

7, 1939

No. 82 of 1938.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF NOVA SCOTIA  
(IN BANCO).

A

IN THE MATTER OF  
THE COMPANIES WINDING UP ACT, being Chapter 198,  
R.S.N.S. 1923

—and—

B

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

—and—

IN THE MATTER OF

C

A Certain Claim filed by VITA FOOD PRODUCTS INC.,  
a Body Corporate (Claimant)  
—against— Appellant

UNUS SHIPPING COMPANY, LIMITED,  
IN LIQUIDATION Respondent

D

Case for the Respondent.

RECORD.

1. This is an appeal by the Claimant from a Judgment of the Supreme Court of Nova Scotia in banco dated the 19th day of February, 1938, unanimously, though on somewhat different grounds, dismissing the appeal of the Claimant from the Order of Chisholm, C.J., the Trial Judge, dated the 8th day of July, 1937. p. 131. p. 109.

2. The Order of the Supreme Court of Nova Scotia granting final leave to Appeal to His Majesty-in-Council is dated the 16th day of April, 1938. p. 135.

3. The question raised by this Appeal is whether a Carrier by sea is entitled to rely upon the immunities from liability granted by the Carriage of Goods by Sea Act 1924 (Cap : 18 Newfoundland Statutes) if the Bill of Lading issued by him and accepted by the Owner of goods shipped from Newfoundland fails to contain, in accordance with the specific requirement of that Act, an express statement that the Bill is to have effect subject to the provisions of the Rules contained in the Act. F G

## RECORD.

p. 1, 1. 9.  
p. 1, 1. 17.

4. The Respondent, a body corporate incorporated under the Laws of the Province of Nova Scotia and carrying on business therein, was at all material times the owner of the Motor Vessel "Hurry On," a British ship of Canadian registry registered at Halifax, Nova Scotia.

A

p. 1, 1. 12.

5. The Respondent Company is in process of being wound up under "The Companies' Winding up Act" of Nova Scotia (R.S. 1923, Chapter 198), an Extraordinary Resolution for its winding up having been passed by the Shareholders on the 20th day of December, 1935, in accordance with the provisions of the said Act.

B

p. 97, 1. 28.  
p. 2, 1. 1.  
p. 3, 1. 8.

6. On the 12th day of January, 1935, and prior thereto the Appellant was the owner of some 1806 barrels of Scotch cured herring, 133 barrels of round cured herring and 37 half-barrels of Scotch cured herring, all of which were situate at Middle Arm, Bay of Islands, Newfoundland.

C

p. 2, 1. 1.  
p. 3, 1. 8.

7. On or about the 15th day of January, 1935, the said herring all in good condition were delivered by one, M. G. Basha who the Respondent alleges was the agent of the Appellant for the purpose, to the said Motor Ship "Hurry On" at Middle Arm aforesaid for carriage to and delivery at New York at an agreed freight of \$1.60 per barrel.

D

p. 96, 1. 27.  
p. 92.  
p. 98.  
(Appendix p. 9).

8. Upon receipt of the said herring and prior to January 17th, 1935, Bills of Lading all in similar form, and of which Exhibit E/6 is a specimen, were issued to and accepted by the said Basha. The said Bills of Lading were dated January 15th, 1935.

E

(Appendix pp. 1-16).

(Appendix p. 6, 1. 43).  
p. 4, 1. 1.  
p. 9, 11. 8-17.

9. Notwithstanding the rather unusual circumstances in connection with the signing of the Bills of Lading as detailed in the evidence of the witnesses, Cruickshanks, Poole and Shaw, it is common ground that Poole, the Supercargo, was the agent of the Respondent for the purpose of signing and issuing them and that his acts in so doing were ratified by the Respondent.

F

p. 98.

10. All the said Bills of Lading duly endorsed were delivered by the said Basha to the Bank of Montreal at Curling, Newfoundland, and were eventually delivered to and accepted by the Appellant on or before February 28th, 1935.

G

(Appendix pp. 17, 18).

11. The said Bills of Lading did not conform to the provisions of the Newfoundland "Carriage of Goods by Sea Act,

1932," in that they did not contain any express statement that they were to have effect subject to the provisions of the Rules as applied by the said Act.

RECORD.

