

Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Edward F. Swift and others v. Lester W. David, from the Court of Appeal of British Columbia, delivered the 18th June 1912.

PRESENT AT THE HEARING :
LORD MACNAGHTEN.
LORD ATKINSON.
LORD SHAW.

[DELIVERED BY LORD ATKINSON.]

This is an appeal from a Judgment of the Court of Appeal of British Columbia, dated the 6th of June 1911, reversing a Judgment of Mr. Justice Clement, dated the 29th of September 1910, awarding \$171,500 damages and costs to the Appellants, and dismissing their cross appeal against so much of the said Judgment as directed that a deduction of \$20,000 should be made from the sum claimed by the Appellants. The facts are plain. A certain Limited Liability Company, named the Fraser River Saw Mills Company, incorporated on the 23rd of December 1904 under the laws of British Columbia, with a capital of half a million dollars in shares of 100 dollars each, had acquired, and at the date of the contract hereafter referred to was entitled to, extensive right of cutting timber over an area of over 50,000 acres in British Columbia. It was also possessed of mills capable

of manufacturing into planks about 30,000,000 feet of timber per annum, and its principal place of business was at Millside near the City of Westminster in that Province. This Company had some time before the 15th of July 1907 increased its capital to 1,000,000 dollars in shares of 100 dollars each. The increased stock of half a million dollars had not at that date been issued, but was about to be issued prior to the 10th of August 1907. The Respondent on the 20th of July 1907 owned, or controlled, 3,350 shares, stock of the Company, and when the new issue took place would own or control shares amounting to 6,700 in number at least. On the aforesaid date, the 20th July 1907, the Respondent entered into an agreement with the Appellants to sell to them 6,700 shares of this Company at \$75.00 per share. Attached to this Agreement was a statement of the assets of the Company dated the 30th of April 1907, which contained the following items amongst others:—

" Timber Lands :	\$
" 50 Provincial Licenses, 32,000 acres, " containing 500,000,000 ft., at " 50 cents. per 1,000 ft. - -	250,000.00
" 60,000,000 ft. of Crown Granted " Timber carrying no royalty -	58,763.23
" 141,925 ft. Timber Crown Granted " Land, Comox District and Den- " man Island, at \$1 - -	141,925.00
" 170,000,000 ft. Timber, Government " Leases, at 50 cents. - -	85,000.00
" E. and N. Ry. Co. Timber, 5,475 " acres, 164,250,000 ft., \$1 -	164,250.00
	699,938.23."

The clauses of the Contract referring to this statement of assets, and containing the warranty for the breach, of which the action out of which the Appeal arises was instituted, are paragraphs 3 and 4.

The first of these, and the material part of the second run, as follows :—

“Third: First party is to give a satisfactory guarantee to second party that the quantity of timber on the different tracts of land as shown by the statement of the Fraser River Saw Mills, Ltd., Corporation, under their statement of 30th April 1907, copy of which is attached hereto and made a part hereof, is true and accurate, it being the intention and made one of the conditions of this trade that the timber shall at least run equal in quantity to the number of feet shown in the attached statement.

“Fourth: Second parties are to have until 1st September 1907, to cruise and verify the figures on the attached statement of 30th April 1907, regarding the quantity of timber on said various tracts, and in event of all of the tracts, from a cruising or other verification, failing to reach the quantity represented in the attached statement, first party is to repay second party in just proportion that the amount of shortage bears to the value of the total number of feet of timber estimated to be on said tracts as appears in said attached statement bearing date of 30th April 1907.”

The “first party” in the above clauses means the Respondent, the “second party” the Appellants.

The Appellants alleged that the quantity of timber found by their cruisers on these timber lands was short of the amount guaranteed by about 300,000,000 feet, and they sued for breach of warranty in respect of this shortage. Their cruisers, however, acting presumably on instructions, only arrived at this figure as to the shortage by excluding from their computation, and treating as non-existent all timber trees, which if felled and brought to the mills of the Company, and treated there according to the mode of manufacture now followed by the Company, would not have produced manufactured timber which could, when manufactured, be sold at a profit.

The Appellants contend that this is the meaning of the Contract. They insist that having

regard to the nature of the business of this Company, the manufacture and sale of lumber, and to the fact that the document of the 30th of April was a statement of the assets of the Company as a trading concern, made for the purposes of this Agreement, the word timber used in these Articles 3 and 4 must mean timber merchantable in the trade or business of the Company, that is timber which at the date, or dates above-mentioned would be reasonably capable of being felled, treated, and sold in that trade at the then existing prices at a profit. It is admitted by the Respondent that timber trees growing in places so rocky that, if felled, their trunks would be split and injured in the fall, should be excluded. He also admits that timber trees growing in places so inaccessible, owing to their physical features, that the trees could not under any circumstance be felled, or removed to the mill at any reasonable cost, should also be excluded, but he disputes altogether the test adopted by the Appellants, and contends that at the very least all timber trees now growing on this large tract which, with the exceptions already mentioned, are by reason of their size and quality reasonably fit for use in a business such as that of this Company, come within the meaning of the word timber used in the above-mentioned list of assets and Articles of the Agreement, and ought not to be excluded from the estimate of the quantity of timber found on these lands; and he further insists that if the test he thus suggests be adopted, there is now, and was at the date of the agreement more timber upon these lands than is mentioned in the statement of assets.

