

7, 1939

No. 82 of 1938.

In the Privy Council.

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

IN THE MATTER OF THE COMPANIES WINDING
UP ACT, BEING CHAPTER 198, R.S.N.S., 1923,

AND

IN THE MATTER OF THE WINDING UP OF UNUS
SHIPPING COMPANY LIMITED,

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AND

IN THE MATTER OF A CERTAIN CLAIM FILED BY
VITA FOOD PRODUCTS INC., A BODY CORPORATE, (Claimant)
Appellant,

AGAINST

UNUS SHIPPING COMPANY LIMITED IN LIQUIDA-
TION Respondent.

CASE FOR THE APPELLANT

(1) This is an Appeal by the Claimant from an Order of the Supreme p. 131.
Court of Nova Scotia En Banc, dated the 2nd day of March, 1938,
20 unanimously affirming an Order of the Trial Judge, Sir Joseph Chisholm, p. 109.
dated the 8th day of July, 1937, whereby the Appellant's claim had been
dismissed. The Appeal is brought pursuant to final leave to appeal
granted by the Supreme Court dated 16th April, 1938. p. 135.

(2) The short question in the Appeal is whether the Respondent
as shipowner is entitled to rely upon the exceptions contained in his
bills of lading or the statutory exceptions contained in the Newfoundland
Carriage of Goods by Sea Act, 1932 (which is similar in terms to the English
Carriage of Goods by Sea Act, 1924) inasmuch as the bills of lading
issued by the Respondent failed to comply with Section 3 of the New-
30 foundland Act in that they did not contain an express statement that
they were to have effect subject to the provisions of the Rules as applied
by that Act.

The facts which give rise to the question are shortly as follows :—

(3) The Appellant is a Body Corporate carrying on business at pp. 1, 3.
New York in the United States of America.

- pp. 1, 3. (4) The Respondent is a body corporate, incorporated under the laws of the Province of Nova Scotia and is in the process of a voluntary winding-up under the provisions of "The Companies Winding Up Act," being Chapter 198, R.S.N.S., 1923, and at all times material to this action, the Respondent was the owner of 64 Shares of the M.V. "Hurry On," a Motor Vessel, of Canadian Registry, registered at Halifax, Nova Scotia.
- pp. 98, 99. (5) During the month of January, 1935, the Respondent operated the said ship as a general ship taking cargo from all and sundry as offered for a voyage from various points in and about Bay of Islands, Newfoundland, including Middle Arm, to New York. While so operated 10
pp. 2, 3. 1806 barrels of Scotch cured herring, 133 barrels of round herring and 37 half barrels of Scotch cured herring, all in good order and condition were delivered by M. G. Basha of Curling, Newfoundland, to the Respondent and loaded on the M.V. "Hurry On" at Middle Arm, aforesaid, for carriage and delivery to New York at a freight of \$1.60 per barrel.
- p. 92. (6) Bills of lading covering the said cargo, of which the Bill of Lading, Exhibit E/6 is typical, were issued at Curling aforesaid, by the Respondent, to the said M. G. Basha, from whom the Appellant purchased the herring and at the time of the stranding hereinafter referred to the Appellant was the owner of the said herring. 20
- App., pp. 8, 9, 10. (7) The bills of lading were signed by one Poole who acted as super-cargo for the "Hurry On" for the shipments in question. The form of the bill of lading was one which the said Poole had previously used on behalf of one W. A. Shaw, a steamship operator of Halifax, in connection with shipments on certain other vessels operated by Shaw. None of the bills of lading contained any "clause paramount" incorporating the Carriage of Goods by Sea Act, 1924, Newfoundland, or indeed contained any reference to that Act, and so failed to comply with imperative 30
App., pp. 11, 13. provisions of Section 3 of that Act which provides as follows :—
p. 92. " 3. Every bill of lading, or similar document of title, issued
" in this Dominion which contains or is evidence of any contract
" to which the Rules apply shall contain an express statement
" that it is to have effect subject to the provisions of the said
" Rules as applied by this Act."
- pp. 2, 3. (8) About the 16th day of January, 1935, the "Hurry On" proceeded from Bay of Islands on her said voyage, but on the 18th day of January she stranded at Grady's Point in Chedabucto Bay on the coast of Nova Scotia, with the herring on board, with the result that 40
p. 97. the herring were damaged but subsequently were salvaged and finally between the 6th and 8th days of March, 1935, were delivered in a damaged condition to the Appellant in New York.

