

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Citation: *Porter v. Spinney*, 2017 NSSM 16

Claim No: SCK 459310

BETWEEN:

Darren Porter

Claimant

v.

Graham Spinney and R & K Murphy Enterprises Limited

Defendants

Date of Hearing: February 27, 2017;

Date of Decision: March 17, 2017;

Igor Yuschenko appeared for the Claimant, Darren Porter.

Graham Spinney was self represented and Ronald Murphy appeared for the Defendant, R & K Murphy Enterprises Limited.

Editorial Notice: Addresses and phone numbers have been removed from the electronic version of this judgment

DECISION

This claim arises from the purchase of a quantity of baitfish caught by the Claimant and sold to the Defendant, Graham Spinney. The terms of the contract between Porter and Spinney are not in dispute. On November 21, 2016, the parties entered into a contract created by text messaging where the Claimant supplied baitfish to Mr. Spinney. After negotiations, the parties agreed to a price of \$0.85 per pound. The price was payable on or before the pickup by Mr. Spinney at a rendering plant in Port Williams. Mr. Porter was to advise him of the amount and meet him at the plant. Mr. Spinney was to bring a cheque with him. The amount of fish was estimated between 22,000 to 25,000 lbs. The actual weight of the fish was approximately 31,000 lbs., for a total cost of \$26,350. The Defendant picked up the fish before the Claimant could meet him at the rendering plant. As of yet, he has not been paid, which, therefore, has triggered this claim.

The Defendant, Graham Spinney is a lobster fisherman. He alleges that the fish was of poor quality and not worth keeping. The Defendant, R & K Murphy Enterprises Limited (“Murphy’s”) alleges there was no contract between it and Mr. Porter.

The purchase price exceeds the statutory limit of \$25,000, prescribed by the *Small Claims Court Act*. As frequently happens, the Claimant has reduced the claim to \$25,000 to bring it within the jurisdiction of this Court, rather than proceed through the potentially more time consuming and expensive process found in the Supreme Court.

Issue

Was the baitfish of poor quality such as to find a failure of consideration or to justify an abatement in the purchase price?

Who were the parties to the contract(s)?

The Evidence

Darren Edward Porter is a commercial fisherman who catches and sells baitfish to other commercial fishermen, such as lobster fishermen. Mr. Porter testified that a catch consists of a variety of species of fish such as flounder, shad, “tommy cod”, scalpin, gaspereau and others. According to Mr. Porter, he is one of the few remaining fisherman who catches baitfish exclusively.

He entered into evidence a hard copy of text messages between Mr. Spinney and himself. He spoke to it in evidence. He and Mr. Spinney discussed the possibility of his selling baitfish to him. The texting began on August 12, 2016 and proceeded from time to time until November 1 when the discussions took on a more interested tone. It would not be useful to restate the text messages verbatim. However, I have summarized the key points below.

Mr. Spinney asked if there was any flounder in the baitfish. Mr. Porter indicated there was and indicated the proportion of flounder was likely 50-50. Mr. Porter told Mr. Spinney that the fish was in fact frozen by a plate freezer. Rather than being packaged in standard size blocks or boxes, the fish are frozen, stacked on pallets and wrapped in plastic wrap. He could not give estimates as to the number of pounds of fish per pallet as they are not packaged equally. He estimated the total amount of fish at 22,000 to 25,000 pounds which he estimated to be mostly gaspereau. This includes 3000 to 4000 pounds of flounder mixed. (I note that this is less than 50/50 originally discussed, but these discussions all predated the agreement.) Mr. Porter was asking \$1.00 per pound while Mr. Spinney initially offered to buy all of it at \$.70 per pound. There were further negotiations and the price of \$.85 per pound was agreed to by the parties on November 20, 2016 with the baitfish to be picked up at a rendering plant in Port Williams the following day. Mr. Spinney was to provide a cheque for the correct amount. Mr. Porter testified that the fish was stored at the rendering plant but he was unable to get to the plant by the time Mr. Murphy’s truck had been there to pick up the fish. According to Mr. Porter, the driver was supposed to call him to let him know when he would be there. No cheque was left. In any event, Mr. Spinney promised to pay money into Mr. Porter’s bank account using online banking, and that has not taken place either.

