Fukukawa v. American Timber Holding Co.

Between
Chuhei Fukukawa and The Queen Charlotte Timber Holding Company Limited, and American Timber Holding Company
And between
American Timber Holding Company, and Chuhei Fukukawa

[1928] B.C.J. No. 51

[1928] 3 D.L.R. 44

British Columbia Supreme Court
Vancouver, British Columbia

Hunter C.J.B.C.

Heard: March 6, 1928.
Judgment: April 20, 1928.

Counsel:

Mayers and C.S. Clark, for the plaintiffs.
Burns and Walkers, for the defendant.

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1 HUNTER C.J.B.C.:-- The plaintiff Fukukawa, and The Queen Charlotte Timber Holding Company Limited (in which Fukukawa is the chief shareholder) which subsequently acquired his interest, are the plaintiffs in the consolidated actions and at the time of the making of these agreements Fukukawa was resident in Tokio while the defendant Company had its general office in Milwaukee, Wisconsin. The agreements were negotiated in Japan during January and February, 1920, between Fukukawa and one Ikeda who was acting as sub-agent for M. C. Lawler, the British Columbia resident agent of the defendant Company. It was admitted at the trial that for purpose of these negotiations Ikeda was the defendant's agent as he had taken a commission on the sale from the defendants. The total purchase price amounted to $1,583,195.50. The agreements provided for this amount to be paid by instalments over a term of five years with interest at 6 percent. Owing to financial difficulties arising chiefly from the earthquake in Japan the time for the payment of some of the instalments was extended from time to time by subsequent agreements. At the time of the negotiations in Japan, Ikeda exhibited to the plaintiff blue prints and estimates of the amount of timber said to exist on the land covered by the licences made up by the firm of Brayton & Lawbaugh who

were engaged in the timber-cruising business. According to Fukukawa, Ikeda assured him that these estimates were correct. They were admittedly given Ikeda by Lawler for [40 BCR Page46] the purpose of promoting a sale and Ikeda testified that Lawler told him they were correct and Lawler did not appear as a witness to contradict Ikeda's statement. The estimates stated that there was a total quantity of 1,050,533,000 feet of timber. Up to the time of the plaintiffs' action Fukukawa had paid in respect of principal sums and interest the sum of $1,110,164.92 to which should be added the cost of exchange amounting to $57,043.82 making a total stun of $1,167,208.74 and the plaintiffs' action is for rescission and repayment on the ground that Fukukawa was induced to enter into the agreements by a material misrepresentation, viz., that the quantity of timber existed as set forth in the Brayton & Lawbaugh estimates, whereas shortly before he brought the action he discovered by means of the cruise hereinafter referred to that there was a shortage to the extent of 34.6 percent.

2 In the fall of 1925 the plaintiffs had entered into a contract with another company for a sale of a portion of the timber covered by the Brayton & Lawbaugh estimates and it was reported to Fukukawa that after the intending purchasers cruised the timber they found such a shortage that they refused to proceed further in the matter and that a similar discovery was made with respect to several other licences. Whereupon Ikeda, who, after the agreements had been executed, had become, and then was, the agent resident in British Columbia to look after Fukukawa's interests, wrote West, the secretary of the defendant Company, on the 6th of March, 1926, requesting that the time for payments then falling due should be extended until the matter was cleared up. The defendant refused to recognize any responsibility in connection with the alleged shortage and insisted upon the contract being carried out and hence the litigation.

