

**DONALD LAURENCE SMITH (Plaintiff) V. DAVID SEYMOUR, Administrator of the Estate of LEONARD GAMBLE HUMCHITT, and WILLIAM GORDON HUMCHITT (Defendants)**

[Indexed as: **Smith V. Seymour**]

**British Columbia Supreme Court, Hinds J., January 29, 1990**

**K.A. Bowman, for the plaintiff**  
**G.C. Carruthers, for the defendant Seymour**  
**K. Roberts, for the defendant Humchitt**

The plaintiff seeks to enforce a lease of category H Roe Herring Gill Net fishing licence issued under the *Fisheries Act*, R.S.C. 1985, c.F-14 to the deceased L.G. Humchitt, a registered Indian.

In 1983, the deceased had leased his herring licence to the plaintiff. The licence was issued yearly. The lease provided that the deceased would lease the licence to the plaintiff in the year 1984 and thereafter would renew the lease of the licence for a period of 98 years. The lease was to be binding upon the successors and assigns of the lessor and "upon their heirs, executors, administrators, successors and assigns of the lessee." Pursuant to the terms of the lease, the deceased signed a Power of Attorney authorizing the plaintiff to apply each year to the Department of Fisheries for the licence. The plaintiff benefited under the lease for the years 1984 through 1987.

In 1986, the deceased died intestate. In 1988, the defendant Humchitt (the deceased's son), the plaintiff, and the administrator, applied for the licence. The application of the plaintiff was refused on the ground that the deceased was no longer eligible for the issuance of a licence. The licence was issued to the estate with the defendant Humchitt as designated operator. The Department of Fisheries later notified the defendant Humchitt that in 1989, following an established policy of awarding the licence of a deceased person to a member of the family of the deceased person, the Department of Fisheries would, upon application, issue the licence to him. Th 1989, the defendant Humchitt applied for and was issued the licence.

The plaintiff sued to enforce the lease of licence against the estate and Humchitt. The plaintiff also sought rectification of the lease.

**Held: Action dismissed.**

1. Rectification of the lease allowed. The lease was clearly intended to be binding on *the* heirs, executors, administrators, successors and assigns of the lessee rather than *their* heirs, executors, administrators, successors and assigns of the lessee.
2. The lease is valid and binding on the heirs and administrator of the deceased.
3. Pursuant to s.7 of the *Fisheries Act*, the issuance of the licence is purely at the discretion of the Minister. The licence, when issued, is property, but there is no right to the issuance of the licence in following years.
4. The defendant Humchitt holds the licence not as heir of the deceased, but as a result of ministerial discretion. The estate of the deceased has no interest in the licence.
5. Upon issuance of the licence to another, the subject matter of the lease ceases to exist and, due to the doctrine of frustration, the agreement between the deceased and the plaintiff is unenforceable.
6. The Power of Attorney is frustrated when the subject matter over which it was intended to operate ceases to exist.

\* \* \* \* \*

**Introduction**

**HINDS J.:** This action involves the enforceability by the plaintiff of a lease granted to him by Leonard Gamble Humchitt, a native Indian, of a category H roe herring gill net licence (the licence) issued to Leonard Gamble Humchitt under the *Fisheries Act*, R.S.C. 1970, c.F-14 (now R.S.C. 1985, c.F-14). Subsequent to the granting of the lease of the herring licence, Mr. Humchitt died

intestate. The defendant David Seymour (Seymour) is the recently appointed administrator of the estate of Leonard Gamble Humchitt (the deceased). The defendant William Gordon Humchitt (William Humchitt) is the eldest son of the deceased.

## Facts

In consideration of the sum of \$15,000.00 the deceased signed, on November 29th, 1983, an undated document called a "Herring Licence Agreement." It will be referred to as the "Lease of Licence Agreement." It provided that the deceased would lease the licence to the plaintiff for the year 1984 and thereafter would renew the lease of the licence automatically for a further period of 98 years.

Pursuant to the terms of the Lease of Licence Agreement, the deceased signed, on November 29th, 1983, an undated Power of Attorney. It authorized the plaintiff, on behalf of the deceased, to apply each year to the Department of Fisheries and Oceans (Fisheries) for the licence.

The plaintiff was the designated operator of the licence in the years 1984 and 1985. He worked on a gill net fish boat as a deck hand and the licence was used to enable that boat to fish for herring. In 1984 and 1985 the defendant earned \$5,474.00 and \$17,554.00 respectively, from herring fishing. How much of those earnings was attributable to the plaintiffs' work as a deck hand, and how much was attributable to the licence was not revealed in the plaintiffs' evidence. The herring season usually extends from approximately February 20th to approximately April 10th each year. In 1986 and 1987 the plaintiff worked on a seine boat during the herring season. He rented the licence in those years to other gill net fisherman and received rent of \$2,500.00 and \$9,000.00 respectively.