Mr. Porter testified that he repeatedly asked for money, a point which is clearly shown in the text messaging. Mr. Spinney told him to speak with Mr. Murphy since, for some reason, Mr. Spinney was unable to do online banking. When asked how to get the money, his answer was to contact Roland. When asked by his counsel if there were any concerns, Mr. Porter testified that Mr. Spinney could not find the flounder. On November 24, Mr. Spinney made some reference to the quality of the fish, specifically that Mr. Murphy advised him the fish was freezer burnt. He did not believe the fishermen would like it. Mr. Spinney told him that Mr. Murphy said the fish “looked like hell”. He testified that it was freezer burnt and rotten. Specifically, he indicated that nobody wants the fish and therefore they were not going to accept it. He estimates the time it took from when he first spoke with Mr. Spinney on the 24th until he was told the decision was made not to accept the fish was approximately 57 minutes.

Mr. Porter testified that he chose to have his fish stored in a plate freezer. He describes the process as easier than regular freezing because the fish freezes quickly and there are no batches or boxes. The individual pallets are weighed rather than packaging the fish in standard sized boxes. Once the fish is caught, it is taken to the rendering plant and put in individual plates and frozen in an ammonia circulated freezer. This way, it is frozen soon after it is caught.

Mr. Porter believed that Mr. Spinney was supposed to meet him at Port Williams so they could look at the fish and he could be paid. When he learned the fish had been picked up, he immediately asked the Defendants where the fish was taken. Roland Murphy told him it is in his freezer, but nobody wants it. Mr. Porter denied that the fish was ever rotten. He acknowledged that the top of it was sprayed with water prior to being frozen so it is possible the top layer may have been a bit freezer burnt. He does not believe the rest could be as it was wrapped in plastic wrap. Between November 21-23, neither Mr. Spinney, Mr. Murphy nor anyone else mentioned to him that the fish was of poor quality.

Under cross-examination, Mr. Porter confirmed that he believed the driver of Mr. Spinney's truck was to call him on his way to the plant. He was not called until he the driver had already been to the plant. The weight of the fish was given to him by Dale Scott, who was at the rendering plant. Mr. Porter was not there and he did not know how long it took to load the truck. After being asked for the money, Mr. Murphy said he would facilitate the transfer of the funds but Mr. Spinney is paying for the bait.

Dale William Scott is a self-employed business owner. His business is in rendering and freezing meat and fish.

He first dealt with Darren Porter when Mr. Porter called looking for the best way to freeze his baitfish. He uses plate freezers which are vertical plates that are ammonia circulated. The fish is dumped into a plate and then frozen in square blocks. He describes the end product as “industrial scale popsicles”. When he first received the fish from Mr. Porter, he found the fish looked good to him. It did not stink. He does not typically freeze a lot of fish, but when he does it usually goes into cold storage. He estimates the timeline to be about 3 to 4 months. He did not inspect the fish but he said he did have a chance to “glance at it and there were no red flags”. There were no technical problems with the system or he would have mentioned that to Mr. Porter. He was

working on November 21, 2016. He was not at the rendering plant when the truck driver picked up the fish. He passed the weight from the scales onto Mr. Porter.

Under cross-examination he testified that this is the first time he froze bait but he has frozen whole fish for mink feed without incident. The temperature range for fish was between -5°F and -15°F.

Roland Murphy is the owner and sole director of Murphy's. He had never met or talked to Darren Porter before the hearing.

With respect to this matter, Mr. Spinney advised Mr. Murphy that he had bought fish and Mr. Murphy agreed to pick it up using one of his trucks and transport the order to his location. The two had done business in this way before. Mr. Murphy testified that his driver called and got directions to the rendering plant and when he arrived advised him that the bait "did not look that good". Mr. Murphy told him to pick it up and bring it down to their location in Yarmouth County. He described the season that ended in November as being the busy season with "lots of fish going out". He testified that they did not have time to unload the fish but once it was unloaded it did not look that good. He advised Mr. Spinney who contacted Mr. Porter. Mr. Murphy also called him and told him that the quality was poor that he had no room to store it. He gave Mr. Porter the option of having it returned to him. He testified that the temperature at his location was colder than the shipping temperature, namely -20°C. When I confirmed with him that a conversion to Fahrenheit worked out to -4°F, Mr. Murphy then changed his answer to -20°F. He testified that he then proceeded to attempt to sell it and contacted someone in New Brunswick or a person from Lockport to see if he could sell it to them. He testified that he showed approximately three or four fishermen the bait but nobody would buy it.