3 Part of the argument turned on the question as to whether the agreements were for a lump sum without any reference to a rate per M. feet or whether the basis of the contract was an agreement to pay for a stated quantity of timber at the rate of $1.50 per M. The agreements themselves provided for the payment of a named sum payable in certain instalments without specifying that the amount had been arrived at on the basis of [40 BCR Page47] $1.50 per M. As to this question, I think there can be no doubt that the agreements were arrived at on the basis that the vendor was selling and the purchaser was buying the timber at the rate of $1.50 per M. and that this is demonstrated by the fact that at the time of the negotiations the Brayton & Lawbaugh estimates were the only statements as to the quantities of timber that were before the plaintiff; that the sums named in the agreements were actually, with the exception of 50 cents, which is no doubt a clerical error, the number of M. feet stated in the estimates multiplied by this factor; that a reduction for any timber that would be found to have been removed from the lands by the Imperial Munitions Board was fixed at the rate of $1.50 per M.; that it was provided that any loss by fire during the currency of the contract should be equally divided and be computed at a rate not to exceed $1.50 per M. and that a reduction at this rate was made for an error in the addition of the total estimates discovered by Fukukawa's agent, Tsukioka, in the same year that the agreements were entered into. That the quantities shewn by the Brayton & Lawbaugh estimates to be paid for at the rate of $1.50 per M. forms the core of the contract is also borne out by the correspondence which shews that that at any rate was the intention of the defendant. Before the agreements were entered into, viz., December 23rd, 1919, Lawler writes West, the defendant's secretary, that "my opinion is that the Japs mean business and are going to buy this timber at the price I made of $1.50 per M. feet on your estimate." On January 19th, 1920, Lawler wires Starnes, the vice president at Milwaukee "Ikeda has requested his man to see me and get detailed estimates on each licence based upon a price of $1.50 per M. feet, board measure, and on quantity of timber as shewn by Brayton & Lawbaugh estimates. I have written Mr. West to send

same" and, on January 21st, 1920, West writes Ikeda to the effect that the price was $1.50 per M. board measure and on a quantity of timber as shewn by Brayton & Lawbaugh's estimates and that this was in accordance with resolutions passed by the Company. In his examination for discovery Lawler was asked "Was that the substance of your negotiations with Ikeda that the timber was for sale at $1.50 per [40 BCR Page48] M. on Brayton & Lawbaugh's cruise -- that is right?" To which he answered: "Yes, I believe that is right." In fact it is difficult to see how otherwise Fukukawa could know how much the timber would cost him as he had no knowledge either personally or through his agents as to the quantity and had nothing to go on as to the quantity except the Brayton & Lawbaugh estimates and while he had had some information about the situation of the timber, the character of the district and its availability to water transportation I accept his evidence that he entered into the agreements relying upon these estimates upon the question of quantity. It was argued very strongly for the defence that these estimates were really statements of opinion and not statements of fact and that the purchaser entered into the transaction at his peril if he did not choose to investigate for himself the question of the amount of timber. I think I must reject that contention. If a man offers to sell me his orchard which I have not seen and tells me that he estimates that there are 600 trees and that the price is $5 per tree and I agree to pay him the $3,000 and then find that there are only 400 trees, I do not think that he can say "that was only my opinion, you should have looked for yourself." The reason why I agreed to buy is that I relied on his statement that I would get 600 trees which will cost me $5 per tree. He has no right to force me to pay at a greater rate than $5 per tree for I did not agree to pay any more and whether the remedy would be rescission or compensation would depend on the circumstances. It may well be that where, from the nature of the subject-matter it can be seen that the parties were contracting on the basis of substantial accuracy and not absolute accuracy and that, if the Brayton & Lawbaugh estimates varied by a small percentage from the actual facts as found by a reliable cruise, the plaintiff would have no right to rescind as it has not been claimed that the defendant's representatives were guilty of fraud in putting forward these estimates. At the same time, it is somewhat peculiar that no person who was concerned in that cruise was produced as a witness in support of its accuracy which raises a suspicion that it was what is commonly known as a vendor's cruise with the right to the payment of a commission to the cruisers in the event of a sale [40 BCR Page49] but I will assume that there was no fraud in connection with the matter and that the defendant was ignorant that these estimates were wrong by a large percentage and that the case has to be decided on the footing of innocent misrepresentation. That there was a deficiency to the extent of approximately one third I think was satisfactorily established by the witnesses who took part in the Lacey Company's cruise made at the instance of the plaintiffs. Those in charge of this cruise were quite emphatic upon the question that they never turned in a cruise to suit the source of the request and stated positively, as far as they were concerned, that no matter who ordered the cruise the return would be in exact accordance with the facts as far as they could discover them. Notwithstanding a searching cross-examination of their methods of cruising and their methods of computation, their cruise stood the test with possibly an insignificant exception. The very minute criticism to which it was subjected by Mr. Burns in his argument proves too much for if applied to either the Brayton & Lawbaugh cruise or the Wolfe cruise, made at his clients' instance, it would at once demolish both of them and if the hyper-accuracy which he suggests were to be insisted on by the Court it would practically be impossible for any cruise to be made which would comply with such a standard with the result that the Court would be powerless to do justice but I think that if the Court is satisfied that the methods adopted are such as to insure substantial accuracy in the results that that is enough. On the other hand, the so-called cruise made by Wolfe and put forward by the defendants in support of Brayton & Lawbaugh's estimates was rid-

