

105, 1930

No. 37 of 1930.

# In the Privy Council.

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## ON APPEAL

FROM THE APPELLATE DIVISION OF THE SUPREME COURT  
OF ONTARIO.

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BETWEEN

CHARLES E. CAMPBELL (Plaintiff) - - - *Appellant*

AND

10 NATIONAL TRUST COMPANY, LIMITED,  
Executor of the last Will and Testament of  
E. A. Wallberg, deceased (Defendant) - - - *Respondent.*

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## Case for the Appellant.

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1. This is an appeal, by special leave, given by the Appellate Division of the Supreme Court of Ontario. The appeal is from a judgment of that Court delivered on the 23rd day of April 1929, which allowed in part an appeal from a Judgment for the Appellant given by the Trial Judge, Hon. Mr. Justice McEvoy, on the 20th day of July 1928. RECORD.  
p. 90.

The Trial Judgment awarded the Appellant a commission on the sale of newsprint at the rate of 1 per cent. on the paper sold under a contract extending over a period of ten years. The Judgment on appeal reduced this amount to \$10,000.00. p. 74.

2. There are two questions involved in the Appeal :—

(A) The amount of commission to which the Appellant is entitled for an introduction bringing about the sale of the total output of the Defendant Wallberg's paper mill for a period of ten years, and involving a minimum of about \$40,000,000. Probably the largest paper contract ever made.

(B) The form of the Judgment.

p. 10,  
ll. 21-24.

3. The Appellant is a newspaper proprietor, owning and operating among other papers the "Edmonton Bulletin" at the City of Edmonton, the capital of the Province of Alberta.

p. 41,  
ll. 11-19.

The defendant E. A. Wallberg was a financier engaged in engineering and manufacturing ventures and the exploitation of natural resources. He has since died and the action is carried on in the name of the National Trust Company Limited as his executor.

p. 41, l. 24-  
p. 42, l. 9.

4. On the 6th day of April 1926, Wallberg obtained a lease from the Government of the Province of Quebec of certain large timber areas suitable for the manufacture of pulp and paper. 10

p. 42,  
ll. 4-24.

This lease was taken in the name of the Leaside Engineering Company Limited, a company controlled by Wallberg. He owned all the stock except a qualifying share for each of the nominal directors.

pp. 12, 26,  
31-32.  
cf. p. 59.  
pp. 113-120.

5. Wallberg's business office was in Toronto. He apparently contemplated the erection of a pulp and paper mill to operate in connection with the above-mentioned timber limits if suitable financial arrangements could be made. To finance the construction and operation of a pulp and paper mill at this time was a matter of difficulty. It required the investment of many millions of dollars. When the mill was completed difficulties still loomed ahead. The paper market was what is called "soft." The mills already in operation were only running on part time because the market was suffering from over-production. 20

pp. 23, 32,  
34.

6. On the 17th of April 1926, the Appellant came to Wallberg at his office in Toronto with a proposal. The Appellant and Wallberg were not previously acquainted but the Appellant had telephoned to him from Ottawa the day previous for an appointment.

pp. 12-14.

The Appellant stated that he had a purchaser who would be prepared to take the entire output of the proposed mill. Before introducing his purchaser the Appellant said, "Mr. Wallberg I am out to make some money. This party is quite capable of buying this output. Now will you pay me a commission if I introduce you to this party and it results in a sale or contract for the paper." The answer was "I will." 30

pp. 14, 27.

7. Thereupon the Appellant took Wallberg to the King Edward Hotel and introduced him to Lester J. Clarke, of New York City.

p. 13, l. 34.  
p. 31, l. 35.

Wallberg had never heard of Clarke before and Clarke knew nothing of Wallberg, except what he had learned from the Appellant.

p. 11, l. 25.  
p. 30, l. 8.

The Appellant before interviewing Wallberg saw The Hon. W. D. Ross. His preliminary inquiry resulted in satisfactory assurances about Wallberg's financial responsibility.

Clarke was the President of the Newspaper and Magazine Paper Corporation and was said to be the largest purchaser of newsprint paper in the world. He provided for the supply of newsprint for the Hearst Newspapers in the United States. pp. 28, 29.

8. It appears that the Appellant and Clarke had been old friends. The Appellant had induced Clarke to come with him from Montreal to Toronto and to wait in the King Edward Hotel while he submitted his proposal to Wallberg. p. 12, l. 22, p. 30, l. 5.

