Date: 1997 090 23
Docket: 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 an action alleging breach of contract and fiduciary duty.

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

Heard at Yellowknife , Northwest Territories
on July 14, 15, 16, 17 & 18, 1997

Reasons filed: September 23, 1997

Counsel for the Plaintiff: James D. Brydon

Counsel for the Defendants: Tracey M. Foster

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REASONS FOR JUDGMENT

[1] In this action the plaintiff seeks damages for breach of contract and breach of fiduciary duty. The defendants had filed a counterclaim but that was dismissed at the conclusion of the trial after counsel indicated that it was abandoned. In a previous judgment, released on June 16, 1997, I granted summary judgment on behalf of the defendants, Mackenzie Wood Products Ltd., Trans North Developments Ltd., Roy Peterson and Wayne Wilkinson, and dismissed the claims as against those parties. These are my reasons for judgment with respect to the claims brought against the remaining defendants.

Facts:

[2] The plaintiff, 923087 N.W.T. Ltd., is a privately-owned company. It is directed by Eugene Patterson. In 1993, Patterson proposed what he called a "joint venture" to the defendant Allan Anderson. Both Patterson and Anderson have long experience in the logging industry in the Northwest Territories. The proposal was that Patterson's company, the plaintiff, and Anderson's company, the defendant Anderson Mills Ltd., band together to obtain logging rights to a certain area of land near Ft. Simpson. Patterson thought he needed Anderson for local liaison since Patterson had previously encountered political difficulties in obtaining logging rights in that area.

[3] In October, 1993, the Government of the Northwest Territories issued a timber cutting licence to Anderson Mills Ltd. It was for a term of 5 years and authorized the licencee to harvest 25,000 cubic metres of timber in each year. The arrangement between the two companies was subsequently reduced to writing in August, 1994:

THIS AGREEMENT made the 29 day of August 1994
BETWEEN:

ANDERSON MILLS LTD.
(hereinafter called the "License Owner")

OF THE FIRST PART

- and -

923087 N.W.T. Ltd.
(hereinafter called the "Contractor-Operator)

OF THE SECOND PART

CONTRACT

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 (MFBM) for all lumber sold from the license.

5. The License Owner, if and when required by the Contractor-Operator, agrees to supervise, temporarily oversee or perform work associated with the logging, sawing and marketing of the timber.

6. The Contractor-Operator agrees to pay the License Owner a fee for services contained in paragraph 5. The fee and terms are to be negotiated between the parties.

7. The License Owner agrees to provide its existing yard for the use of the Contractor-Operator as a sawmill and log and lumber storage to the extent that the License Owner has available.

8. The License Owner agrees to provide liaison with the various communities and levels of government as required for the maintenance of the License.

[4] In another previous set of Reasons for Judgment, released on September 9, 1996, I held that this agreement provided the plaintiff with the exclusive right to log timber under Anderson Mills' licence. Anderson himself testified that his role was to be a "front man or agent" on behalf of Patterson. It seems to me that, on a plain reading of the agreement, it should have been readily apparent to anyone that the plaintiff was to be the operating entity and the defendant company would simply collect a fee for the use of its licence authority.

[5] No logging was done in the first year of the licence because of local opposition to the grant of harvesting rights in the specified area. Accordingly, the parties and the government, as represented by officials of the Department of Renewable Resources, negotiated on an alternate area for harvesting. In November, 1994, an amended licence was issued designating a new area. The term of the licence was, however, as initially set (5 years expiring on November 1, 1998) and the volume to be harvested remained the same. Shortly thereafter, in recognition that the licence now had in effect a 4 year term, the annual harvest volume was adjusted to 31,250 cubic metres per year.