- A 12. The "Hurry On" sailed from Middle Arm on January 16th, 1935, bound for New York, and on the morning of the 18th ran into bad weather and ice off the coast of Nova Scotia. On the early morning of that day Canso Buoy was sighted on the port side indicating that the Vessel was some fifteen miles off her course. p. 2, 1. 12.  
p. 3, 1. 16.  
p. 36.  
p. 41.
- B 13. As the weather was bad and the ship behaving badly, the Master decided to bring her round and make Queensport for refuge. He encountered ice, however, and decided to turn into the Gut of Canso toward Eddy Point. While so proceeding the ship took the ground at Grady Point. At the time of the stranding the sea was high and the wind from the south-east and of about forty to forty-five miles per hour. p. 37.  
p. 17, 1. 44.
- C 14. The vessel was eventually salvaged and towed to Guysboro where the cargo was unloaded, reconditioned and forwarded to destination. p. 18, 1. 1.  
p. 19, 1. 21.
- D 15. The said cargo of herring was delivered to the Appellant in New York in a damaged condition upon presentation of the Bills of Lading between the 6th and 8th days of March, 1935, delivery being complete on March 8th. It is common ground that the cargo was damaged and that the Appellant incurred salvage and other expenses as a result of the stranding. p. 97, 1. 5.  
p. 2.
- E 16. The question of the unseaworthiness of the ship does not now arise as, though raised at the trial, it was abandoned by the Appellant before the Court in banco. p. 114, 1. 33.
- F 17. The claim came on for trial before His Lordship the Chief Justice of Nova Scotia on agreement by Counsel that the question of liability be first tried and that if the Respondent were held liable, the damages be later assessed.
18. After trial His Lordship reserved Judgment and subsequently delivered his Decision dismissing the Appellant's claim. pp. 99-109.

## RECORD.

19. The learned Chief Justice held :—

p. 107,  
11. 19-38.

(a) That prior to the commencement of the voyage the owners had exercised due diligence to make the ship seaworthy and that she was in fact seaworthy.

p. 109, 1. 3.

(b) That the "Hurry On" was a common carrier and as such liable as an insurer unless her owners had contracted out of such liability. A

p. 109, 1. 7.

(c) That the Appellant's claim was founded on contract and not in tort.

p. 109, 1. 8.

(d) That the contract was wholly embodied in the Bills of Lading. B

p. 109, 1. 11.

(e) That notwithstanding the non-inclusion of the Paramount Clause the Bills of Lading are effective documents to which are incident the freedom from liability prescribed in the Rules contained in the Newfoundland "Carriage of Goods by Sea Act." C

p. 109, 1. 12.

(f) That suit was not brought within one year from the date of the completion of the delivery of the cargo.

p. 109, 1. 13. He consequently dismissed the claim.

p. 105, 1. 40-  
p. 107, 1. 18.

20. In coming to these conclusions the learned Trial Judge was of the opinion that the provisions of Clause 3 of the Newfoundland Act were directory and not mandatory and that the words "shall contain" therein used should be construed as "shall be deemed to contain" so that the Rules applied notwithstanding the absence of any express statement to that effect. D E

p. 106.

He intimated further that if he was wrong in so holding and the contract evidenced by the Bills of Lading was consequently an illegal contract, no cause of action could arise upon it.

pp. 109-110.

21. From the Decision of the learned Chief Justice and from the Order based thereon the Appellant appealed to the Supreme Court of Nova Scotia in banco, and the appeal came on for hearing at the November 1937 Sittings before a Court composed of Graham, Carroll, Hall, Doull and Archibald, JJ., who unanimously dismissed the appeal. F

pp. 111-131.

pp. 111-112.  
pp. 112-128.  
pp. 129-131.

Reasons for Judgment were given by Graham, J., by Hall, J. G  
concurrent in by Archibald, J., and by Doull, J. concurred in by Carroll, J.