dled in cross-examination both as to the mode of identification of the licences in question with the parcels cruised, the methods of cruising and the methods of computing the volume content of the timber. The evidence at the trial in short establishes that the Brayton & Lawbaugh estimates were grossly wrong to the extent of at least one-third in volume content. Now the case being one of an executory contract into which one of the parties has been induced to enter by the representation that the timber amounted to that stated in the Brayton & Lawbaugh estimates and it being established that that amount was too great by approximately one-third [40 BCR Page50] the question is whether that is a material misrepresentation which entitled the plaintiff to rescind. I think it is. Had the difference been a small percentage it might have been argued that the case was one for the abatement of the purchase-money rather than for rescission but I think that the Court has no right to fasten a new bargain on the plaintiff which differs to so great an extent from the one into which he entered. It would moreover be practically impossible to accurately assess the deficiency in money value as for one reason it must be obvious that it might be a nice question of judgment as to whether any particular area which has been found to contain very much less timber than that which was called for by the contract would still have sufficient timber available to be logged off at a profit and, on the other hand, it might not be just to the defendant to affirmatively say, as against it, that there was only the exact amount of timber as shewn by Lacey & Company's cruise as that cruise was made at the request of the plaintiffs and not by order of the Court and I find from the evidence that there might be a variation of at least upwards of 5 percent between two equally reliable cruises of a large area of timber largely owing to difference of opinion as to the get-at-ability of a given portion of it. But that being the only evidence of reliable cruising which has been adduced, I am bound to hold that the discrepancy is so great that the plaintiffs ought not to be forced to complete, there being no difficulty about restitutio in integrum.

4 It was much pressed that because Fukukawa retained Ikeda to look after his interests in British Columbia, after he had agreed to buy but before the agreements were formally drawn up, this amounted in some way or other to a bribe of the defendant's agents and that, therefore, be is not rectus in curia. I cannot comprehend the argument. There was no secrecy about it as Ikeda, acting as the plaintiffs' agent on numerous occasions, negotiated with the defendant, for extensions of time without any protest by the defendant or it even occurring to it that he was still their agent. If I engage a land agent to find me a buyer for my house there is no law that I know of to prevent the buyer from afterwards engaging the agent to collect the rent. Why should not Fukukawa, who trusted Ikeda, appoint him to look after his interests in British Columbia? [40 BCR Page51]

5 With regard to the defence of waiver based on the extensions of time, I think it fails. Waiver postulates knowledge and I accept the account given by Fukukawa of the interview with West supported as it is by Hattori's evidence and his statement that he had no actual knowledge of the shortage until the attempted sale to the Powell River Company and it is therefore not open to the defendant to object that its representations on a material question of fact were given full faith and credit by the plaintiffs.