(9) The above facts are not in dispute and are either admitted by the Respondent in its pleadings or by written Admissions subsequently made, Exhibits E/18 and E/19. p. 3. pp. 96-99.

(10) In the view taken by the Trial Judge and also by the Justices of the Appellate Court, it was immaterial whether or not the stranding of the "Hurry On" and the consequent damage to the Appellant's cargo was the result of negligent navigation of that vessel and consequently no finding has yet been made as to whether or not the damage to the cargo resulted from the Respondent's negligence.

10 (11) It is possible on this Appeal that the question of negligence might fall to be determined and in that event the Appellant's submission is that the stranding of the "Hurry On" resulted from the negligence of the master in failing to take soundings under the circumstances which then prevailed.

(12) Briefly these circumstances are, that on the morning of the 18th January, a severe storm developed which rapidly grew worse and in the forenoon the Master was obliged to make for shelter at Queensport, Guysborough County, but found that he could not reach that port because of ice, so he altered his course for Eddy's Point in the Straits of Canso. p. 35. p. 37. pp. 17, 37.

20 Canso.

(13) It had been necessary previously to haul the ship's log because of ice and while Canso Buoy at the entrance to Chedabucto Bay and the Straits of Canso was passed in the early forenoon and although the Captain had no means of computing his speed, no soundings were taken between Canso Buoy and Grady's Point, the place of stranding, for a distance of over twelve miles. p. 40. p. 42.

(14) During all this period the visibility was very poor and at the time of stranding was about 1000 feet according to the Captain and 500 feet according to the Chief Officer. pp. 18, 42. p. 37. p. 18.

30 (15) According to the uncontradicted evidence of Captain Melville H. Bloomer a witness called on behalf of the Appellant (whose evidence on this point was not cross examined to) the failure to take soundings every quarter of an hour after passing Canso Buoy until the 20 fathom line was picked up and thereafter to sound continuously amounted to negligent navigation. p. 50.

(16) The Appellant submits that had the Captain taken soundings and referred to his Chart he would have known that he was gradually approaching shallow water and could readily have altered his course to have avoided the stranding in question and further that his failure to take these soundings amounts to negligence. 40

(17) The proceeding upon which this claim was founded was taken under the provisions of The Companies Winding Up Act aforesaid on or about the 2nd day of March, 1936, by the Appellant filing a claim with the Liquidators of the Respondent which the latter refused to recognize, whereupon the learned Chief Justice by Order dated the 16th day of March, 1936, directed that the parties to the claim should deliver statements in the nature of pleadings stating the facts upon which they respectively relied and subsequently fixed the 22nd day of December, 1936, as the date for the adjudication of the Appellant's claim.

(18) Upon the adjudication the Appellant argued,—(a) that the Respondent was a common carrier ; (b) that as such it was liable in tort at common law to the Appellant as an insurer of the cargo and that its liability existed independent of contract ; (c) that the Respondent could not avail itself of the exceptions contained in the Bill of Lading or the said Carriage of Goods by Sea Act, to escape its common law liability because the bills of lading were illegal, null and void due to the failure of the Respondent to comply with the imperative provisions of Section 3 of the aforesaid Act, and (d) on the assumption that the bills of lading were good, the Respondent still could not succeed because it could not establish that it had “ exercised due diligence to make the ship seaworthy ” and hence could not take advantage of the exceptions in the Bills of Lading or the Carriage of Goods by Sea Act aforesaid. 10 20

