

**NOVA SCOTIA COURT OF APPEAL**  
Cite as: Fish Reduction Ltd. v. Malone, 1997 NSCA 179

**Freeman, Roscoe and Pugsley, J.J.A.**

**BETWEEN:**

<b>FISH REDUCTION LIMITED, and</b>	)	S. Clifford Hood, Q.C.
<b>DOCKSIDE FISHERIES LIMITED</b>	)	for the Appellants
	)	
Appellants	)	
	)	
- and -	)	
	)	
<b>JEFF MALONE</b>	)	Andrew S. Nickerson, Q.C.
	)	for the Respondent
Respondent	)	
	)	
	)	Appeal Heard:
	)	September 24, 1997
	)	
	)	Judgment Delivered:
	)	November 21,1997
	)	
	)	
	)	

**THE COURT:** The appeal is dismissed, per reasons for judgment of Pugsley, J.A; Freeman and Roscoe, J.J.A., concurring.

**PUGSLEY, J.A.:**

The principal issue in this appeal is whether the trial judge erred in concluding that there was a contract between the appellants and the respondent whereby a lobster licence held in the name of the respondent was beneficially owned by him and not in trust for the appellants. A subsidiary issue is concerned with the amount of damages, if any, to which the appellants are entitled, as a consequence of the respondent selling the catch to companies other than the appellants.

**Background**

The appellants, Dockside Fisheries Limited (Dockside) and Fish Reduction Ltd. (Fish Ltd.) are engaged in buying lobster, tuna, and swordfish from fishers in southwestern Nova Scotia. The appellants process the fish and sell it to customers. The success of their business depends upon an adequate supply of fish. Dockside was supplied with lobster by approximately 25 boats in the area, and Fish Ltd. by approximately 40. Dockside is owned by Christopher Malone, and Fish Ltd. is owned by his father, Richard Malone.

The respondent, Jeff Malone, (JM) is a full-time commercial fisherman and had served either as captain, or crew member, on boats which sold to Dockside and Fish Ltd. JM is Christopher's cousin, and Richard's nephew.

The trial judge described an arrangement that existed between fish companies and commercial fishers in this area:

Under the provisions of **The Fisheries Act of Canada**, a company such as Dockside could not hold a lobster or a tuna licence, as it was not a commercial fisherman. The defendant [JM], being a commercial fisherman, could hold both a lobster and a tuna licence. A policy was in place whereby fishing companies would buy such a licence but would have it held by a commercial fisherman generally with an agreement with the fisherman providing he would transfer it as the company directed. This arrangement was beneficial to both the company and the fisherman; to the company it guaranteed a supply of fish as the commercial fisherman was bound by agreement to sell his catch to the company, and to the fisherman as it guaranteed him employment.

A succinct review of this type of arrangement is found in the decision of this Court in **Theriault et. al. v. Corkum et. al.** (1993), 121 N.S.R. (2d) 99.

In the fall of 1993, Dockside "purchased" an in-shore lobster licence from W. Banks Seafoods Limited for \$100,000. The licence entitled the holder to set 400 lobster traps in the spring, and 375 in the fall, during the lobster season which ran from the last

Monday in November to May 31 of the following year. The holder was entitled to fish for lobster from Cape Sable Island to the Bay of Fundy.

At the time of the purchase, the licence was registered in the name of Paul Sears. Sears held the licence in trust for W. Banks Seafoods Ltd. At the time of purchase, Sears was obliged by regulations issued by the Department of Fisheries & Oceans to hold the licence in his name for a period of one year.

Dockside entered into a written agreement with Sears as of December 17, 1993, whereby Sears agreed to hold the licence in trust for Dockside. Sears, JM and Dockside then agreed that Sears would "transfer" the licence to JM at the end of the one-year period.

Dockside arranged for a vessel to enable JM to operate in the lobster fishery that commenced on the last Monday in November 1993 and which terminated on May 31 of 1994. Dockside appointed JM as captain of the vessel. The arrangement required Sears to serve as a crew member until the one-year period elapsed.

The licence was transferred from Sears to JM before the beginning of the 1994 fall lobster fishery.