Mr. Murphy testified he does not have a lot of experience with bait but he estimates there are between 2,500,000 to 3,000,000 pounds of bait at his location. He testified that November tends to be a busy time as lobster season starts the last Monday in November, unless it is postponed due to weather (which happened in 2016).

As for this transaction, it is his evidence that Mr. Spinney contracted for the bait and arranged to pay for it. Spinney would use the baitfish for lobster. The payment would be advanced by way of Mr. Murphy's company. Murphy's would sell what was left over. He described the arrangement as typical between himself and several commercial fishermen in the area, namely the company pays for the fish and then the fisherman repays the company. He said the bait was left in the refrigeration truck until it was put into the freezer. He testified that they did not have time to look at it until two days after the delivery. His driver had told him on the date it was delivered that the baitfish did not "look good". He offered to send it back because the quality was poor and there was no room to store it. At this point, it was approximately two to three weeks into a six week season, and it was hard to sell the bait. He was contacted by Mr. Porter and told him to deal with Mr. Spinney. He confirmed to Mr. Porter that his truck driver told him on the 21st that there was something wrong with the bait. However, he did not have time to inspect it until the 23rd.

Neither the truck driver nor any of the "three or four" fishermen referred to by Mr. Murphy gave evidence.

Graham Charles Spinney is a lobster fisherman who fishes out of Dingy's Point, Yarmouth County. He has bought bait from Mr. Porter in previous years before 2016. In those years, Mr. Porter sold the fish in 40 pound blocks. He does not owe Mr. Porter from any previous transactions.

He testified that he received 31,000 pounds of baitfish in November, although he was initially told the load was estimated between 20,000 to 25,000 pounds. He indicated to Mr. Porter that he did not have the money and Mr. Murphy would pay him. He testified that he and Mr. Murphy bought fish together and whatever was not sold, Mr. Murphy (or Murphy's) sold the excess to the fishermen. He confirmed saying to Mr. Porter that the fish "looked like hell" and the "quality was not there". He described the fish as yellow and looked to be freezer burnt. If it had been good, he would have used it. He testified that Mr. Murphy offered to bring the fish back free of charge but Mr. Porter did not want it.

Under cross-examination, Mr. Spinney confirmed that there was no written agreement with Mr. Porter. The contract was essentially the content of the text messages. He acknowledged that he did not expect to receive 31,000 pounds of bait but rather something closer to 25,000. There were no indications that he would not accept more than that quantity. However, he knew he would not be able to use 31,000 pounds by himself and he would have to sell it. He testified that he would be able to catch some of his own bait in the spring and, therefore, Mr. Murphy told him he was going to try to sell some of it. He did not feel that he was in a partnership or agency arrangement with Mr. Murphy. He did not bring any photographs of the bait with him to court. He believes the bait was not frozen properly, although he was not present when the fish was frozen and he did not inspect it on November 21st or 22nd. He believed the fish was inspected on the 23rd. He hoped to salvage the deal by offering Mr. Porter \$.70 per pound. He has not provided with a picture or a sample since the fish is on pallets that you could see them. He acknowledged the original agreement was that he would pay \$.85 per pound. He told the truck driver when he was sent to the rendering plant that he did not have a cheque to give him, despite the agreement with Mr. Porter. He testified that he believed the agreement was between himself and Mr. Porter but that Mr. Murphy would pay for it. He did not have time to look at the fish on the 21st because he was getting his boat ready. He said that Mr. Murphy called him on the 22nd to tell him that it was not good.

In rebuttal evidence Mr. Porter testified that he had dealt with Mr. Spinney the two previous years and had difficulty with him paying on time. As a result, he required the cheque before the delivery went out. He stated that his usual price is between \$0.65 and \$0.75 per pound for most baitfish with flounder being sold at \$1.00 per pound. He testified that some areas of Nova Scotia do not want sand dabs (small flat fish) in their baitfish. He indicated to Mr. Spinney that he was changing arrangements for freezing.

The Law

In order to establish liability for breach of contract, the Claimant must prove the existence of a contract and that it was fulfilled according to its terms. Two possible defenses include that the contract was not performed or in the case of a contract for the sale of goods, that it not fit for its

purpose as prescribed in the *Sale of Goods Act*. The Claimant has the burden to adduce evidence to establish a breach of contract. The standard is the balance of probabilities.