9. Following the introduction negotiations continued between Wallberg and Clarke, which resulted in a written contract for the entire output of the mill, when built, for a period of 10 years. The contract to purchase was signed by Clarke's Company and personally guaranteed by the signature of William Randolph Hearst. See Exhibit 1, dated 29th December 1926. pp. 32-35. pp. 95, 96. pp. 95-109.

10. It is to be noted that this agreement is made with the Lake St. John Power and Paper Company Limited and signed by Wallberg as President. This Company was simply another of Wallberg's companies. p. 35, l. 25, pp. 43-44.

Some time after the commission arrangement with the Appellant the Leaside Company transferred the Quebec limits to the Lake St. John Company. (This company had its name changed twice.) The financing was done in the name of the Lake St. John Company. p. 124.

The Leaside Company owned all of the issued preference shares of the Lake St. John Company par value of \$2,000,000.00, and 71 per cent. of the common stock. The balance of the common stock issued was apparently used by Wallberg as a bonus to advance the sale of the mortgage debentures. Wallberg continued to hold all but the qualifying shares in the Leaside Company. pp. 44, 124. p. 46, ll. 18-19, 59, p. 29. Sec Ex. 11, p. 116. p. 42.

11. During the summer and fall of 1926, while the negotiations with Clarke were maturing, construction of the mill was proceeding. The prospective contract was evidently a material factor and in the end was actively used in the Prospectus for the raising of \$5,000,000 on first mortgage bonds and \$3,000,000 by mortgage debentures. p. 58. Ex. 11, p. 113

This Prospectus, dated as of 1st February 1927, quotes from a letter from Wallberg in part, as follows :—

“Sale of Paper Output: The Company has contracted with one of the largest and financially strongest publishing interests in the United States for the sale for the term of ten years of the entire capacity output of the newsprint paper mill now under construction.” p. 58, l. 20. p. 118.

p. 120. "Earnings: The management estimates that the annual net earnings of the company, based upon the present price of newsprint paper available for interest on these debentures, depreciation and income tax, after payment of interest on the First Mortgage Bonds Series A, will not be less than \$1,025,000 annually."

p. 16.  
Ex. 2.  
p. 110. 12. On the 14th of February 1927 the Appellant, who was then in Montreal, wrote Wallberg stating that as he now understood the arrangements had been completed by which the output of his mill was sold to Clarke's Company, that he, the Appellant, was now entitled to be remunerated for his services as agreed. He asked to have the matter definitely settled while he was still in the East. 10

p. 17.  
Ex. 3, p. 111.  
p. 17.  
Ex. 4, p. 111. Receiving no reply to this letter, the Appellant's solicitors in Montreal telegraphed Wallberg on 17th February. A wire the following day advised them that Wallberg was out of the city.

pp. 18-19.  
Ex. 6, p. 120. On 12th March the Appellant wired Wallberg intimating that if he did not hear from him suit would follow.

On 26th March Wallberg wrote to the Appellant's solicitors, advising them that he would call to see them.

p. 20, Ex. 7.  
p. 121.  
p. 22.  
pp. 4-5.  
p. 74.  
pp. 81, 83. The letter did not repudiate or deny the existence of the contract. 20 Interviews followed, but being unable to get a satisfactory settlement a Writ was issued on 5th April 1927, and a claim was made for commission at the usual brokerage rate of 3 per cent. on the price of the total sale made through the introduction. Alternatively a claim was made based on a quantum meruit. The action was brought against Wallberg personally and against the Lake St. John Company. Judgment was given at the trial against both, but on the appeal it was conceded by counsel for the Appellant that he must elect. He elected to rely on the Judgment against Wallberg with whom the contract had been made.

pp. 5-7, 47,  
52-54. 13. In his pleadings and at the trial Wallberg's defence was a 30 denial that he had made any agreement with the Appellant for commission.

14. The trial began on 17th November 1927, before Mr. Justice McEvoy.

The witnesses for the Appellant were himself and Lester J. Clarke.

pp. 46-47,  
52-55. Wallberg testified in his own behalf. He said that the Appellant simply came to his office and asked him to come to the King Edward Hotel to meet a man he had never heard of. He did not know the Appellant

and nothing was said about the nature of the business. He went over and met Clarke. He denied any arrangement with the Appellant for commission or discussion with him about the sale of his product.