The trial judge reviewed the evidence relating to the principal issue:

. . . Dockside, contends that even though Jeff Malone indicated that someday he would like to have a lobster license to pass on to his children, that is as far as it went and the situation that existed with this license was that Dockside had purchased this license and both Sears and Jeff Malone held it in trust for Dockside who could direct them at any time, subject to the one-year period [to transfer the license] to any party [Dockside] directed. . . .

Jeff Malone contends he was not holding the lobster fishery license in trust for Dockside, but as the would-be owner, subject to paying \$100,000 (the cost of the license to Dockside) by deduction from profits from fishing by the defendant Jeff Malone with Dockside. Jeff Malone contends there was a verbal agreement with Chris Malone on behalf of Dockside that Jeff Malone would work for Dockside at a set salary per week with the profits to Jeff Malone going to pay down the \$100,000 at the end of which Jeff Malone would own the license.

It is noted while Jeff Malone was fishing this license with or without Paul Sears, he was the captain of the boat. Generally, the captain of a boat is paid a certain set percentage of the gross stock less expenses. This was not the situation between Dockside and Jeff Malone. Jeff Malone was paid a salary commencing the third week of November 1993, just before or at the opening of the fall lobster season. It was first set at \$745.00 per week. It was shortly thereafter changed to \$1000.00 per week retroactively to when his salary started. . . Jeff Malone testified in furtherance of his agreement with Chris Malone he was to receive a salary of a definite amount per week with all his extra earnings in excess of that salary to be applied to the purchase price of the lobster license. Chris Malone testified there was never such an agreement and the reason Mr. Jeff Malone was not on a percentage like other captains, but on salary, was because he was in need of money. . . .

The trial proceeded before Justice Carver of the Supreme Court without a jury. In a reserved decision, Justice Carver concluded that the licence was beneficially held by JM without any obligation to Dockside and Fish Ltd., other than to pay what was "justly due" against the original purchase price of \$100,000.

Justice Carver went on to determine that there were no profits in which JM was entitled to share and accordingly, JM owed Dockside the full amount of \$100,000. Justice Carver ordered that JM should be entitled to his costs based on Tariff "A", Scale 3, upon \$100,000.

The appellants advised that approximately a week before trial, they had offered to settle their claim without costs provided JM agreed to transfer the lobster licence to their nominee unconditionally. Three days before trial, JM had offered to settle the appellants' claim, upon terms whereby he would retain the licence but pay to the appellants the sum of \$75,000.

After reviewing the offers of settlement, counsel's submission, and the degree of success of the parties, Justice Carver advised that he was not prepared to vary the award of costs.

The appellants appeal from the trial judge's decision respecting the ownership of the licence, as well as the decision relating to costs.

The appellants submit that Justice Carver erred in law:

- by concluding there was a contract, or any contract completed between the appellants and JM;
- by failing to award damages for claims advanced by the appellants;
- in not awarding pre-judgment interest to the appellants.

JM has not cross-appealed.

### **Analysis**

In the course of making specific findings respecting the critical issue of credibility of the witnesses and parties that appeared before him, Justice Carver stated:

I find Chris Malone, on behalf of Dockside, and Jeff Malone did enter into a verbal agreement whereby Jeff Malone would fish for

Dockside for which he would receive a set salary per week and the balance due him would go on the license until the amount of \$100,000.00 was paid in full. I accept the evidence of Jeff Malone . . . I had some problems with Chris Malone's evidence . . .

Counsel for the appellants recognized that he had a heavy burden in attempting to convince this Court to overturn Justice Carver's findings on credibility.

Lord Sumner stated in the House of Lords in **S.S. Hontestroom (Owners) v. S.S. Sagaporack (Owners)**, [1927] A.C. 37 at pp. 47-48:

... not to have seen the witnesses puts appellate judges in a permanent position of disadvantage as against the trial judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case . . . If his estimate of the man forms any substantial part of the reasons for his judgment the trial judge's conclusions of fact should, as I understand the decisions, be let alone. . . .

Lord Sumner then referred with approval to Lord Kinsdown's comments in **The "Julia"**, [1860] XIV Moo. P. C. 210 at 235:

...we must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong.

I am satisfied that, far from being convinced that Justice Carver was wrong in concluding this issue in favour of JM, the evidence supports the conclusion he reached.



One starts with a basic premise that JM, being the registered owner of the licence, was the beneficial owner, and that in order to be successful, Dockside and Fish Ltd. were obliged to establish there was a trust imposed on JM.