(19) The learned Trial Judge Sir Joseph Chisholm, Chief Justice (a copy of whose judgment will be found at pp. 99–109 of the Record), found,—

p. 109. (a) That the “ Hurry On ” was a common carrier at all times relevant to the proceedings and as such that the Respondent was liable as an insurer of the cargo unless the Respondent had contracted out of such liability ; (b) that the Appellant's claim was founded on contract and not in tort ; (c) that the contract was wholly embodied in the bills of lading ; (d) that the mandatory words “ shall contain ” as used in Section 3 aforesaid must be construed as meaning “ shall be deemed to contain ” ; (e) that notwithstanding the non-inclusion of the Paramount Clause in the bills of lading, the bills of lading were effective documents to which were incident the freedom from liability prescribed in the Rules referred to ; and (f) that the Respondent exercised due diligence to make the “ Hurry On ” seaworthy and that the said vessel was in fact seaworthy at the commencement of the voyage and that for these reasons the claim failed. 30

p. 109. (20) On the 8th day of July, 1937, the learned Chief Justice granted an Order directing that the Appellant should recover nothing by its claim but that the same should be and was thereby dismissed with Costs. 40

(21) From the aforesaid Decision and the Order passed thereon, the Appellant appealed to the Supreme Court of Nova Scotia En Banc and the Appeal came for hearing at the November Sitting, 1937, before a Court composed of Graham, Hall, Carroll, Doull and Archibald, J.J., who on the 12th day of February, 1938, rendered Decisions dismissing the Appeal which were subsequently made effective by an Order granted on the 19th day of February aforesaid.

p. 110.

p. 131.

(22) The Appellant argued on the Appeal that the learned Trial Judge had erred in the findings referred to in Paragraph (18) (b) (c) (d) hereof.

(23) The Judgments of the Appellate Court were delivered by Graham, J. (p. 111), by Hall, J. (p. 112), with whom Archibald, J., concurred and by Doull, J. (p. 120), with whom Carroll, J., concurred.

pp. 111-131.

(24) Graham, J., was of the opinion that the bills of lading were illegal and that an action could not be maintained on the contract set out therein; that M. G. Basha, the shipper of the goods, was the Appellant's agent and that the Appellant was therefore charged with the illegality. He also held that for the breach of the common law duty to carry the goods safely in a proper case, an action will lie in tort but that the relationship of the parties under which that duty arises is brought about by reason of some expressed or implied contract and that in the case at Bar if the duty arose at all, it arose by reason of the illegal contract in the bill of lading, to which the Appellant was a party and could not, therefore, recover.

pp. 111-112.

p. 111.

p. 111.

(25) It is respectfully submitted that Graham, J., erred in the following respects,—

(a) In holding that the Appellant must be charged with the consequence of the illegality of the Respondent in issuing a bill of lading without complying with the imperative provisions of Section 3 of the aforesaid Act.

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The learned Justice seems to have overlooked the fact that the said Act was passed for the purpose of definitely limiting the common law right of the carrier to contract out of every sort of liability and consequently was passed for the protection of that section of the public known as "cargo-owners." Though the Respondent could not avail itself of the exceptions contained in the illegal contract to limit its liability, there is nothing in law to prevent the cargo-owner, the Appellant, from relying upon the common law liability of the Respondent as common carrier or from recovering damages suffered by it in the shipment of its goods.

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(b) In treating the common law liability of a carrier not as arising in tort or from the relationship of the parties, but as being necessarily founded in contract, whereas that liability exists, in the words of Lord Dunedin, in *London and North-Western Railway Company vs. Hudson*, [1920] A.C. 324, at p. 333, "as an obligation "independent of contract . . . not an adjacent term to the "contract as made, but an obligation which attaches from the "fact of the goods being carried by a common carrier, in favour "of the owner of the goods whoever he may be."

pp. 112-128. (26) Hall, J., with whom Archibald, J., concurred, was of the opinion 10
 p. 117. that the language of Section 3 did not warrant the construction placed
 upon this Section by the learned Trial Judge, who imported into the
 Section words not found there and construed the words "shall contain"
 p. 117. as "shall be deemed to contain." Further that that construction would
 defeat the very purpose of the Act which was that the Rules unanimously
 adopted at the Brussels Conference and designed for uniformity should
 establish the responsibilities, liabilities, rights and immunities attaching
 p. 119. to carriers under bills of lading. He further held that the mandatory
 provisions of Section 3 were imperative and not directory, otherwise
 the parties could contract themselves out of the Rules by omitting the 20
 Clause Paramount and expressing their intention to be governed by other
 Rules and thus the intent and purpose of the Legislature as expressed in
 the enactment would be defeated. Like all the other justices of the
 pp. 127, 128. Court of Appeal, Mr. Justice Hall concluded that the omission of the
 Clause Paramount rendered the bills of lading illegal and void and that
 they therefore could not be enforced.