Their Lordships have not to decide between these two contentions. The sole question for their decision is whether the contention of the Appellants as to the meaning of the Contract is sound.

Now, in the first place, it is not disputed that terms for which some of the licenses mentioned in the statement of assets have been granted are 21 years, or that some are perpetual. It is proved by Mr. Ernest Walker, the former Secretary of the Company, that the mill would, if reasonably worked, cut about 30 million feet of timber per annum. This statement was, apparently, not seriously disputed, so that if the quantity of timber suitable from its size and quality now on these lands be anything like that mentioned in the statement of assets, that is close upon 700 million feet, there would be enough raw material there to keep the mill working for the next 20 years, irrespective altogether of the timber now unripe, which would gradually mature in that period. Again, Articles 3 and 4 deal with quantity alone. Nothing is suggested in these as to value, cost of manufacture, price or profit.

And, moreover, the cruisers are in these clauses treated as persons capable of ascertaining the quantity and verifying the schedule of assets. If the Appellants' contention be right these cruisers must necessarily be able to judge whether the timber is merchantable or not. This, however, admittedly involves an estimate of the present cost of felling the timber trees, and bringing them to the mill, the cost of manufacturing them in the mill, the expenses to be incurred in the conduct of the Company's business, such as the cost of advertisement, wear and tear, &c., and, until the manufactured article is sold, or the portion of these expenses appropriate to this part of the Company's business, and lastly, to an estimate of the prices at which the finished product could be sold if now manufactured, before they could determine whether the raw material of this industry now

existing on the land could be dealt with at a profit by this Company. It appears to their Lordships that several things of this nature must be taken into account before it can be determined whether the manufacture of the raw material of the industry obtained at any given cost will yield a profit.

Men in the position and with the experience of cruisers may be well fitted to measure a tree, to determine whether or not it is sound, or to estimate the labour necessary to fell it, and to calculate number of trees suitable to be treated as this Company in its business treats them, but their Lordships think that it never could have been the intention of the parties to the contract to require these cruisers to solve the difficult and delicate problems above-mentioned before testing the accuracy of the statement of assets or determining what is the quantity of timber growing on these lands within the meaning of this contract. Yet this by the very terms of the Agreement they should do before the 1st of September 1907, if they are to perform the task at all.

A value is no doubt put upon the timber in the statement of assets, but it is admitted there is no warranty as to value or the price at which it could be sold. Quantity is alone guaranteed. There is this difficulty too in adopting the test suggested by the Appellants, prices may vary from time to time, and the cost of felling and bringing a log of timber to the mill may vary from month to month.

The very operations of the Company, the clearance which they must necessarily make wholly or partially in the forest on these lands in the conduct of their own business may diminish so considerably the cost of procuring the raw material of their industry and bringing it to their mill, that the trees the treatment of which would

yield no profit in the year 1907, would yield a profit in 1908. Again roads may be run through these woods opening up new tracts and making them more easy of access. Machinery may be improved, and the whole condition of the industry may change long before the term of the shortest of these licenses shall have expired, or the supply of suitable timber been exhausted.

Their Lordships cannot see on what principle, not only are all considerations of growth to be excluded, but the estimated cost of procuring, between the date of the contract and the 1st of September 1907 the raw material, of manufacturing it, as well as the estimated profit realisable by sale of the finished products within that period, none of which things can ever, in fact, take place, should be treated as determining factors in measuring or estimating the vast number of timber trees upon these lands, suitable in size and quality for the purposes of an industry which it was evidently contemplated should be carried on for years to come. Such a mode of verification bears no rational relation to the actual facts of the case, and in their Lordships' view never could have been contemplated by the parties to the contract as the mode to be adopted by the persons constituted judges of the matter, namely the cruisers, who, in the words of the above-mentioned articles, were to "cruise and verify the figures" on the statement of assets "regarding the quantity of timber on the various tracts." It appears to their Lordships to be almost inconceivable that if it was intended that a method of verification so artificial in character as that contended for should be applied, no indication whatever, direct or indirect, express or implied, should be found in the contract to the effect that men should be selected so

unfitted for their difficult task as these cruisers apparently are, and that no instruction should be given to them touching the special nature of the test they were to apply. On the whole, therefore, their Lordships are of opinion that the construction of this contract contended for by the Appellants is not its true construction, that the Judgment appealed from was on this point right and should be upheld, and this Appeal be dismissed, and they will humbly advise His Majesty accordingly. The Appellants must pay the costs of the Appeal.

In the Privy Council.

EDWARD F. SWIFT AND OTHERS

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LESTER W. DAVID.

DELIVERED BY LORD ATKINSON.

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