[6] Having the licence is only the first step to eventually being able to cut down trees. The licencee was then required to formulate a Long Term Development Plan, an Economic Benefits Plan and an Annual Operating Plan. Various other permits had to be obtained, including land use permits from both the federal and territorial governments, and a mill site had to be established. Finally, on-site approval had to be given by Renewable Resources prior to the start of work. Needless to say not all of this was accomplished so as to allow harvesting to start in the second year of the term (1994-1995). Pursuant to the conditions of the original licence, the annual volume was to be harvested during winter operations from November to March in each year.

[7] Patterson continued work on the documents and permits necessary to obtain approval to commence harvesting. The 1994-1995 season was lost but he was hoping to start work on the 1995-1996 harvest. By October 13, 1995, Patterson had obtained approval of the Annual Operating Plan for that season; he had in hand a mill licence and a transport permit; and, he had obtained the necessary land use permits. He still had to set up a mill (a deadline having been set for January 1, 1996) and he still had to obtain government approval to his harvesting plan, but these were all matters of on-going discussion. Up until then Patterson had been dealing with the various government departments through an express authority granted by Anderson.

[8] On October 26, 1995, Anderson informed the government that he had withdrawn the authority of Patterson to act on his behalf with respect to the licence. He also informed the government that he was in the process of negotiating for the sale of the licence. Patterson then tried to submit his harvest plans, or "lay-outs", to Renewable Resources for approval. As a

result of Anderson's communication of October 26th, the department set a requirement that Anderson, as the licencee's director, sign off on the plans. Patterson then sent the plans to Anderson asking him to sign them so they can be submitted to the department. Anderson did not sign or submit them.

[9] At this time Anderson entered into negotiations for the sale of the licence or his company or both. Those negotiations were with Messrs. Wilkinson and Peterson, on behalf of Mackenzie Wood Products Ltd. They knew about the licence and wanted to obtain the harvest rights. They also knew about Anderson's contract with Patterson's company but did not, apparently, understand its full implications. They were led to believe, to a great extent by Anderson, that the contract was "dead" because nothing had been done under it.

[10] In late November, 1995, after Patterson became aware of Anderson's intentions, there was a flurry of correspondence between lawyers. Patterson put the others on notice that he had the exclusive right to harvest under the licence because of his agreement with Anderson Mills. Patterson also, however, indicated his willingness to negotiate a new deal with the new owners. Further negotiations were held and draft agreements were circulated but eventually to no avail.

[11] In the meantime Patterson still had taken no steps to establish the mill and he had not received approval for his harvest plans. So, harvesting was not started in late 1995.

[12] On January 11, 1996, Anderson sold his shares in Anderson Mills Ltd. to Mackenzie Wood Products Ltd. Wilkinson and Peterson knew that by buying the shares they were to end up with Anderson Mills Ltd. as an operating entity with all of its contractual commitments. Once negotiations with Patterson broke off, however, they refused to recognize his exclusivity rights and the on-going operation of the 1994 contract. Patterson elected to treat the contract as having been breached by Anderson Mills Ltd. and thus terminated. On January 18, 1996, this action was launched.

[13] There were, of course, many more events in the sequence of things, some of them the subject of disputed evidence, but this is the pertinent history. Some other facts will emerge in my discussion of the claims made against the two remaining defendants.

Breach of Contract:

[14] The breach of contract claim is directed solely at the defendant Anderson Mills Ltd. There were numerous allegations during the trial from both sides as to actions, or lack of action, that were breaches of the contract. All that to me is irrelevant until we get to the period of October and November, 1995. Up until that time Patterson kept working on the various facets of the project but at no time was he in a position to commence operations. This was due to a number of reasons, not the least of which was his on-going desire to debate over his harvesting plans with government officials. So, if there were breaches by Anderson Mills Ltd. prior to this time period, they were effectively waived by the plaintiff and, in any event, no damages flow from them.

[15] Plaintiff's counsel relied primarily on two incidents as evidence of breach by the defendant: (1) the withdrawal of Patterson's signing authority; and, (2) the refusal or neglect by Anderson to sign off on the lay-out plans and forward them on to Renewable Resources. Defendants' counsel submitted that Anderson's actions were reasonable since he had valid grounds to believe that Patterson had renounced the contract through non-performance.