22. Graham, J., concurred in the opinion of the other members of the Court that the Bill of Lading was illegal because it omitted the statement that the contract it contained was subject to the Rules of the Newfoundland Statute. He also agreed with them (and in this respect disagreed with the Trial Judge) that the Bill of Lading could not be deemed to contain the omitted clause. He further held that because it was illegal an action could not be maintained on the contract set out in it. He held also that Basha was Appellant's agent and that the Appellant was, therefore, charged with the illegality. He was also of the opinion that the Appellant could not disregard the illegal contract evidenced by the Bill of Lading and found its action upon the breach by the Respondent of a common law duty to carry the goods safely.
23. Hall, J., with whom Archibald, J. concurred, after quoting extensively from the Decision of the learned Trial Judge, stated that on the hearing of the appeal the claim of unseaworthiness was abandoned and that it is common ground that if the Bills of Lading are legal and valid in Newfoundland, the Appellant could not recover. He pointed out that the Appellant contended that the Respondent was a common carrier and as such was liable by the custom of the Realm as an insurer of the cargo and that this liability exists independent of any contract; and further that the Respondent could not avail itself of the exceptions contained in the Bills of Lading or the "Carriage of Goods by Sea Act, 1932" 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 Act. For reasons which he set forth at length he held that the provision in Section 3 of the Act requiring that every bill of lading issued in Newfoundland to which the Rules apply "shall contain an express statement that it is to have effect subject to the provisions of the said Rules" is obligatory and not directory. In this respect he also differed from the learned Trial Judge. Considering next the effect upon the Bills of Lading of the non-inclusion of the Clause Paramount in disobedience to Section 3 he held that such omission rendered the Bills of Lading illegal and void—not merely nugatory—and, therefore, that they could not be enforced. He further held that there was no contract between the parties except as set out in the Bills of Lading and agreed with the learned Trial Judge that "the Bill of Lading must be taken to be the sole contract between them," and that as all previous negotiations whether they had resulted in a binding agreement or not were merged in the Bills of Lading which contain all the terms

RECORD.

p. 111, l. 15.

p. 111, l. 20.

p. 111, l. 21.

p. 111, l. 24.

p. 111, l. 5.

pp. 112-114.

p. 114, l. 33.

p. 114, l. 36.

p. 114, ll. 36-42.

pp. 115-119.

pp. 119-121.

p. 121, l. 37.

- RECORD. of the contract, it follows that no action lies in contract outside the Bills of Lading and action on the Bills of Lading is barred by their illegality. He further pointed out that in order to circumvent this difficulty the Appellant had endeavoured to frame its action in tort and relies upon the admissions that the "Hurry On" was a common carrier; that the herring in good order and condition were delivered to Respondent and loaded on the ship for carriage and delivery to the Claimant at New York. that the herring were damaged as a result of the stranding and were delivered to Claimant in a damaged condition. He further pointed out that there was in issue the further allegation that the stranding and damage were due to the neglect or default of the master and crew in the navigation and management of the ship and that if an action lies in tort the only obligation remaining upon the Appellant is to prove damages.
- pp. 122-126. After reviewing the authorities he held that on a contract of carriage an action would not lie in tort unless the alleged wrongful act was one entirely independent of the contract, and that in the present case the negligence in navigation of the ship, if any, could not be said to be a wrong apart from the contract itself. He further held that the Bills of Lading specifically excepted liability for damages arising from negligence and that the Appellant is forced to reply that the Bills of Lading are illegal and void and this plea is not open to it.
- p. 128, 11. He summarized his reasons as follows:—
- p. 128, 28-41. (a) That the sole contract between the parties is to be found in the Bills of Lading.
- p. 128, 1. 31. (b) If the Bills of Lading are legal and valid, their terms provide a complete defence to the action.
- p. 128, 1. 33. (c) If the Bills of Lading are illegal and void, the Appellant fails because:—
- p. 128, 1. 35. (1) The action is founded on a breach of duty in a relation originally established by contract.
- p. 128, 1. 37. (2) While both parties are *participes criminis*, the maxim "*in pari delicto potior est conditio defendentis*" enables the Respondent to plead the contract.
- p. 128, 1. 40. (3) The Appellant in reply is forced to reply that the contract is illegal, and therefore has no right of action.
- p. 128, 1. 42. He, therefore, held that that the appeal should be dismissed.