Mr. Justice McEvoy believed the Appellant's evidence, both because of the probabilities and because of the demeanor of the witnesses. He held that the contract had been proved as testified to by the Appellant, and that the sale had been made as a result of the introduction.

15. At the trial Lester J. Clarke testified that the usual broker's commission was 3 per cent. on the value of the output sold. This evidence was not disputed, but it was contended that a broker's commission was not based on the introduction only, but on his services in consummating the sale as well. Mr. Justice McEvoy was apparently influenced by this view and gave Judgment allowing the Appellant a commission at the rate of 1 per cent.

16. From this judgment Wallberg appealed—

First—for a dismissal of the action ; and

Second—for a reduction of the amount.

The Appellant cross-appealed for an increase of the commission allowed.

17. The appeal was heard before Mulock, C.J.O., Magee, J.A., Middleton, J.A., and Grant, J.A.

The finding of fact that a contract had been made between the parties was not disturbed, but the amount of the judgment was reduced to \$10,000.00.

The Chief Justice concurred generally with Mr. Justice Middleton and thought the Appellant was entitled to be paid not on a commission basis but on a quantum meruit. His Lordship was, however, of the opinion that as the claim had been made on a commission basis there was no evidence upon which to base a quantum meruit and that the case should be referred to a jury to determine the amount to be allowed. His Lordship seems to have overlooked the fact that Wallberg owned the Leaside Company and that the Leaside Company substantially owned the Lake St. John Company. He seems also to have disregarded the fact that an established rate of commission on the sale price of the product furnishes by analogy a basis for a quantum meruit.

Mr. Justice Magee observed that although Wallberg was only the agent of the Company, yet he had been held liable for the commission for benefits to the Company and not to him.

The learned Judge also thought there was no benefit to Wallberg because the Appellant only forestalled Clarke's visit, which would have

p. 31, l. 29. occurred anyway. There was no cross-examination suggesting any such idea and the facts are to the contrary. The learned Judge, however, did not dissent.

p. 83-89.  
p. 87, l. 39. Mr. Justice Middleton reviewed the facts as found by the learned Trial Judge and expressed some doubt because the Appellant did not reduce his agreement to writing at the time. However, he was not prepared to overrule the findings of fact. He disagreed with the judgment below on two grounds—

First—That it was a declaratory judgment; and

Second—That the services rendered by the Appellant did not entitle him to such a large amount. The learned Judge felt himself generous in making an allowance of \$10,000.00.

Mr. Justice Grant concurred.

18. It is respectfully submitted that several facts are misconceived in the judgments of the Appellate Division,—

p. 87, ll. 17  
and 42.  
Ex 2, p. 110. (1) Mr. Justice Middleton regarded the Appellant's letter of 14th February 1927 to Wallberg as inconsistent with his "self serving evidence at the trial." This letter refers to his "remuneration as agreed." The evidence at the trial which the learned Trial Judge believed stated what this agreement was: "I will 20 pay you a commission."

It is submitted there is no conflict.

Commission is a form of remuneration. Wallberg at the trial said nothing of any other form of remuneration. He had denied everything. His evidence was disbelieved. The Appellant was believed as to what the conversation was. Why should his unchallenged evidence as to the nature of the remuneration be disregarded? Mr. Justice Middleton has accepted the Appellant's evidence where it is in conflict with Wallberg—that there was a contract—but has refused to accept it as to the language in which the contract was couched.

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p 88, l. 9. (2) The learned Judge further said "The contract actually negotiated was a valuable and satisfactory contract, but it must be borne in mind that it was not brought about by the negotiations conducted by the plaintiff (Appellant). He did not sell the output of the mill. It is altogether out of place to suggest that he is to be paid a commission calculated at a percentage rate upon the total paper that may be supplied under the contract."

This, it is submitted, is contrary to authority, as well as the facts.

“ If the relation of buyer and seller is really brought about by the act of the agent he is entitled to commission although the actual sale has not been effected by him.”

Green v. Bartlett, 1863, 14 C.B. N.S. 681.

“ If an agent brings a person into relation with his principal as an intending purchaser the agent has done the most effective and possibly the most laborious and expensive part of his work.”

Burchell v. Gowrie, 1910, A.C. 614, at 625.

