CV 06226

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

923087 N.W.T. LTD.

Plaintiff

- and -

ANDERSON MILLS LTD., ALLAN ANDERSON, MACKENZIE WOOD PRODUCTS LTD., TRANS NORTH DEVELOPMENTS LTD., ROY PETERSON, and WAYNE WILKINSON

Defendants

Trial of a preliminary issue respecting interpretation of a contract.

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J. Z. VERTES

Heard at Yellowknife, Northwest Territories
on September 3 & 4, 1996

Reasons filed: September 9, 1996

Counsel for the Plaintiff: James D. Brydon

Counsel for the Defendants: Tracey M. Foster

CV 06226

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

923087 N.W.T. LTD.

Plaintiff

- and -

ANDERSON MILLS LTD., ALLAN ANDERSON, MACKENZIE WOOD PRODUCTS LTD., TRANS NORTH DEVELOPMENTS LTD., ROY PETERSON, and WAYNE WILKINSON

Defendants

REASONS FOR JUDGMENT

1 In this action the plaintiff seeks damages for breach of contract and breach of fiduciary duty. The action is under case management and, as a result of a case management conference, the parties agreed to hold a summary trial to determine a preliminary issue.

Facts:

2 The plaintiff, 923087 N.W.T. Ltd., is a family-owned company run by Mr. Eugene Patterson. He has been involved in the logging business for his entire working life. In 1993, Patterson approached Mr. Allan Anderson, principal of the defendant Anderson Mills Ltd., with the idea of forming a co-operative effort to harvest timber from a specific

area near Fort Simpson, Northwest Territories. Based on the evidence presented to me, I have no hesitation in concluding the following:

1. Patterson wanted Anderson to be the "front man" for the purpose of obtaining the necessary licences and government approvals because (a) Patterson had encountered difficulties previously with local groups in the Fort Simpson area and (b) Anderson had a long-standing business operation in the area and thus could provide a local profile for this project.

2. Patterson paid all of the expenses necessary to obtain the required government approvals for the project and also advanced $1,000 to Anderson to cover any expenses his company may incur.

3. Anderson gave Patterson express authority to deal with government officials in the name of and on behalf of Anderson Mills Ltd.

4. Anderson understood his role to be that of a "front man or agent" for Patterson for the purpose of holding the necessary licence for this project. The description "front man or agent" are the exact words used by Anderson in his testimony before me.

3 In October, 1993, the Government of the Northwest Territories issued a timber cutting licence, number 00676, to Anderson Mills Ltd. authorizing it to harvest timber from an area described as "Martin Hills". The licence authorized the harvesting of 125,000 cubic metres in equal annual quantities over a period of 5 years. Patterson prepared the required documents for this licence and paid the licence fee. Patterson then attempted

to obtain a land use permit but, because of objections from local groups in the area, the government decided to relocate the harvesting area. Thus in November, 1994, an amended timber cutting licence number 00676 was issued to Anderson Mills Ltd. authorizing it to cut the same quantity of timber but from a different area. Patterson then went on to prepare the necessary documentation for a land use permit which was eventually issued in April, 1995. He also prepared an "annual operating plan" for approval by the government. In this document, Anderson Mills Ltd. is listed as the "licencee" while the plaintiff company is identified as the "contractor".

4 Prior to this, the two parties, Patterson and Anderson, made a formal agreement. This document was prepared by Patterson and executed by the two parties on August 29, 1994. It names Anderson Mills Ltd. as "licence owner" and 923087 N.W.T. Ltd. as "contractor-operator". The pertinent parts of this agreement are the following clauses:

> 1. The Contractor-Operator agrees to log, saw and market timber under License number 676, (hereinafter called the "License")
>
> 2. The Contractor-Operator agrees to pay all Territorial and Federal Government fees that are necessarily associated with acquiring and maintaining the License.
>
> 3. The Contractor-Operator agrees to pay all expenses directly incurred to log, saw and market the lumber.
>
> 4. The Contractor-Operator will pay to the License Owner a fee of Two Dollars ($2.00) per thousand foot board measure (MGBM) for all lumber sold from the license.

5 In October, 1995, Anderson revoked Patterson's authority to act on behalf of Anderson Mills Ltd. He had been approached by another party who was interested in obtaining the licence rights. Anderson testified that at that point he thought Patterson was delaying things so as to avoid doing some of the things he undertook to do in the

operating plan. Anderson thought that perhaps they no longer had a contract so he felt he could entertain other interested parties. Eventually, in early 1996, Anderson sold his company to the co-defendant Mackenzie Wood Products Ltd. These proceedings commenced when the defendants refused to recognize what Patterson claims is his exclusive right to harvest timber under Anderson's licence.

Issue:

6 The preliminary issue for determination requires interpretation of the August 29, 1994, agreement between 923087 N.W.T. Ltd. and Anderson Mills Ltd. The parties are agreed that it is a valid contract. The question in dispute is whether that contract provided the plaintiff with the exclusive right to cut timber under Anderson's licence.

Discussion:

7 Both parties maintain that the contract is unambiguous. Plaintiff's counsel submits that the only reasonable interpretation of the portions of the agreement quoted above is that the plaintiff had an exclusive right to log, saw and market timber under the licence. The agreement did not stipulate any limitation on quantity or area and certainly did not say "some" of the timber available under the licence. Defendants' counsel submits, however, that since exclusivity was not expressly stated in the agreement, one cannot impute such a condition into it.

