

NOVA SCOTIA COURT OF APPEAL

Citation: *Goreham v. D.E. & Son Fisheries Ltd.*, 2003 NSCA 93

Date: 20030918

Docket: CA 194046

Registry: Halifax

Between:

Dwayne Goreham

Appellant

v.

D.E. & Son Fisheries Ltd. and
Danny Shand and Ricky Smith

Respondents

Judges:

Glube, C.J.N.S.; Roscoe and Cromwell, JJ.A.

Appeal Heard:

September 16, 2003, in Halifax, Nova Scotia

Held:

**Appeal allowed per reasons for judgment of
Cromwell, J.A.; Glube, C.J.N.S. and Roscoe, J.A.
concurring.**

Counsel:

Dale Dunlop, for the appellant
Andrew Nickerson, Q.C., for the respondent D.E. & Son
Fisheries Limited
No one appearing for Danny Shand and Ricky Smith

Reasons for judgment:

[1] Dwayne Goreham appeals a summary judgment for specific performance granted by Carver, J. in Chambers. The background to the proceedings is set out in Hamilton, J.A.'s reasons on the stay application in this Court: see (2003), 213 N.S.R. (2d) 47; 2003 NSCA 31. The issue is whether Carver, J. erred in principle by ordering summary judgment in the face of disputed questions of fact going to the issue of liability. In my respectful view, he did.

[2] Summary judgment may be granted to a plaintiff if the plaintiff can prove the claim clearly and the defendant is unable to set up a *bona fide* defence or raise an issue against the claim which ought to be tried: **Bank of Nova Scotia v. Dombrowski** (1977), 23 N.S.R. (2d) 532 (S.C.A.D.) at 537; **Oceanus Marine Inc. v. Saunders**, (1996), 153 N.S.R.(2d) 267 (C.A.) at para. 15. In the present case, there were both a lack of clear proof of the claim and disputed facts going to the existence of the contract which was sought to be specifically enforced. Therefore, the plaintiff's claim for summary judgment should not have been granted. The appeal, therefore, should be allowed and the order under appeal set aside.

[3] The Chambers judge did not deal with the rest of the plaintiff's application which included claims for an interim mandatory order and a recovery order. The disposition of the appeal should be without prejudice to the rest of the application being renewed in the Supreme Court by the plaintiff if so advised. I express no opinion on the merit, or otherwise, of those claims.

[4] To allow a reasonable time for the plaintiff to pursue the rest of its application in the Supreme Court, I would direct that the District 34 lobster licence being Licence Control Number ALBA 1664 be transferred to Dwayne Goreham on or before 4:00 p.m. on November 14, 2003 unless otherwise ordered by a judge of the Supreme Court of Nova Scotia dealing with the balance of the plaintiff's application for interim relief.

[5] The costs of the summary judgment application before Carver, J. as fixed by him, of the appeal fixed at \$1,500 plus disbursements, as well as the costs of the stay application fixed by Hamilton, J.A. at \$750 inclusive of disbursements, shall all be costs in the cause of the main action.

Cromwell, J.A.

Concurred in:

Glube, C.J.N.S.

Roscoe, J.A.