p. 126. (27) As to the Appellant's contention that the Respondent was
 liable as a common carrier in tort altogether apart from contract, Mr.
 Justice Hall was of the opinion that in contracts of carriage an action
 will not lie in tort unless the alleged wrongful act is entirely independent 30
 p. 127. of contract; that this claim was founded on a breach of duty in a relation-
 ship originally established by contract; that both parties were participes
 p. 128. criminis; that the maxim in pari delicto potior est conditio defendentis
 applied and that the Appellant in reply was forced to plead that the
 contract was illegal which plea was not open to it and that therefore the
 Appellant had no right of action.

(28) With deference the Appellant submits that Mr. Justice Hall
 erred in holding that the law is settled that on contracts of carriage an
 action will not lie in tort unless the wrongful act is entirely independent
 of the contract. This conclusion is not justified by the authorities. On 40
 the contrary, as appears from the speech of Lord Macmillan in the House
 of Lords in *Donoghue v. Stevenson*, [1932] A.C. 562 at p. 610, the fact
 that there is such a relationship between the parties as may give
 rise to a breach of contract does not exclude the co-existence of a right

of action in tort as between the same parties, independently of contract, though arising out of the relationship in fact brought about by it. Here the relationship of cargo-owner and carrier existed in fact between the Appellant and the Respondent before the bills of lading were issued. There was nothing illegal in the Appellant's delivery of his herring into the possession of the Respondent as bailee for carriage and delivery and it is out of that relationship, quite lawful in itself, though consummated in an illegal bill of lading that the Appellant's claim arises in tort. If the claim can be so founded it cannot be affected by the illegality of the bill of lading which was a nullity ab initio. From which it follows that even if the Appellant is particeps criminis in the making of the contract, which it is submitted it is not, it could succeed because its claim arises in tort or out of the relationship of shipper and common carrier and it does not have to plead an illegal contract upon which it relies for any purpose but it does plead illegality to destroy the contract upon which the Respondent must stand if it is to escape. Since the Appellant does not have to bring any illegal contract into Court, but can succeed altogether apart from it, it is submitted that the maxim in pari delicto potior est conditio defendentis has no application.

20 (29) Doull, J., with whom Carroll, J., concurred, was of the opinion pp. 129-131.
that there were serious difficulties in adopting the construction placed p. 130.
upon the Paramount Clause by the learned Trial Judge, namely, that
the words "shall contain" as used in Section 3 aforesaid should be read
as equivalent to "shall be deemed to contain." He was of the opinion
that the Statute was intended to require the insertion of the Clause as an
integral part of every bill of lading and he concluded that the mandatory
words in the Section constituted an absolute command of the Legislature,
and that the bills of lading issued in Newfoundland without complying
with the imperative provisions of the Statute were illegal. He, however, p. 131.
30 held that because the Appellant accepted the illegal bill of lading which
it might have refused and otherwise acted upon it that it was as much a
party to the illegality as the Respondent and he agreed with Mr. Justice
Hall in dismissing the Appeal.

It is respectfully submitted that Doull, J., was equally in error in
holding that the Appellant was as much a party to the illegality as was
the Respondent as the Statute imposed the duty of issuing the bill of
lading in the proper form upon the shipowner and not upon the shipper.
The Appellant (it is submitted) can recover without putting the bill of
lading in suit. On proof that the goods were in the course of a legal
40 transaction delivered to the Respondent as common carrier and delivered
damaged the Appellant can recover unless the Respondent can prove
that he is protected by a valid contract or by the terms of some statute
and this he was unable to do.