24. Doull, J., with whom Carroll, J. concurred, was of the opinion that the provisions of Section 3 of the Newfoundland Act constituted an absolute command of the Legislature requiring the Paramount Clause to be inserted in every Bill of Lading of out-going freight and that the Bills of Lading were consequently illegal as being forbidden by the law of Newfoundland. He was further of the opinion that it was impossible to separate the contract which the parties made into two contracts, one illegal and the other consisting of a common law bailment for carriage. He held that the contract which the parties made for themselves was one which involved the issue of a Bill of Lading and that the Appellant bought the goods from Basha and in delivering them to the carrier demanded a Bill of Lading. It was given a Bill of Lading which it might have refused. It, however, took the Bill of Lading without protest, obtained funds on it for payment of the goods, took the Bill of Lading in course from the Bank and obtained the goods. It elected to claim upon the Bill of Lading and was consequently as much a party to the illegality as was the Respondent. In this respect he relied upon the authorities cited by Hall, J., and agreed with him in dismissing the appeal.

RECORD.

pp. 129-131.  
p. 130, l. 30.

p. 130, l. 34.

p. 131, l. 1.

p. 131, l. 10.

25. All the learned Judges in the Court in banco appear to have been of the opinion, which it is respectfully submitted is erroneous, that the only way that the Newfoundland Legislature could insure that uniformity of Bills of Lading which the Act, as well as the Convention as a result of which it was passed, sought was to require that the parties to a Bill of Lading insert in the document an express provision that it was to take effect subject to the Rules. They appear to be under the impression that there was some limitation, constitutional or international, that precluded the Newfoundland Legislature from obtaining the desired result by merely enacting that the Rules should apply whether or not the required statement was actually inserted in the Bill of Lading.

pp. 117-119.

p. 130.

pp. 117-119.

p. 130.

26. It is respectfully submitted that the learned Judges in the Court in banco erred in holding that the contract contained in or evidenced by the Bills of Lading was not governed by the Rules as applied by the Newfoundland Act and that the contract was consequently illegal by reason of the omission of the required statement.

p. 111, l. 15.

p. 119, l. 1.

p. 121, l. 35.

p. 130, l. 30.

Clause 1 of the Act provides that subject to the provisions of the Act the Rules shall have effect in relation to and in connection with the carriage of goods by sea in ships carrying goods from any port in Newfoundland to any other port whether in or outside Newfoundland.

(Appendix p. 17).

## RECORD.

(Appendix p. 18).

Clauses 4 and 5 create express exceptions to which the words "subject to the provisions of this Act" used in Clause 1 obviously apply.

(Appendix p. 18).

Clause 3, the so-called "Clause Paramount," provides as follows:—

"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."

It is patent, therefore, that the obligation to insert the express statement applies only to contracts of carriage to which the Rules apply.

If the Rules apply, they govern such contracts of carriage and continue to do so notwithstanding the omission of the express statement from the Bills of Lading as there is no suggestion in the Act that the Rules shall cease to apply if the express statement is not inserted.

This submission, though pressed upon both the learned Trial Judge and the Court in banco, has not been dealt with by any of the Judges in the Courts below.

27. It is further respectfully submitted that it is axiomatic that either the Newfoundland Rules apply to the contract contained in or evidenced by the Bills of Lading in question or they do not apply.

p. 114, l. 33.  
p. 108, l. 10.(Appendix  
pp. 21, 22).

If they apply, they afford a complete defence to the action inasmuch as no question of unseaworthiness now arises and it is common ground that the damage was caused either by perils of the sea or by neglect or default in navigation of the ship, or by both combined, from all of which the Respondent is exempted from liability by the Rules.

p. 108, l. 20.  
(Appendix  
p. 21, l. 3).

It is also common ground that no action was brought within one year from delivery of the goods as required by Clause 6 of Article III of the Rules.

p. 1, l. 12.  
p. 108, l. 20.

In this connection it is pointed out that a Special Resolution for winding up of the Respondent Company was passed on December



20th, 1935, and by Section 8 of "The Companies' Winding Up Act" of Nova Scotia, R.S.N.S. 1923, Chapter 198, it is provided:

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" 8. The following consequences shall ensue upon the commencement of the winding up of a company :—

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" No action, suit or other proceeding shall be proceeded with against the company except with the leave of the Court and subject to such terms as the Court imposes."

28. It is further respectfully submitted that if, on the other hand, the Rules do not apply one of two results must inevitably follow, viz. :

C

(a) Either the Bills of Lading govern the contract of carriage and afford a complete defence to the Respondent as they contain express provisions exempting the Respondent from liability in the events that have happened; or

pp. 92-96.