6 Then there is the contention that because an error had been found in December, 1920, in the additions of the Brayton & Lawbaugh estimates that that put the plaintiff on his enquiry. It is, in my opinion, wholly untenable. That had nothing to do with the question of the accuracy of the cruise itself. It was an error in the compilations and moreover the plaintiff had received an assurance from the secretary that any further errors discovered would be corrected on the same basis. Then there is the contention that because it was reported to him that the Whalen Pulp Company stated they found a shortage in respect of some of the timber which they had cruised and were proposing to buy he

was put on enquiry. It was of course natural enough for him to consider that this was merely depreciatory information coming from an intending buyer as he had no actual cruise put before him but, as he was not intending to sell, there was no reason why he should investigate especially in view of the assurance already referred to. The contention therefore amounts to nothing more than that he owed a duty to the defendant to test, at his own expense, the assertions of a possible buyer instead of relying, as he had a right to do, on the defendant's representations. And generally on the question as to Fukukawa being put on enquiry, it seems to me that the acts of the defendant were such as not only not to arouse suspicion but to encourage him to go on with his payments by confirming him in his reliance on the estimates which were the basis of the contract and in the belief that he had made a good bargain. Else what was the point in West writing on March 26th, 1923, that

> "we are getting good offers for several tracts of our timber anywhere from $3 to $4 per M."

7 And again on October 29th, 1923: [40 BCR Page52]

> "We just sold a small tract of British Columbia timber at $3.50 per M. I can see plainly now that you will make a nice profit on your investment."

8 And again on June 9th, 1924:

> "We have sold nearly a million dollars worth of timber to loggers at from $3 to $4 board measure per M."?

although any suggestion made by Fukukawa during his financial difficulties that the contract should be reconstituted on the basis of the payments already made was always peremptorily rejected. Again, on July 26th, 1924, West writes the plaintiff encouraging him to let a long time cutting contract so as the better to enable him to make his payments. Of course if he had done that he would have got deeper into the mire and there would have been no escape by way of rescission.

9 The result is that if the parties cannot agree upon the quantity of timber that ought to be paid for at the contract rate and to carry out the contract on that basis, the plaintiffs will be entitled to judgment affirming the rescission and to repayment of the amount claimed and any payments necessarily made to keep the licences in good standing plus legal interest from the date of the service of the writ but the details of the judgment will be reserved to be dealt with on the settlement of the minutes.

10 I would like to say in conclusion that I am greatly indebted to the learned counsel for the written arguments which have reduced the labour of the Court to a minimum.

DOMINION
LAW REPORTS

CITED [1928] D.L.R.

REPORTS OF ALL REPORTABLE CANADIAN CASES FROM ALL THE COURTS OF CANADA INCLUDING ALL DECISIONS OF THE SUPREME COURT OF CANADA AND ALL CANADIAN DECISIONS OF THE PRIVY COUNCIL.

VOL. 3

[1928]

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ANNOTATED

Annotations or briefs, prepared by experts in their respective branches of law, covering the whole law of Canada are included in the D.L.R to date. A consolidated table of Annotations is published at the beginning of each completed volume.

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Foot of York St.
1928.

Ont.
S.C.
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Wright, J.

ment the onus is upon the plaintiff who brings an action at law against the defendant to show that the dispute is one which ought not to be referred to arbitration, so that the plaintiff has to discharge that onus in the present case.

A careful perusal of the last cited case will show that the decision was largely based upon the fact that the agreement dealt with matters of a technical nature and provided for a reference to an engineer who was skilled in such matters. See particularly the judgment of Lord Hanworth, M. R., at p. 386.

It would appear from the judgment cited that if the question to be decided is one of law, or relating to the construction of the agreement, or one of mixed law and fact, the Court will allow the action to proceed. As pointed out in these cases, if it is probable that questions of law will arise which ultimately will come before the Court for decision, an action will be allowed to proceed.

As already stated, one of the main points to be decided in this case as to the right of the defendant to be credited with the payments which it has already made, on a different basis from that found by the arbitrators to be a proper basis and there is also a question as to the liability for interest, both of which are at least mixed questions of law and fact.

