong Yue Steamship Co.* (*supra*) at p. 507 quotes from Lord Blackburn in *Dahl* v. *Nelson* 6 A.C. 38, who at p. 53 refers to a " frustration " as being a matter " caused by something for which neither party was responsible " : and again (p. 508) he quotes Brett J.'s words which postulate as one of the conditions of frustration that " it should be without any default of either party." It would be easy but is not necessary, to multiply quotations to the same effect. If either of these tests is applied to this case, it cannot in their Lordships' judgment be predicated that what is here claimed to be a frustration, that is, by reason of the withholding of the

licence, was a matter for which the appellants were not responsible or which happened without any default on their part. In truth, it happened in consequence of their election. If it be assumed that the performance of the contract was dependent on a licence being granted, it was that election which prevented performance, and on that assumption it was the appellants' own default which frustrated the adventure: the appellants cannot rely on their own default to excuse them from liability under the contract.

On this ground, without determining any other question, their Lordships are of opinion that the appeal should be dismissed with costs.

They will humbly so advise His Majesty.

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In the Privy Council.

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DELIVERED BY LORD WRIGHT.

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