(30) On the 2nd day of March, 1938, an Order was granted by the p. 132.
Supreme Court of Nova Scotia En Banc giving to the Appellant,

Conditional Leave to Appeal to His Majesty-in-Council from the Judgment of the said Court and on the 16th day of April, 1938, Final Leave to Appeal was granted by the said Court.

(31) The Appellant humbly submits that this Appeal should be allowed and the Judgment of the Trial Judge and of the Supreme Court of Nova Scotia En Banc should be reversed and set aside for the following, amongst other,—

REASONS.

- (1) BECAUSE the Respondent was a common carrier.
- (2) BECAUSE as such it was liable to the Appellant for breach of a 10
duty imposed upon it by the custom of the realm, altogether independent of contract, such liability being founded either in tort or arising from the special status of the Respondent as common carrier.
- (3) BECAUSE the Respondent could not avail itself of the exceptions from liability contained in the bills of lading to escape its common law liability, the bill of lading being illegal, null and void due to the failure of the Respondent to comply with the imperative provisions of Section 3 of The Carriage of Goods by Sea Act, 1932, Newfoundland; nor could the Respondent 20
avail itself of the exceptions from liability contained in the Rules scheduled to the aforesaid Act since those Rules were never effectually incorporated into the contract between the parties.
- (4) BECAUSE the learned Trial Judge erred in holding that the Appellant's claim was founded on contract and not in tort or on the special status of the Respondent and that notwithstanding the non-inclusion of the Paramount Clause in the bills of lading, the bills of lading were effective documents to which were incident the freedom from liability prescribed 30
in the Rules referred to.
- (5) BECAUSE the learned Trial Judge and Justices of the Court of Appeal erred in holding that the Appellant's claim was founded on contract and not in tort or on the special status of the Respondent.
- (6) BECAUSE the Carriage of Goods by Sea Act aforesaid was passed for the protection of cargo-owners and the learned

Justices of the Court of Appeal erred in holding that the Appellant, a cargo-owner, could not rely on the breach by the Respondent of an imperative provision of the said Statute which was passed for the protection of the Appellant.

- (7) BECAUSE that construction ought to be put upon the Statute which will best give effect to the intention of the Legislature, namely, the unification of certain rules relating to Bills of Lading with a view to establishing the responsibilities, liabilities, rights and immunities attaching to carriers thereunder.
- 10 (8) BECAUSE it was the intention of the Legislature that carriers should be liable in the event of failure to obey the imperative provisions of Section 3, otherwise the purpose of the Act could be defeated by mere disobedience of this Section on the part of the carrier.
- (9) BECAUSE the statute imposes the duty of issuing a bill of lading in proper form on the shipowner and not on the shipper and because the Appellant in accepting the bill of lading after the goods had been legally shipped on board the Respondent's vessel was not itself guilty of any illegality and cannot properly be said to be *particeps criminis*.
- 20 (10) BECAUSE, if in the words of Greer, L. J., in *The Torni* (1932) P. at p. 87 the failure to insert the express statement required in the Statute has the "effect of entirely destroying the contract of carriage between the parties," the Appellant can still rely upon the obligation imposed by law upon the Respondent as common carrier to indemnify him as insurer for all loss or damage other than loss or damage occasioned by Act of God or King's Enemies.
- (11) BECAUSE the Respondent having accepted the Appellant's goods as bailee for reward and not being entitled to rely upon the exceptions contained in the bills of lading or on the Rules scheduled to the Act is liable unless he can prove that the loss or damage happened in some way consistent with the absence of negligence on the part of himself his servants or agents (and this he failed to prove).
- 30 (12) BECAUSE the loss or damage was occasioned by the negligence of the Respondent his servants or agents.

W. LENNOX McNAIR.

In the Privy Council.

*On Appeal from the Supreme Court
of Nova Scotia en Banc.*

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PANIES WINDING UP ACT,
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AGAINST

UNUS SHIPPING COMPANY LIMITED
IN LIQUIDATION

Respondent.

CASE FOR THE APPELLANT.

INCE, ROSCOE, WILSON & GLOVER,
10/11, Lime Street,
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