Having in view all these circumstances, I think my discretion ought to be exercised by refusing the motion and allowing the action to proceed in the ordinary way.

The motion will therefore be dismissed—costs in the cause.

Motion dismissed.

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FUKUKAWA et al. v. AMERICAN TIMBER HOLDING Co.

British Columbia Supreme Court, Hunter, C.J.B.C. April 20, 1928.

Vendor and Purchaser VII D—Recission—Timber—Discrepancy in estimates.

A discrepancy of approximately one third in the amount of timber on certain land between the estimates on the faith of which the purchaser bought and reliable estimates of the actual amount, is a good ground for rescission of a contract of purchase and sale of timber licences.

ACTION for rescission of a contract for the purchase of certain timber limits.

E. C. Mayers, and *G. S. Clark*, for plaintiffs.

W. E. Burns, and *K. Walkem*, for defendant.

HUNTER, C.J.B.C.:—These are consolidated actions, one brought by the plaintiffs against the American Timber Holding Co. for rescission and the other brought by the American Timber Co. for specific performance of two agreements, dated March 21, 1920, for purchase and sale of a total of 42 Queen Charlotte Island timber licences.

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Hunter, C.J.B.C.

The plaintiff Fukukawa, and the Queen Charlotte Timber Holding Co. (in which Fukukawa is the chief shareholder) which subsequently acquired his interest, are the plaintiffs in the consolidated actions and at the time of the making of these agreements Fukukawa was resident in Tokyo while the defendant company had its general office in Milwaukee, Wisconsin. The agreements were negotiated in Japan during January and February 1920 between Fukukawa and one Ikeda who was acting as sub-agent for Lawler, the British Columbia resident agent of the defendant company.

It was admitted at the trial that for the purpose of these negotiations Ikeda was the defendants' agent as he had taken a commission on the sale from the defendants. The total purchase-price amounted to $1,583,195.50. The agreements provided for this amount to be paid by instalments over a term of 5 years with interest of 6%. Owing to financial difficulties arising chiefly from the earthquake in Japan the time for the payment of some of the instalments was extended from time to time by subsequent agreements. At the time of the negotiations in Japan, Ikeda exhibited to the plaintiff blue prints and estimates of the amount of timber said to exist on the land covered by the licenses made up by the firm of Brayton & Lawbaugh who were engaged in the timber cruising business. According to Fukukawa, Ikeda assured him that these estimates were correct. They were admittedly given Ikeda by Lawler for the purpose of promoting a sale and Ikeda testified that Lawler told him they were correct and Lawler did not appear as a witness to contradict Ikeda's statement. The estimates stated that there was a total quantity of 1,550,533,000′ of timber.

Up to the time of plaintiffs' action Fukukawa had paid in respect of principal sums and interest the sum of $1,110,164.92 to which should be added the cost of exchange amounting to $57,043.82 making a total sum of $1,167,208.74 and the plaintiffs' action is for rescission and repayment on the ground that Fukukawa was induced to enter into the agreements by a material misrepresentation, *viz.*, that a quantity of timber existed as set forth in Brayton & Lawbaugh estimates, whereas shortly before he brought the action he discovered by means of the cruise hereinafter referred to that there was a shortage to the extent of 34.6%.

In the fall of 1925 the plaintiffs had entered into a contract

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with another company for a sale of a portion of the timber covered by the Brayton & Lawbaugh estimates, and it was reported to Fukukawa that after the intending purchasers cruised the timber they found such a shortage that they refused to proceed further in the matter and that a similar discovery was made with respect to several other licenses. Whereupon Ikeda, who, after the agreements had been executed, had become, and then was, the agent resident in British Columbia to look after Fukukawa's interests, wrote West, the secretary of the defendant company, on March 6, 1926, requesting that the time for payments then falling due should be extended until the matter was cleared up. The defendants refused to recognize any responsibility in connection with the alleged shortage and insisted upon the contract being carried out and hence the litigation.