10 The learned Judge also said : “ Wallberg is by no means identical with the defendant Company. It would be quite illogical to make him pay a commission based upon the amount of paper sold by a company in which he is merely a shareholder.” p. 88, l. 19.

This, it is submitted, overlooks two things :—

(A) Wallberg dealt with the Appellant only as a principal ;

(B) The fact that at the time the contract was made Wallberg through the Leaside Company was the absolute owner. He never parted with this ownership except for such minority shares as he issued for a bonus to help in financing. pp. 43, 44, 59.

20 Wallberg's evidence is that he put up through the Leaside Company \$200,000 to secure the leases. Later the Leaside Company paid further sums totalling \$1,850,000. Of this the \$850,000 was paid back. He estimated the total cost of the mill and leases as \$7,600,000.00. As against this \$8,000,000.00 was raised on mortgage and debenture issue. As to the million put up by the Leaside, he admitted that it was practically all in the treasury where it would remain as working capital. He says it was only put up to make a scheme look a little better in the eyes of the financiers. From this it appears that on a total investment of nearly \$9,000,000.00 Wallberg has nominally put up \$1,000,000.00 and in reality nothing. For 30 this he has \$2,000,000.00 preferred stock and 71 per cent. of the common stock. Out of this, after paying interests and sinking funds there will be a return to him of over half a million dollars a year. p. 49. p. 63. p. 62. p. 113. pp. 62, 63. p. 64, l. 8. pp. 59, 124.

19. The Appellant humbly submits :—

(A) As to the amount of commission :—

(1) That the learned Trial Judge has found a contract to pay a commission and the only issue remaining for determination is : pp. 71-72.

What is the amount to be allowed for the commission ; or at what rate shall it be fixed ?

The remuneration must be for commission, not for something else. The contract must be the one sworn to in the evidence, or none at all.

It is submitted that the Court of Appeal was in error in accepting the learned Trial Judge's finding of a contract and then refusing to fix the remuneration on the basis of the contract so found. If the Appellant was to be paid a commission then the principles governing commission must apply. A commission for an introduction leading to a contract involves more than a mere gratuity. It is not a quantum meruit merely for the time spent in making the introduction. It is not a payment based on the Court's generosity. 10

In every business of buying and selling the word commission has a definite meaning. It means a percentage of the sale price, and the amount of such percentage is generally to be determined by the custom of the trade. This is a customary commission.

(2) That the rate or amount of commission in the present case must therefore be determined in one of two ways :— 20

First : The promise to pay " a commission " for an introduction leading to a sale, in a trade having a customary commission, should be construed as having reference to such customary commission ; or

Second : It should be interpreted to mean a commission based on a quantum meruit determined as commissions are usually determined. That is that the service rendered and the benefit conferred should be measured by the sale price. In such a case it is submitted the percentage rate should be fixed by analogy to the customary rate. 30

pp. 35-36.

First, as to the customary commission. The evidence of Mr. Lester J. Clarke established the customary commission as 3 per cent. of the purchase price. This is a broker's commission. It was immaterial to Wallberg whether or not the Appellant was a broker. With that he was not concerned. It was the introduction he wanted. For that he was prepared to pay. This was the service of substance for which " a commission " was to be paid, and the parties must have had in mind the usual or customary commission.

Secondly the quantum meruit basis here considered is to be distinguished from that considered by the Court of Appeal. It is a quantum meruit as to the rate of commission. It is still a commission on the sale—that is a percentage on the price. What is a fair rate for the services rendered and the benefits conferred ?

It is submitted that the customary commission is the surest guide by way of analogy.

If a broker had effected a contract of this magnitude for the same period, acting for an operating mill with its goods immediately available, he would have been paid 3 per cent. on the price of the total sale. Why should the Appellant's services be rated less ? In the ordinary course of events Clarke would have sought out the established operating mills. From them he would have secured his requirements. These mills were only running 80 per cent. capacity. Clarke had never heard of Wallberg and Wallberg knew nothing of Clarke. The brokers who were receiving 3 per cent. were only satisfying 80 per cent. of their customers' needs. The Appellant's introduction led to a 100 per cent. contract, calling for the sale of approximately 60,000 tons of newsprint paper per annum. As to profits up to capacity output, the law of increasing returns governs. It is the last ten or twenty thousand tons which produces the profits. Those profits were estimated by Wallberg at something between a million and a million and a half dollars a year.