In the meantime, on May 29th, 1986, the deceased died intestate. Some months later the Department of Indian Affairs learned of his death and on October 21st, 1986, pursuant to s.43 of the *Indian Act*, R.S.C. 1970 c.I-6 (now R.S.C. 1985, c.I-5), Charles Brian Norcliffe, an employee of Fisheries, was appointed administrator of the estate of the deceased. In the spring of 1987, William Humchitt telephoned another employee of Fisheries, Stanley Fisher, inquiring about the status of his father's licence. Mr. Fisher contacted Fisheries and learned, for the first time, of the existence of the licence and of a power of attorney given by the deceased to the plaintiff. Mr. Fisher did not learn at that time of the existence of the Lease of Licence Agreement.

In October, 1987, Mr. Fisher appeared on behalf of William Humchitt before the Pacific Region Licence Appeal Board. He applied for a licence to be issued for 1988 in the name of William Humchitt. Mr. Fisher's appearance was in accordance with the policy of the Department of Indian Affairs of assisting native people with applications to various branches of government. The board heard the application and pursuant to its mandate, it made a confidential recommendation to the Minister of Fisheries, the Honourable Tom Siddon (the Minister).

While the recommendation of the board was still under consideration by the Minister, Mr. Norcliffe as administrator of the deceased's estate, applied on January 6th, 1988, for the issuance of a 1988 licence in the name of the estate of the deceased. He made that application in order to preserve eligibility for a licence to be issued to William Humchitt and not because he considered the licence or any renewal thereof was an asset of the estate of the deceased.

Later in January 1988, the plaintiff applied for the issuance of the 1988 licence in the name of the deceased. On February 5th, 1988, his application was refused on the ground that eligibility for the issuance of a licence in the name of the deceased had expired upon the death of the deceased having come to the attention of Fisheries. Shortly thereafter, on February 10th, 1988, for administrative reasons, a licence for 1988 was issued in the name of the estate of the deceased. William Humchitt was the designated operator thereof and he used the licence to fish for herring in 1988.

On February 25th, 1988, the Minister notified Mr. Fisher that his appeal on behalf of William Humchitt for the 1988 licence to be issued in the name of William Humchitt had been successful. Upon application William Humchitt would be granted a licence. The Minister's decision was in accordance with the established policy of the Minister of Fisheries that upon the death of a holder of a licence, preference would be given to a spouse or to a child of a deceased licence holder with respect to the issuance of a licence in succeeding years. The plaintiff was aware of that policy because he had benefited under it some years previously with regard to his deceased father's salmon licence.

Representations were made by the solicitors acting for the plaintiffs to Fisheries, and, eventually, to the Minister. On July 21st, 1988, the Minister wrote to the plaintiffs solicitors as follows:

I am writing to you further to your presentation of an appeal on behalf of your client, Mr. Donald L. Smith, to the Pacific Regional Licence Appeals Board on June 8, 1988. I am advised that Mr. Smith has asked that I reconsider my decision to issue a roe herring gillnet 'H' licence to Mr. William G. Humchitt. Mr. Humchitt is the son of Mr. Leonard Humchitt, who was formerly a roe herring licence holder and is now deceased. After careful consideration of the facts and circumstances and of the Board's recommendation, I confirm my earlier decision to issue a 1988 licence to Mr. W.G. Humchitt.

In making this decision further to my discretion under section 7 of the *Fisheries Act*, I have taken into account the representations you made to the Board about the "lease" agreement Mr. Smith had with the late Mr. Humchitt.

In 1989 William Humchitt applied for and received a licence. He used it to fish for herring. In the same year Mr. Norcliffe left the employment of Fisheries. The defendant Seymour was appointed in his stead as administrator of the estate. The pleadings were amended to reflect that change. Both Seymour and William Humchitt have denied the plaintiff's contention that the Lease of Licence Agreement is binding upon them or upon either of them.

### Issue

The basic issue is whether, in the circumstances of this case, the Lease of Licence Agreement is binding upon the defendant Seymour, as administrator of the estate of the deceased, or upon his heir, the defendant William Humchitt.

### Legality of the Lease of Licence Agreement

On the authority of *B.C. Packers Ltd. v. Sparrow* (1989), 35 B.C.L.R. (2(1)) 334, [1989] 4 C.N.L.R. 63 (B.C. C.A.), I conclude that the leasing of the licence was not an illegal act. The Lease of Licence Agreement was not void for illegality; it was a legal agreement.

### Rectification

The final paragraph of the Lease of Licence Agreement provided:

14. This Lease shall enure to the benefit of and be binding upon the successors and assigns of the Lessor and shall be binding upon their heirs, executors, administrators, successors and assigns of the Lessee.