[16] In my opinion the two acts complained of by the plaintiff do amount to breaches of the contract. There is an obligation implicit in the agreement between the two companies for co-operation and good efforts in achieving the object of the agreement, that being the harvest of the timber. Anderson Mills Ltd. expressly undertook to provide liaison with the government "as required for the maintenance of the licence" (see clause 8). These two acts in October, 1995, were incompatible with that undertaking and prevented the plaintiff from eventually realizing the benefits of the agreement.

[17] Having said that, however, it is also my opinion that no consequences flow from these breaches. I conclude that for two reasons. First, the plaintiff was in no position in any event to commence harvesting. Second, the plaintiff, after these breaches and after becoming aware of Anderson's plans to sell his company, willingly entered into negotiations for a new arrangement. Patterson in effect condoned those breaches by his willingness to carry on with the project (whether under the terms of the 1994 contract or new terms). In my opinion, the conclusive breach of contract was the failure of the new directing minds of Anderson Mills Ltd. to honour the exclusive rights granted to the plaintiff by the contract.

[18] On the first point, it is accurate to say that the submission of the lay-out in October was a crucial step toward getting approval to commence harvesting. But other things had to be done. The plaintiff had to have a mill established by January 1st. No steps had been taken to do so. I heard evidence from Paul Kraft, Superintendent for Renewable Resources, that as of November, 1995, there were three critical issues that had to be cleared up before approval would be given to start harvesting: (a) the field lay-out prepared by Patterson was inadequate; (b) the harvest plan had to be agreed upon; and (c) a mill had to be on site. There

is no evidence that any of these items could have been resolved in October or November of 1995.

[19] Furthermore, Patterson was not in a position to commence harvesting because he committed his crews to other work in the fall and early winter months of 1995. He testified that he chose not to harvest under Anderson Mills' licence because he needed lead time to establish the mill and put everything in place to be able to start work. So, in the meantime, he chose to work in other areas on other projects.

[20] I do not accept, however, defendants' argument that Patterson either by words or conduct renounced the contract. Patterson had taken and continued to take steps to advance the project to the approval stage. He continually maintained his aim of eventually harvesting under the licence. The fact that there were important issues that still had to be resolved does not mean that they could not have been resolved in a reasonable time period. None of the problems identified by Kraft were impossible to overcome and indeed, as Kraft acknowledged, the many terms and conditions imposed by government were all subject to negotiation and change.

[21] Defendants' counsel pointed to the lack of a mill on-site, as required by the government, as a major deficiency and argued that it was likely impossible for the plaintiff to meet the January 1, 1996, deadline. That may be true but it is not tantamount to renunciation due to impossibility of performance.

[22] Patterson testified that he had a mill available which would have been refurbished and relocated for the project. This would take time and the work had not begun to prepare the mill. But it could have been done. Kraft testified that the operating plans could have been amended to allow harvesting to start while the mill was being set up. Finally, the January 1st deadline could have been altered as well. There was nothing, either in the regulations governing this project or the attitude of the regulators, as evidenced by Kraft's testimony, that compelled the suspension or cancellation of the licence if specific steps were not taken by specific dates. All that would happen is that the licencee would lose another year's volume. I note that it was not until November, 1996, that Renewable Resources suspended the licence due to the various deficiencies in the plans and the lack of any work to that time.

[23] On the second point, that being the willingness of Patterson to carry on with the project after learning of the breaches in October and November, this is evidenced by his entering into negotiations with the new owners of Anderson Mills Ltd. for a new arrangement. But at no time did Patterson renounce his rights under the 1994 agreement during those negotiations.