Mr. Yuschenko cites as authority the following sections of the *Sale of Goods Act*:

Quality or fitness for particular purpose

17. Subject to this Act and any statute in that behalf, there is no implied warranty or condition as to the quality or fitness, for any particular purpose, of goods supplied under a contract of sale, except as follows:

- (a) where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgement and the goods are of a description that it is in the course of the seller's business to supply, whether he be the manufacturer or not, there is an implied condition that the goods shall be reasonably fit for such purpose, provided that, in the case of a contract for the sale of a specified article under its patent or other trade-name, there is no implied condition as to its fitness for any particular purpose;
- (b) where goods are bought by description from a seller who deals in goods of that description, whether he be the manufacturer or not, there is an implied condition that the goods shall be of merchantable quality, provided that, if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed;
- (c) an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;
- (d) an express warranty or condition does not negative a warranty or condition implied by this Act, unless inconsistent therewith.

Opportunity to examine

36 (1) Where goods are delivered to the buyer that the buyer has not previously examined, the buyer is not deemed to have accepted them unless and until the buyer has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of the goods to the buyer, the seller is bound, on request to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

Deemed acceptance

37 The buyer is deemed to have accepted the goods when the buyer intimates to the seller that he has accepted them, or when the goods have been delivered to him, and the buyer does any act in relation to them, which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, the buyer retains the goods without intimating to the seller that he has rejected them.

Findings

I have had the advantage of hearing all of the evidence in Court. To me, it is a question of credibility. I found the Claimant a far more credible witness than either Defendant, more so than Mr. Murphy; considerably more than Mr. Spinney. Where the evidence differs, I favour that of Mr. Porter.

Liability of Graham Spinney

In considering the evidence, I find the parties agreed to a supply of frozen baitfish to be delivered to the rendering plant (RS Rendering) in Port Williams. Once the fish was weighed, Mr. Spinney was to bring a cheque for Mr. Porter based on the weight at a rate of \$0.85 per pound. He was aware the manner in which the fish was stored and frozen as was clear from his texting with Mr. Porter.

The estimated weight of the baitfish was between 20,000 to 25,000 lbs. The actual amount was closer to 31,000 lbs. Mr. Spinney protested that amount immediately and acknowledged that fish boxes and the refrigeration truck had to be used to store the load. He did not decline to accept the 31,000 lbs., even though he could have declined the excess without additional liability. However, he took it all by way of the delivery truck and, subsequently, did not return it or pay for it. Therefore, I find he accepted the full load at \$0.85 per pound at that point.

Murphy's delivery truck arrived without notifying Mr. Porter, despite the agreement to the contrary. The fish was loaded on the truck and delivered to Murphy's facility. I find Spinney took delivery of the full load of the fish. Despite Mr. Porter's reliance on the assertion, I find there was no cheque for Mr. Porter. Indeed, given those circumstances, I find Mr. Spinney had no intention to pay him by cheque at any point in time.

As for the quality, I do not find there was sufficient evidence to establish the fish was lacking in quality. Once again the issue is one of credibility. According to their evidence, Mr. Spinney had arranged for Mr. Murphy to pay Mr. Porter for the baitfish despite that he told Porter specifically he would provide a cheque when the fish was picked up. The truck driver allegedly told Murphy the fish did not look good when it was picked up on November 21. Mr. Spinney did not look at the fish until November 24 and only after Mr. Murphy had viewed the fish on the 23rd. Throughout his evidence, Mr. Spinney stated that quality of bait is important to lobster fishermen. He used phrases such as "baitfish is everything" for use in trapping lobsters. He had ordered 25,000 pounds of baitfish. I find he knew he was receiving 31,000 pounds before taking delivery. Thus, he knew that he would have 5000 - 6000 lbs more than he anticipated. Murphy or somebody would need to sell the excess if he, Spinney, could not use it himself. The cost would have been \$26,350 for 31,000 pounds. Despite this, neither of them attended to Port Williams to see the fish before it was loaded. More significantly, they did not view the fish for two or three days after it arrived in Yarmouth County. The parties communicated by text messages. It would not have been difficult to take pictures of any freezer damage with a smart phone and text the photos to Mr. Porter. There is no evidence that any photographs were taken by either Defendant. I find there were none.