Part of the argument turned on the question as to whether the agreements were for a lump sum without any reference to a rate per M. or whether the basis of the contract was an agreement to pay for a stated quantity of timber at the rate of $1.50 per M. The agreements themselves provided for the payment of a named sum payable in certain instalments without specifying that the amount had been arrived at on the basis of $1.50 per M. As to this question, I think there can be no doubt that the agreements were arrived at on the basis that the vendor was selling and the purchaser was buying the timber at the rate of $1.50 per M. and that this is demonstrated by the fact that at the time of the negotiations the Brayton & Lawbaugh estimates were the only statements as to the quantities of timber which were before the plaintiff; that the sums named in the agreements were actually, with the exception of 50c, which is no doubt a clerical error, the number of M. feet stated in the estimates multiplied by this factor; that a reduction for any timber that would be found to have been removed from the lands by the Imperial Munitions Board was fixed at the rate of $1.50 per M.; that it was provided that any loss by fire during the currency of the contract should be equally divided and be computed at a rate not to exceed $1.50 per M. and that a reduction at this rate was made for an error in the addition of the total estimates discovered by Fukukawa's agent, Tsukioka, in the same year that the agreements were entered into.

That the quantities shown by the Brayton & Lawbaugh estimates to be paid for at the rate of $1.50 per M. forms the core of the contract is also borne out by the correspondence which shows that that at any rate was the intention of the defendants. Before the agreements were entered into, *viz.*, December 23, 1919, Lawler writes West, the defendant's secretary, that, "my

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opinion is that the Japs mean business and are going to buy this timber at the price I made of $1.50 per M. on your estimate."

On January 19, 1920, Lawler wires Starnes, the vice-president at Milwaukee:—"Ikeda has requested his man to see me and get detailed estimates on such licence based upon a price of $1.50 per M. board measure, and on quantity of timber as shown by Brayton & Lawbaugh estimates. I have written Mr. West to send same," and on January 21, 1920, West writes Ikeda to the effect that the price was $1.50 per M. board measure and on a quantity of timber as shown by Brayton & Lawbaugh's estimates and that this was in accordance with resolutions passed by the company. In his examination for discovery Lawler was asked:—"Was that the substance of your negotiations with Ikeda that the timber was for sale at $1.50 per M. on Brayton & Lawbaugh's cruise—that is right?"

To which he answered:—"Yes, I believe that is right."

In fact it is difficult to see how otherwise Fukukawa could know how much the timber would cost him as he had no knowledge either personally or through his agents as to the quantity and had nothing to go on as to the quantity except the Brayton & Lawbaugh estimates, and while he had had some information about the situation of the timber, the character of the district and its availability to water transportation, I accept his evidence that he entered into the agreements relying upon these estimates upon the question of quantity. It was argued very strongly for the defence that these estimates were really statements of opinion and not statements of fact and that the purchaser entered into the transaction at his peril if he did not choose to investigate for himself the question of the amount of timber. I think I must reject that contention. If a man offers to sell me his orchard which I have not seen and tells me that he estimates that there are 600 trees and that the price is $5 per tree and I agree to pay him the $3,000 and then find that there are only 400 trees, I do not think that he can say "that was only my opinion, you should have looked for yourself."

The reason why I agreed to buy is that I relied on his statement that I would get 600 trees which will cost me $5 per tree. He has no right to force me to pay at a greater rate than $5 per tree for I did not agree to pay any more and whether the remedy would be rescission or compensation would depend on the circumstances.

It may well be that where, from the nature of the subject-matter it can be seen that the parties were contracting on the basis of substantial accuracy and not absolute accuracy and that,

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if the Brayton & Lawbaugh estimates varied by a small percentage from the actual facts as found by a reliable cruise, the plaintiff would have no right to rescind as it has not been claimed that the defendant's representatives were guilty of fraud in putting forward these estimates. At the same time, it is somewhat peculiar that no person who was concerned in that cruise was produced as a witness in support of its accuracy which raises a suspicion that it was what is commonly known as a vendors' cruise with the right to the payment of commission to the cruisers in the event of a sale but I will assume that there was no fraud in connection with the matter and that the defendants were ignorant that these estimates were wrong by a large percentage and that the case has to be decided on the footing of innocent misrepresentation.