That the Appellant's efforts stopped with the introduction is not a matter of substance. There was here more than a bare introduction. It is obvious the Appellant had prepared the ground in advance. Wallberg by his contract with the Appellant was paying for the Appellant's prior efforts as well as the subsequent ones. There was nothing remaining to be done after the introduction but to work out the details. Clarke was not cross-examined to show the existence of any subsequent salesmanship activities and Wallberg gave testimony of none.

(3) That the learned Judges in the Court of Appeal were in error in holding that the Commission should be based on the amount of effort expended by the Appellant. It is submitted that the two factors which should determine the amount of commission payable in the present case are the sale price under the contract, and the rate of commission customary in the trade.

(B) As to the form of the Judgment—

The contract was to pay a commission when the contract was made for the sale of paper.

(1) If the commission is the usual or customary one there should be a declaration that the Appellant was entitled to 3 per cent. on the total sale price.

This could be worked out in one of two ways :

(A) So far as this is capable of immediate calculation there should be judgment. For the balance there should be a declaratory judgment :

The Court has power to make a declaratory judgment :

See : Ontario "Judicature Act" Section 16 (B), which is the same as Order 25, Rule 5 of the English Practice.

See also: *Wilson v. Harper*, 1908, 2 Ch. 370 ; *Nanson v. Radcliff Urban District Council*, 91 L.J. Ch. 829, at 837 ; *Evans v. Manchester*, 57 L.J. Ch. 159 ; *Barraclough v. Broom*, 10 66 L.J. Q.B., at p. 677.

or, (B) On the basis of damages :

It is submitted that under ordinary circumstances the customary commission would be paid at the rate of 3 per cent. on the value of the paper sold. The commission to become due from time to time as this amount is determined over the period of ten years. Wallberg made the promise to pay the commission personally and dealt with the Appellant on the basis that he, Wallberg, was the owner, as he was in fact at that time. Wallberg has since put the control of the selling contract out of his hands into that of a company. This does not affect the obligation in his contract with the Appellant. This fact, coupled with his repudiation of his promise to the Appellant, may have the effect of accelerating the time of payment. It gives the Appellant the right to have the payments to which he would have been entitled over a ten-year period, assessed at a liquidated amount, payable now as damages for breach of contract. Such damages would be the estimated present cash value of an obligation to pay over a period of ten years a 3 per cent. commission on an estimated total sale of \$40,000,000.00 worth of paper. 30

(2) If the commission is fixed on a quantum meruit a lump sum can be settled upon once and for all. If a lump sum is awarded the amount should, it is submitted, be based on the following considerations :—

(A) The customary rate of commission by analogy ;

(B) The prospective total sale price ;

(C) The present cash value of an amount determined by analogy to a commission payable over a period of ten years. This amount can be awarded either in contract or as damages for breach of contract. 40

pp. 12-13.

pp. 41-44.

20. The Appellant therefore humbly submits that the judgment appealed from should be reversed and the Appellant's cross-appeal allowed, or in the alternative, the judgment below restored as to the rate of commission, for the following among other

### REASONS.

- (1) BECAUSE the contract to pay a commission has been found in favour of the Appellant.
- (2) BECAUSE the customary commission was proved as a fact at the trial.
- 10 (3) BECAUSE the Appellant's introduction was the effective cause of the contract for one of the largest sales of newsprint paper ever made in the world—being for at least \$40,000,000.00.
- (4) BECAUSE the defendant Wallberg financed both the construction and operation of his mill on this contract.
- (5) BECAUSE the Appellant secured for the defendant a ten-year contract for a 100 per cent. output.
- 20 (6) BECAUSE the Appellant is entitled to a commission based on a percentage of the sale price under the contract secured by him.
- (7) BECAUSE the rate of such percentage should be determined by reference to the customary commission.
- (8) FOR the reasons given by the learned Trial Judge.

J. W. DE B. FARRIS.

GEOFFREY LAWRENCE.

No. 37 of 1930.

**In the Privy Council.**

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*From the Appellate Division of the Supreme  
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**AND**

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**last Will and Testament of**

**E. A. Wallberg, deceased**

(Defendant) - - - *Respondent*

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**Case**

**FOR THE APPELLANT.**

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