In addition, the Defendants did not provide the Court with any evidence to corroborate their position regarding the condition of the fish. As I mentioned, there were no photographs, there was no evidence from any witnesses who saw the fish, including the truck driver. It would have been helpful to know what the driver observed and how long he observed it. Dale Scott testified that the fish looked fine to him. According to Mr. Murphy, the fish is still on-site at his facility. If so, they could have removed a sample and brought it with them to Court. There is no evidence to support any allegations of poor quality. There is no evidence of the proper freezing temperature for baitfish, other than the parties competing claims of differing temperatures needed. In the absence of evidence, I find the fish was at all times suitable and fit for its purpose. Having made that finding, I do not need to consider ss. 36-37 of the *Sale of Goods Act*.

I find the Defendant, Graham Spinney, received suitable and fit baitfish. The amount received was approximately 31,000 pounds at \$0.85 per pound for which Mr. Porter has not been paid. I find Mr. Spinney liable to Darren Porter for breach of contract. As the purchase price exceeds the limit of this Court, I set damages in the amount of \$25,000.

Liability of R & K Murphy Enterprises Limited

It is clear there is no contract directly between Mr. Porter and Murphy's.

The contract was negotiated between Porter and Spinney. Murphy's' role was to sell any excess fish and, according to Spinney, act as an intermediary for the payment of funds. Murphy's was to store Spinney's fish and provide the truck to pick up the fish. At no time, did Porter think he was dealing with Murphy to buy the fish. This is clear from the text messages.

Section 4 of the *Partnership Act* was not raised by either party. It provides the following definition:

"Partnership is the relation which subsists between persons carrying on a business in common, with view of profit, but the relationship between members of any incorporated company or association is not a partnership within the meaning of this Act."

This definition is useful in establishing a partnership in individual cases. In this instance, there is nothing to suggest that Mr. Porter thought that by dealing with Mr. Murphy, he was doing so as a contracting party. In fact, he stated several times to Mr. Spinney that this was "not Roland's fish, it was yours (Mr. Spinney's)". I find there was no belief he was dealing with a partnership. I find there is not enough evidence to establish a partnership in fact.

As for agency, I do not find the evidence establishes an express agency between the Defendants for the purposes of this transaction. Agency may also be implied or imputed if certain factors exist.

The test for a finding of agency was considered by Justice Hall of the Supreme Court of Nova Scotia in *Horne v. Capital District Health Authority*, 2005 NSSC 41 states as follows:

"Under the common law principle of agency, a principal may be bound by the acts of his or her agent under circumstances where the agent has the ostensible or apparent authority to act and bind the principal. This is usually referred to as the doctrine of "agency by estoppel". In order for the doctrine to arise three requirements must exist. First, there must be a representation or holding out by the principal by a statement or conduct indicating the agent's authority to act for him or her; second, there must be a reliance on the representation by the third party; and third, there must have been an alteration to the third party's position as a result of the reliance. (See Friedman, **The Law of Agency**, 7th Edition, Chapter 6)."

In reviewing the facts, Mr. Spinney's statement was to the effect that "Roland would pay you". His evidence was clear that Mr. Murphy intended to provide Mr. Porter with payment. However, this statement was only made after the contract had been formed. Murphy's was an intermediary, in the same way that one's bank might be. There is no liability on the part of Murphy's to Mr. Porter. The claim against the corporate Defendant is dismissed. In the circumstances, I find this an appropriate case to award no costs despite Murphy's success on this ground.

Prejudgment Interest and Costs

I award costs to the Claimant against the Mr. Spinney in the amount of \$199.35 filing fee. Mr. Yuschenko did not have invoices for the process server and suggested I use my discretion. I award \$175. Mr. Porter is also entitled to prejudgment interest on \$25,000 at 4% per annum from November 21, 2016 to the date of judgment.

Summary

The Claimant, Darren Porter, shall have judgment against the Defendant, Graham Spinney, as follows:

Amount of Claim:	\$25,000.00
Prejudgment Interest:	\$ 317.81
Costs:	<u>\$ 374.35</u>
Total Judgment	\$25,692.16

The Claim against the Defendant, R & K Murphy Enterprises Limited, is dismissed without costs.

Order accordingly.

Dated at Kentville, NS,
on March 17, 2017.

Gregg W. Knudsen, Adjudicator

Original: Court File
Copy: Claimant(s)
Copy: Defendant(s)