8 Much of the argument before me revolved around the question of what extrinsic evidence one may rely on in the interpretation of a contract. In this case, Patterson testified that the contract had to be exclusive because it was not economically feasible

to divide it up. Anderson testified that the issue of exclusivity was never discussed by he and Patterson and that he never put his mind to that issue. This oral evidence, self-serving and coming after the fact, is not acceptable. What is acceptable, however, is evidence of the surrounding circumstances, the facts known to both parties, and the objectively determined commercial purpose of the parties.

9 Every lawyer is familiar with the parol evidence rule. If the language of the written contract is clear and unambiguous, then no extrinsic evidence may be admitted to alter, modify or contradict the words used in the contract. But difficulty of interpretation is not synonymous with ambiguity. Extrinsic evidence is admissible as an aid to interpretation. This is not the application of the parol evidence rule since the extrinsic evidence goes not to the intention of the parties but to the objective factual circumstances known to the parties at the time which then assists the court to properly interpret the written agreement.

10 In *Acli Limited v. Cominco Ltd.* (1985), 61 B.C.L.R. 177 (C.A.), Lambert J.A. put this proposition very simply:

> The agreement must be interpreted in the factual matrix at the time it was made. Ambiguity is not a pre-condition to a consideration of the factual matrix.

11 This proposition flows from the judgment of Lord Wilberforce in *Reardon Smith Line Ltd. v. Hansen-Tangen*, [1976] 3 All E.R. 570 (H.L.), where he wrote (at pages 574-575):

> No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard

> to is usually described as 'the surrounding circumstances' but this phrase is imprecise: it can be illustrated but hardly defined. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating...
>
> ...what the court must do must be to place itself in thought in the same factual matrix as that in which the parties were. All of these opinions seem to me implicitly to recognise that, in the search for the relevant background, there may be facts, which form part of the circumstances in which the parties contract, in which one or both may take no particular interest, their minds being addressed to or concentrated on other facts, so that if asked they would assert that they did not have these facts in the forefront of their mind, but that will not prevent those facts from forming part of an objective setting in which the contract is to be construed.

12 This proposition is not new or even relatively recent. In *Canada Law Book Co. v. Boston Book Co.* (1922), 66 D.L.R. 209 (S.C.C.), Duff J. quoted an earlier judgment by Lord Davey in *Bank of New Zealand v. Simpson*, [1900] A.C. 182, where he wrote that "extrinsic evidence is always admissible not to contradict or vary the contract but to apply it to the facts which the parties had in their minds and were negotiating about."

13 There is always an interplay between the actual words used in a contract and the context in which the contract was formed. If the meaning of the words used is sensible with reference to external circumstances and that meaning is not excluded by the context then such meaning must be taken to apply. The necessary thing is to keep the text of the agreement in the foreground and the contextual facts in the background.

14 In my opinion the words of the agreement in this case are compatible with the interpretation advanced by the plaintiff. This interpretation is only reinforced when one examines the factual matrix at the time the agreement was made.

15 The contractor, by clause 1 of the agreement, "agrees to log, saw and market timber under licence number 676". There is no limitation as to quantity. The reference to the licence implicitly must refer to the quantity of logs to be cut as authorized by the licence. The contractor further agrees to pay all expenses not just with respect to the actual operation but also with respect to the maintenance of the licence. In exchange, the contractor will pay the licencee a set fee of $2.00 per thousand board feet of lumber sold. The arrangement encapsulated by the agreement is the same as that testified to by both Patterson and Anderson: this project was Patterson's project with Anderson acting as a front for purpose of holding the licence.

16 I am reinforced in this conclusion by the evidence as to what transpired, i.e., Patterson paying all expenses to obtain the licence; Patterson being responsible for all related documentation; Anderson giving authority to Patterson to do whatever was necessary to obtain the licence and further approvals. It seems to me incomprehensible that any business person would think that Patterson would go to the expense and trouble he did without receiving exclusive rights to log this timber or that Anderson would not realize that.

17 Defendants' counsel argued that exclusivity was not specifically stated in the agreement because it was neither contemplated nor agreed to by the parties. Further she submitted that exclusivity was not necessary for the business efficacy of this arrangement. It is conceivable that the logging rights could have been divided up by Anderson among several contractors. But it is not reasonable to conclude that he thought he could do so when it was Patterson who was effectively in charge of the entire project. Anderson left everything up to Patterson. In my opinion there was no explicit reference

to exclusivity in the contract because both parties simply assumed that to be the case. Patterson would log the timber while Anderson would, in exchange for a fee, put his company's name on the licence.

18 When I consider the admissible evidence as to circumstances, the words in the agreement fit comfortably within the factual matrix existing at the time. The words are capable of a meaning that makes sense in light of the circumstances. The only reasonable interpretation of this agreement is that the plaintiff had the exclusive right to log the timber under Anderson's licence. I have no doubt that this interpretation would have been obvious to both parties had it been put to them at the time the agreement was executed.

Conclusion:

19 I find that the contract of August 29, 1994, provided the plaintiff an exclusive right to log timber under Anderson's licence. I need not go further than that at this time. I will await word from counsel as to the next step in these proceedings.

20 Costs were not discussed so I will leave it open to counsel to make submissions on costs if necessary.

J. Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 9th day of September, 1996

Counsel for the Plaintiff: James D. Brydon

Counsel for the Defendant: Tracey M. Foster

CV 06226

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

923087 N.W.T. LTD.

Plaintiff

- and -

ANDERSON MILLS LTD., ALLAN ANDERSON, MACKENZIE WOOD PRODUCTS LTD., TRANS NORTH DEVELOPMENTS LTD., ROY PETERSON, and WAYNE WILKINSON

Defendants

Reasons for Judgment of the Honourable Mr. Justice J. Z. Vertes