It was not drawn with precision. It was submitted by counsel for the plaintiff that it failed to reflect the obvious intention of the parties which was indicated in other paragraphs of the agreement and in the power of attorney. Upon considering the whole of the document and of the wording of the power of attorney, which was referred to in the Lease of Licence Agreement, I find there is convincing proof that it was intended that the agreement would be binding not only upon the "successors and assigns" of the lessor, but also upon his "heirs, executors and administrators." Moreover, I find there is convincing proof that it was intended that "the" rather than "their" heirs, executors, administrators, successors and assigns of the lessee were intended to be bound. Accordingly, rectification may be granted: see *Peter Pan Drive-In Ltd. v. Flambro Realty Ltd.* (1978), 93 D.L.R. (3d) 221 (Ont. H.C.J.), affirmed (1980), 106 D.L.R. (3d) 576 (Ont. C.A.).

Rectification of paragraph 14 is granted, in the following form as requested by counsel for the plaintiff, with underlining [italicizing] of the specific words rectified:

14. This Lease shall enure to the benefit of and be binding upon *the heirs, executors, administrators*, successors and assigns of the Lessor and shall be binding upon *the heirs, executors, administrators, successors and assigns* of the Lessee.

### Duration of the Power of Attorney

It was submitted by counsel for the defendant Seymour that the power of attorney terminated upon

the death of the deceased and therefore without a valid power of attorney, the plaintiff had no authority to apply for the licence in the name of the deceased each year after the year in which the deceased died. I am unable to accede to that submission.

The *Power of Attorney Act*, R.S.B.C. 1979, c.335 does not provide that an agent's authority under a power of attorney terminates on the death of the principal or donor. Section 7, which deals with "enduring powers of attorney," has no application to the death of the donor; it pertains to the subsequent mental infirmity of the donor. Section 1 of the Act provides, *inter alia*, that "terminated, when used with reference to the status of an agent's authority, means that the authority has been terminated either by revocation, or by operation of law or both."

At common law the authority of a donee under a power of attorney is, as a general rule, terminated upon the death of the donor. But there are exceptions to that general rule. In *Wilkinson v. Young*, [1972] 2 O.R. 239 (Ont. H.C.J.), Addy J. stated, at p.240:

Where an agency is created, either for valuable consideration or by deed, and the purpose of the agency is to secure an interest of the agent, the authority normally cannot be revoked, i.e., where the authority is coupled with an interest, the authority is generally irrevocable: *Walsh v. Whitcomb* (1797), 2 Esp. 565, 170 E.R. 456, and, *Smart v. Sandars* (1848), 5 C.B. 895, 136 E.R. 1132. Similarly, where a power of attorney is given to a purchaser for value and is expressed to be irrevocable, the authority is not revocable nor is it revoked by the death or disability of the donor. However, in all cases where the agency is gratuitously created and is created merely for the benefit of the principal, it terminates at law with the latter's death or mental incompetency.

See also *Halsbury's Laws of England*, 4th ed., vol.1, p.523-24; and *Bowstead on Agency*, 15th ed., article 125, p.509-510.

In this case the power of attorney was given to the plaintiff for value and it clearly provided that it was to be irrevocable. Paragraph 7 thereof stated:

7. I DECLARE that the powers herein shall be irrevocable and shall not be revoked by my death but may be exercised *in* the name of and on the behalf of my heirs, executors or administrators.

I conclude that the power of attorney was not terminated by the death of the deceased.

### Nature of the Licence

On the evidence I make the following findings of fact. A category H roe herring gill net licence is personal to the holder of the licence and cannot be transferred. It expires at the end of the calendar year for which it is issued regardless of whether the licence holder is dead or alive on that date. There is no legal right to its renewal. To conserve the fishery, the number of licences issued by Fisheries is severely restricted. Fisheries follows a policy of giving preference to the issuance of a new licence each year to a fisherman who held a licence in the preceding year and, in the event of the death of a licence holder, of giving preference to the issuance of a new licence to a member of the immediate family of such deceased licence holder. The issuance of a licence by Fisheries is a purely discretionary matter.

In addition to the foregoing findings, it is noted that under section 7 of the *Fisheries Act*, the Minister has absolute discretion in determining the issuance of licences.

I have considered the numerous authorities cited by counsel including *B.C. Packers Ltd. v. Sparrow* (*supra*), *Joliffe v. The Queen*, [1986] 1 F.C. 511 (F.C.T.D.), *Johnson v. Ramsay Fishing Company Ltd.* (1987), 15 F.T.R. 106, [1989] 1 C.N.L.R. 73 (F.C.T.D.), *Re National Trust Company & Bouckhyt* (1987), 61 O.R. (2d) 640 (Ont. C.A.) and *Re Bennett & Bennett* (1988), 24 B.C.L.R. (2d) 346 (B.C.S.C.).