The trial judge has clearly found that no such trust existed.

Chris Malone testified that his lawyer had advised him that whenever Dockside entered into arrangements with commercial fishers respecting fishing licences, that the arrangements should be reduced to writing to protect Dockside. Following this advice, Dockside required Paul Sears to enter into an agreement on December 17, 1993 respecting the lobster licence in question. On the same date, Dockside required JM, as well, to enter into a written agreement respecting a tuna licence held by JM for the benefit of Dockside. The failure of Dockside to cause JM to reduce to writing the arrangement between it and JM whereby JM acquired the lobster licence can be viewed as evidence of an arrangement entirely different from that between Dockside and Sears, and that between Dockside and JM respecting the tuna licence.

Justice Carver's conclusions on the issue of credibility are further supported when one reviews the evidence concerning the transfer of the lobster licence from Sears to JM in December of 1994.

Sears testified:

Jeff had mentioned to me when we were out hand lining, asked whether I could sign it clear to him or not.

Q: What was your reaction to that?

A: I said yes, the time is up, or the deadline is up that I have to hold the license in my name.

Q: Yes. And did you transfer it then, or did you see someone before you did that?

A: I went and seen Chris Malone first.

Q: And why did you do that?

A: Because I had an agreement signed with him and it states right in it that nothing is done unless I talk to them first.

Q: Did you tell Jeff Malone that you were going to do that before you would transfer it at his request?

A: I believe I did, yes.

Q: And was the license transferred by you to Jeff Malone?

A: Yes.

Q: And was that done with Chris Malone's consent?

A: Yes.

After re-examining all the evidence in accordance with mandates stipulated by the Supreme Court of Canada in **Stein v. The ship Kathy K.**, [1976] 2 S.C.R. 69, I am not convinced that Justice Carver made any palpable or overriding error which affected his assessment of the facts on this issue.

The appellants principal submission on this first ground of appeal is that an enforceable contract requires certain fundamental elements, such as consideration, consensus *ad idem*, and certainty of terms - all of which were lacking in this case;

It is clear, however, the courts are not concerned with the adequacy of consideration (see MacKeigan, C.J.N.S. on behalf of this Court in **Bank of Nova Scotia v. McLellan** (1977), 25 N.S.R. (2d) 181 at 184.

The supply of fish was critical to the success of the appellants' operations. It was recognized by all parties that JM was a capable fisherman. An undertaking from JM that he would sell his catch to the appellants, in my opinion, constitutes consideration.

Justice Carver determined that:

Chris Malone, on behalf of Dockside, and Jeff Malone did enter into a verbal arrangement whereby Jeff Malone would fish for Dockside for which he would receive a set salary per week and the balance due him would go on the license until the amount of \$100,000 was paid in full. I accept the evidence of Jeff Malone.

Justice Carver was satisfied that JM was to:

...get credit against the purchase price for any profits over and above the salary he received derived from his fishing activities whether from the lobster, tuna or other fisheries.

In the light of the subsequent experience in the lobster fishery, one might have reasonably questioned whether there would be any profits which would entitle JM to reduce the \$100,000 balance. I do not, however, consider this to be a relevant factor. The focus should be on the time at which the arrangement was made when the parties obviously concluded that some profits would be forthcoming.

I am not satisfied Justice Carver made any error when he concluded the parties had reached a consensus *ad idem* and I am further satisfied there was a certainty of terms respecting the arrangement.

Although not advanced as a ground of appeal, the appellants argue in their factum that the original agreement between Dockside and JM was terminated and that a new agreement was entered into between Fish Limited and JM.

In support of this argument, Dockside points out that prior to the start of the November, 1994 lobster season it "sold" the lobster licence to Fish Ltd. and that accordingly its arrangement with JM was over.

I would reject this analysis. Fish Ltd. had no privity of contract with JM. Any arrangement between Fish Ltd. and Dockside could not affect Dockside's obligations to JM negotiated in 1993.

It is helpful to refer to JM's evidence on this point. When he heard rumours that Dockside was going to transfer the lobster licence to Fish Ltd., JM spoke to Chris Malone. According to JM, whose evidence was accepted by the trial judge, Chris Malone told him that:

... Didn't figure it would have anything to do with my dealing... I was really concerned about it and he was sort of like, "Cool down, settle down, it's not - things are not going to change around too much and your deal's still on". . . .