That there was a deficiency to the extent of approximately one-third I think was satisfactorily established by the witnesses who took part in the Lacey Company's cruise made at the instance of the plaintiffs. Those in charge of this cruise were quite emphatic upon the question that they never turned in a cruise to suit the source of the request and stated positively, as far as they were concerned, that no matter who ordered the cruise the return would be in exact accordance with the facts as far as they could discover them. Notwithstanding a searching cross-examination of their methods of cruising and their methods of computation, their cruise stood the test with possibly an insignificant exception. The very minute criticism to which it was subjected by Mr. Burns in his argument proves too much for if applied to either the Brayton & Lawbaugh cruise or the Wolfe cruise, made at his client's instance, it would at once demolish both of them and if the hyper-accuracy which he suggests were to be insisted on by the Court it would practically be impossible for any cruise to be made which would comply with such a standard with the result that the Court would be powerless to do justice but I think that if the Court is satisfied that the methods adopted are such as to insure substantial accuracy in the results that that is enough.

On the other hand, the so-called cruise made by Wolfe and put forward by the defendants in support of Brayton & Lawbaugh's estimates was riddled in cross-examination both as to the mode of identification of the licences in question with the parcels cruised, the methods of cruising and the methods of computing the volume content of the timber. The evidence at the trial in short establishes that the Brayton & Lawbaugh estimates were grossly wrong to the extent of at least one-third in volume content.

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Now the case being one of an executory contract into which one of the parties has been induced to enter by the representation that the timber amounted to that stated in the Brayton & Lawbaugh estimates and it being established that that amount was too great by approximately one-third, the question is whether that is a material misrepresentation which entitled the plaintiff to rescind. I think it is. Had the difference been a small percentage it might have been argued that the case was one for the abatement of the purchase-money rather than for rescission but I think that the Court has no right to fasten a new bargain on the plaintiff which differs to so great an extent from the one into which he entered. It would moreover be practically impossible accurately to assess the deficiency in money value as for one reason it must be obvious that it might be a nice question of judgment as to whether any particular area which has been found to contain very much less timber than that which was called for by the contract would still have sufficient timber available to be logged off at a profit, and, on the other hand, it might not be just to the defendants to affirmatively say, as against them, that there was only the exact amount of timber as shown by Lacey & Co.'s cruise as that cruise was made at the request of the plaintiff and not by order of the Court and I find from the evidence that there might be a variation of at least upwards of 5% between two equally reliable cruises of a large area of timber largely owing to difference of opinion as to the get-at-ability of a given portion of it. But that being the only evidence of reliable cruising which has been adduced, I am bound to hold that the discrepancy is so great that the plaintiff ought not to be forced to complete, there being no difficulty about *restitutio in integrum*.

It was much pressed that because Fukukawa retained Ikeda to look after his interest in British Columbia, after he had agreed to buy but before the agreements were formally drawn up, this amounted in some way or other to a bribe of the defendants' agents and that, therefore, he is not *rectus in curia*. I cannot comprehend the argument. There was no secrecy about it as Ikeda, acting as the plaintiffs' agent on numerous occasions, negotiated with the defendants for extensions of time without any protest by the defendants or it even occurring to them that he was still their agent. If I engage a land agent to find me a buyer for my house there is no law that I know of to prevent the buyer from afterwards engaging the agent to collect the rent. Why should not Fukukawa, who trusted Ikeda, appoint him to look after his interests in British Columbia?

With regard to the defence of waiver based on the extensions

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of time, I think it fails. Waiver postulates knowledge and I accept the account given by Fukukawa of the interview with West supported as it is by Hattori's evidence and his statement that he had no actual knowledge of the shortage until the attempted sale to the Powell River Co. and it is therefore not open to the defendants to object that their representations on a material question of fact were given full faith and credit by the plaintiff.