(b) The contract contained in or evidenced by the Bills of Lading is an illegal contract by reason of the failure to insert the express statement required by Section 3 of the Act.

The latter view was adopted by all the learned Judges in the Court in banco and is a ground upon which their Judgments are based.

29. It is further respectfully submitted that if it be held that the contract contained in or evidenced by the Bills of Lading is an illegal one, the Judgments of the learned Judges in the Court in banco on the latter point are, for the reasons which they have assigned, correct on the ground that from an illegal contract no cause of action can arise.

30. It is further respectfully submitted that if the contract was an illegal one, the parties were clearly in *pari delicto*.

F Prior to the goods being laden on board the ship and the Bills of Lading issued these goods were the property of the Appellant and Basha was the agent of the Appellant for the purpose of delivering the goods to the ship and receiving the Bills of Lading. Basha delivered the Bills of Lading to the Bank of Montreal at G Curling, Newfoundland, which Bank forwarded them to Commercial National Bank and Trust Company of New York which endorsed and delivered them to the Appellant, and the goods were delivered in a damaged condition to the Appellant at New York upon pre-

p. 2, l. 11.  
p. 97, l. 28.  
p. 97, l. 32.

p. 98, l. 4.  
p. 98, l. 8.  
p. 98, l. 17.  
p. 97, l. 5.

RECORD.

sensation of the said Bills of Lading. All the Bills of Lading contained the following provision:—

p. 93, l. 16.

“ In accepting this Bill of Lading the shippers, owner  
 “ and consignee of the merchandise or cargo, and the holder  
 “ of the Bill of Lading agree to be bound by its stipulations,  
 “ exceptions and conditions, whether written or printed, as  
 “ fully as if they were all signed by such shipper, owner,  
 “ consignee and holder.”

31. It is further respectfully submitted that the contentions advanced on behalf of the Appellant that it can entirely ignore the contract contained in or evidenced by the Bills of Lading and found its action,

(a) On an antecedent oral contract for carriage; or

(b) In tort based on the common law liability of a common carrier; are both untenable for the reasons set forth in the Judgments of the learned Judges in the Court in banco.

In this connection it is respectfully submitted that there are not two contracts between the parties, one of bailment and one of carriage, but one contract only of carriage or bailment for carriage, and that is the contract of carriage contained in or evidenced by the Bills of Lading. That contract, whether legal or illegal, contained all the terms of the agreement between the parties and precluded the existence of any common law liability on the part of the Respondent as a common carrier in respect of any matters expressly dealt with by the Bills of Lading, and the act complained of was not an independent tort unconnected with the performance of the contract evidenced by the Bills of Lading, but was done in the course of rendering the very service provided for in the Bills of Lading.

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

## REASONS.

- (1) Because the Rules applied by the Newfoundland Act apply to and govern the contract of carriage contained in or evidenced by the Bills of Lading.
- (2) Because the Respondent is exempted from liability by the said Rules on account of the fact that the loss or damage complained of was caused by perils of the sea or by neglect

or default of the master or servants of the carrier in the navigation of the ship, or by both combined.

- A (3) Because the Respondent is exempted from liability by the said Rules by reason of the fact that no suit was brought within one year after delivery of the goods.
- (4) Because if the said Rules do not apply, the Respondent is exempted from liability by reason of the provisions contained in the Bills of Lading.
- B (5) Because if it be held that the contract contained in or evidenced by the Bills of Lading is an illegal contract by reason of the failure to insert the express statement required by Section 3 of the Act, no cause of action can be based upon such illegal contract.
- C (6) Because if such contract be an illegal one, the Appellant cannot base its action on an antecedent oral contract.
- (7) Because if the said contract be an illegal one, the Appellant cannot found an action in tort as the damage complained of was caused in carrying out the very services provided for in the illegal contract.
- D (8) Because if the said contract be held to be an illegal one, the Judgments of the Supreme Court of Nova Scotia in banco were right and should be upheld.

C. B. SMITH.

**In the Privy Council.**

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**ON APPEAL**

FROM THE SUPREME COURT OF NOVA SCOTIA  
(IN BANCO).

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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

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 LIQUIDATION  
*Respondent*

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**Case for the Respondent.**

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