JM testified that the transfer from Dockside to Fish Ltd. was simply a switch of companies by Chris and his father.

JM concluded, "My deal was the same. I still dealt with Chris."

In conclusion on this first issue, I would dismiss the appeal advanced by Dockside and Fish Ltd.

### **Subsidiary Issues - Damages and Pre-judgment Interest**

Counsel for the appellants directs our attention to the amended statement of claim, where claims are made against JM, for *inter alia*:

- 13 ... damages for breach of contract.
- 14 ... for damages for unlawful interference with economic relations of the Plaintiff.
- 15 ...damages for lost future lobster sales and business opportunities.
- 16 ...for damages for the cost of the license **based on current market prices.**
- 17 ... punitive and/or exemplary damages.
- ... .
- 19 **...for relief under the grounds that [JM] should not be entitled to an unjust enrichment.**

The appellants submit that the trial judge did not expressly dismiss its claim for damages, indeed, that he failed to give any consideration to the claim.

The appellants point out that from February 1995, until the end of May 1995, as well as in December 1995, JM "fished" the lobster licence and sold the majority of the catch to companies other than Fish Ltd. and Dockside. This action resulted in a loss of profit to the appellants, which they claim amounts to 40 cents a pound on all lobster processed by them.

The evidence adduced by the appellants to establish the claim for lost profits is not compelling. However, in my opinion, there is a more fundamental reason why the claim should fail.

JM testified that Richard Malone called him:

...down to his office and said they was having financial troubles. And I really can't recall every word he said, but basically he was looking at selling the lobster licence and wanted to know if I was -- give me the offer on buying it and I was sort of, like, wanting to know what he would want for -- what I was owing on it. And he came up with a number of a hundred and sixty-five thousand or a hundred and seventy-five. . . it just took me for a loop.

. . .

I had bought the licence at a hundred thousand. I had worked for it for two years and now they wanted a hundred and sixty-five and they was in a hurry for me to sign it over.

After it became apparent that JM was not prepared to pay \$165,000, Richard Malone arranged the sale of the licence to a third party. He then asked JM if he would fish the licence for the third party. JM responded:

I'm not giving up the licence. I'm not going to sign the licence over.

This, in my opinion, was a perfectly appropriate response. The decision to increase the purchase price from \$100,000 to \$165,000 was contrary to the original

agreement between Chris Malone and JM. When JM refused to meet the price, the unilateral attempt by Fish Ltd. to sell the licence to a third party was inconsistent with JM having any interest in the licence at all. In these circumstances, JM was entitled, in my opinion, to use the licence as he wished. His obligation to pay the \$100,000 purchase price to Dockside was still outstanding. It would be inequitable for the appellants to recover damages in these circumstances.

While the trial judge did not expressly dismiss the appellants' claim for damages, a fair reading of the decision, as a whole, leads to the inescapable conclusion that the claim was dismissed.

I point to the following words used by Justice Carver:

I therefore hold the license is beneficially held by [JM] without any obligation to [Dockside and Fish Ltd.] other than to pay what is justly due against the original purchase price of \$100,000.00 less the amount, if any, worked off during the time he worked for Dockside as extra, over and above his salary. [emphasis added]

As the appellants' claim for damages fail, the claim for interest fails as well.

I would dismiss this ground of appeal.



**Costs**

Orders respecting trial costs are in the discretion of the trial judge. This Court will not interfere unless the trial judge has applied wrong principles of law or the decision is so clearly wrong as to amount to a manifest injustice (**Conrad v. Snair et. al.** (1996), 150 N.S.R. (2d) 215 (N.S.C.A.)).

In my opinion, the appellants have failed to show any error on the part of Justice Carver in exercising his discretion respecting this issue.

**Conclusions**

I would dismiss the appeal with costs to the respondent in the amount of \$1,500 plus disbursements.

Pugsley, J.A.

Concurred in:

Freeman, J.A.

Roscoe, J.A.



**NOVA SCOTIA COURT OF APPEAL**

**BETWEEN:**

**FISH REDUCTION LIMITED, and )  
DOCKSIDE FISHERIES LIMITED )**

Appellants )

- and - )

**JEFF MALONE )**

Respondent )

REASONS FOR  
JUDGMENT BY:  
PUGSLEY, J.A.