Then there is the contention that because an error had been found in December, 1920, in the additions of the Brayton & Lawbaugh estimates that that put the plaintiff on his inquiry. It is, in my opinion, wholly untenable. That had nothing to do with the question of accuracy of the cruise itself. It was an error in the compilations and moreover the plaintiff had received an assurance from the secretary that any further errors discovered would be corrected on the same basis. Then there is the contention that because it was reported to him that the Whalen Pulp Co. stated they found a shortage in respect of some of the timber which they had cruised and were proposing to buy he was put on inquiry. It was of course natural enough for him to consider that this was merely depreciatory information coming from an intending buyer as he had no actual cruise put before him but, as he was not intending to sell, there was no reason why he should investigate especially in view of the assurance already referred to. The contention therefore amounts to nothing more than that he owed a duty to the defendants to test, at his own expense, the assertions of a possible buyer instead of relying, as he had a right to do, on the defendants' representations. And generally on the question as to Fukukawa being put on inquiry, it seems to me that the acts of the defendants were such as not only not to arouse suspicion but to encourage him to go on with his payments by confirming him in his reliance on the estimates which were the basis of the contract and in the belief that he had made a good bargain. Else what was the point in West writing on March 26, 1923, that:—"We are getting good offers for several tracts of our timber anywhere from $3 to $4 per M."

And again on October 29, 1923:—"We just sold a small tract of British Columbia timber at $3.50 per M. I can see plainly now that you will make a nice profit on your investment."

And again on June 9, 1924:—"We have sold nearly a million dollars worth of timber to loggers at from $3 to $4 board measure per M."

Although any suggestion made by Fukukawa during his financial difficulties that the contract should be re-constituted on

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the basis of the payments already made was always peremptorily rejected. Again, on July 26, 1924, West writes the plaintiff encouraging him to let a long time cutting contract so as the better to enable him to make his payments. Of course, if he had done that he would have got deeper into the mire and there would have been no escape by way of rescission.

The result is that if the parties cannot agree upon the quantity of timber that ought to be paid for at the contract rate and to carry out the contract on that basis, the plaintiffs will be entitled to judgment affirming the rescission and to repayment of the amount claimed and any payments necessarily made to keep the licences in good standing plus legal interest from the date of the service of the writ but the details of the judgment will be reserved to be dealt with on the settlement of the minutes.

I would like to say in conclusion that I am greatly indebted to the counsel for the written arguments which have reduced the labour of the Court to a minimum.

Judgment for the plaintiff.

SMITH et al. v. ELROSE RURAL TELEPHONE Co. Ltd.

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Saskatchewan King's Bench, Macdonald, J. April 2, 1928.

Companies IV D—Borrowing money—Ultra vires—Rights of creditor.

A person who has lent money to a company which has been applied in the payment of the legal debts of the company may recover the same although the company had no power to borrow.

ACTION on a promissory note.

J. W. Estey, K.C., for plaintiffs; *R. Dingwall*, for defendant.

MACDONALD, J.:—In this action the plaintiffs claim against the defendant as the maker of a certain promissory note, dated May 1, 1920, signed and sealed by the defendant, whereby the defendant promised to pay to the plaintiffs on or before May 1, 1921, the sum of $2,750, with interest at 12% per annum, on which note there was a payment made on January 3, 1922, of $1,696.10.

In the alternative, the plaintiffs claim that on May 1, 1919, the defendant borrowed from the plaintiffs the sum of $2,500, and that the said sum was used and expended by the defendant for the purpose of purchasing and paying for real and personal property for the use and benefit of the defendant's business.

The defendant is a Rural Telephone Co., incorporated under the provisions of the Rural Telephone Act, R.S.S. 1920, c. 96, and amendments thereto. Under s. 31 of the said Act the de-