I have found the *Bennett* case to be the most helpful because it dealt with the same type of licence that I am considering in the case at bar. In that case Ryan L.J.S.C. described the interest of a bankrupt in a roe herring gill net licence, in the year of bankruptcy, as a "beneficial interest" which came within the definition of "property" in the *Bankruptcy Act*. She held that the opportunity to apply for a similar licence in succeeding years did not come within the definition of "property" in the said Act.

On the basis of the foregoing facts, findings of fact, and authorities, I conclude that there was a "beneficial interest" in the licence for the remainder of the year in which the deceased died, namely the year 1986. It was of no value because the herring season had closed before the date of his death. In 1986 the plaintiff had had the use of the licence and he had rented it to another fisherman. The "beneficial interest" in the licence did not continue beyond December 31st, 1986, because there was no legal right of renewal vested therein.

### Enforceability of Lease of Licence Agreement

There are a number of matters to be considered with respect to this issue.

1. The licence was not transferable and neither the deceased, before his death, nor his administrator or heirs after his death, had a legal right to a renewal of the licence issued in 1986. The issuance of a licence was a matter within the absolute discretion of the Minister. Once the Minister authorized the issuance of a 1988 licence to William Humchitt, the subject matter of the Lease of Licence Agreement ceased to exist and the Agreement became unenforceable.

*Fridman on Contracts*, 2d ed. states, at p.601:

Where the continued existence or coming into existence of a specific thing is essential to the performance of the contract, proper construction of the contract requires a finding of frustration in the event of its subsequent non-existence.

2. I have previously concluded that the power of attorney was not terminated by the death of the deceased. But a power of attorney may be terminated by frustration, by reason of the subject matter of the power of attorney being destroyed or being no longer in existence: see *Fridman, The Law of Agency*, 5th ed. p.356, where the learned author states:

If the property which is the subject matter of the agency is destroyed, or otherwise ceases to exist, for example where the principal sells the business with which the agent was connected, then the agency will end.

It is further stated, at p.358:

... the relationship of principal and agent (if created by contract) will be terminated by the operation of the doctrine of "frustration" - just as with any other contract. This means that if for any reasons it becomes illegal, impossible, or useless to continue to execute the authority, or otherwise fulfil the obligations inherent in the agency relationship, then the parties are discharged from all further obligations.

Upon the Minister authorizing the issuance of the licence to William Humchitt in 1988, the rights of the deceased and of his administrator in the licence ceased to exist. It became ... impossible ... to continue to execute the authority, or otherwise fulfil the obligations inherent in the agency relationship...." I conclude therefore that the authority under the power of attorney terminated through frustration.

3. I have previously found that the deceased held a "beneficial interest" at the time of his death in the licence issued for the year 1986. It would have formed part of his "estate" as that word is defined in s.2 of the *Indian Act*. However, it was worthless because the herring seasons had ended prior to his death and the licence expired on December 31st, 1986. Thereafter neither the deceased nor his estate had any beneficial interest or other interest in the licence. After the expiration of the "beneficial interest" in the licence on December 31st, 1986, the administrator had no further responsibility with respect thereto.

4. William Humchitt was, in one sense, an "heir" of the deceased. Upon completion of the administration of the deceased's estate, he received approximately \$500.00 plus the right to occupy his dwelling on a reserve. But William Humchitt did not eventually receive authorization from the Minister for the issuance to him of a 1988 licence, and the actual issuance to him of a 1989 licence, because he was an "heir" of the deceased as that word was used in the Lease of Licence Agreement. The licence held by the deceased did not devolve to William Humchitt. It expired on December 31st, 1986. The licence eventually authorized to be issued to William Humchitt arose through the Minister exercising his absolute discretion in allowing William Humchitt, as the son of the deceased, to apply for and receive a licence. His opportunity to hold a licence was not based upon him inheriting anything from his father's estate. His opportunity arose because the Minister, in his absolute discretion, adhered to the normal policy of Fisheries of allowing a member of the

family of a deceased fisherman the opportunity to obtain a licence. William Humchitt is not bound by the terms of the Lease and Licence Agreement to which he was not a signatory, and under which he received no benefit through the administration of the estate of the deceased.

After considering the foregoing matters I conclude that the Lease of Licence Agreement is not enforceable by the plaintiff against either the administrator of the estate of the deceased, or against William Humchitt. The relief sought by the plaintiff cannot be granted. The action is dismissed. I am uncertain whether the defendants are seeking costs. If they are seeking cost, and if counsel cannot agree thereon, they may speak to the matter at a convenient date to be arranged through the Registry.