[24] Messrs. Wilkinson and Peterson, who on January 11, 1996, became the directors of Anderson Mills Ltd., testified that they were aware of the 1994 contract and that essentially Anderson was functioning as a "front" for the plaintiff for purposes of the licence. They were

also aware that by buying the shares of Anderson Mills Ltd. they would inherit whatever ongoing contractual commitments that company had. But, they testified that they thought the contract with the plaintiff was effectively "dead" and that Patterson had given up on it because no work had yet been done. Nevertheless they were willing to negotiate with Patterson just so there would be a clean slate for the company. When those negotiations broke down, they refused to honour what Patterson expressed to them was his exclusive right to harvest under the licence pursuant to the 1994 contract. That is the effective breach of this contract entitling the plaintiff to treat it as terminated and to sue for damages. Hence I find Anderson Mills Ltd. liable for damages for breach of contract.

Breach of Fiduciary Duty:

[25] In the pleadings the plaintiff alleges that Anderson is personally liable for breach of his fiduciary duty by (a) undermining the plaintiff's efforts in October and November of 1995 by withdrawing signing authority and refusing to submit the lay-out plans, and (b) negotiating for the sale of the licence (being the only asset of worth of his company).

[26] In my opinion a good argument can be made that Anderson violated the obligations of "loyalty, good faith and avoidance of a conflict of duty and self-interest" that are the hallmarks of a fiduciary relationship: *Canson Enterprises Ltd. v Boughton & Co.* (1991), 85 D.L.R. (4th) 129 (S.C.C.). He was in a position to detrimentally affect, indeed to control, the plaintiff's position vis-à-vis the benefits of the timber cutting licence.

[27] I have concluded, however, that even if Anderson breached his personal obligations no damages flow from those breaches. Everything that Anderson did he did in a time-frame when the plaintiff was not yet ready to commence harvesting. His conduct, as detrimental as it may have been to the plaintiff's efforts, was not the only reason the plaintiff had not been given approval to start work. There were other factors which were solely in the control of the plaintiff (such as the establishment of a mill).

[28] What Anderson eventually did do was sell his shares in Anderson Mills Ltd. There was nothing prohibiting him from doing that either in law or in equity or by contract. The new owners of the company could have and should have honoured the company's contractual grant of an exclusive right to the plaintiff to harvest the licence. As I indicated earlier, their failure to do so is the effective breach of the contract and damages flow from that. In any event, even if I found liability for breach of a fiduciary duty, the measure of damages would be the same.

[29] I need not consider this claim further. The action is dismissed as against Anderson personally.

Damages:

[30] The purpose of damages in breach of contract cases is to put the injured party in the same position as far as it can be done as it would have been in had the contract been performed: *Wertheim v Chicoutimi Pulp Co.*, [1911] A.C. 301 (P.C); *Asamera Oil Corp. v Sea Oil & General Corp. et al*, [1978] 6 W.W.R. 301 (S.C.C.).

[31] In this case the plaintiff presented evidence concerning the expenses already paid by it in furtherance of the harvesting project. It was conceded, however, that the plaintiff's claim is directed at compensation for lost profits and so the expenses incurred are not recoverable since they would have been incurred if the contract had been fulfilled.

[32] The evidence on damages was not very thorough. For the plaintiff, the evidence came solely from the mouth of Patterson. For the defendants there was no evidence at all and they relied simply on cross-examination of Patterson. The plaintiff bears the burden of proving damages, whether they be for lost profits or otherwise, on a balance of probabilities. If the plaintiff's evidence goes uncontradicted then that burden is made easier. What must be shown to some degree of certainty beyond speculation is that it is probable that damages were incurred. Then the court must do the best it can with the evidence presented to estimate the damages: *McElheran v Great Northwest Insulation Ltd.*, [1995] N.W.T.R. 120 (C.A.).

[33] Patterson testified that he anticipated a profit margin of 25% on this project. Defendants' counsel submitted that this was unsupported and speculative. But it was unchallenged. Furthermore, it was the evidence of someone with over 34 years of experience in the logging industry in the Northwest Territories. I accept it.

[34] Patterson projected the price of lumber for 1997 and 1998 based upon an averaging of prices for the years of 1994, 1995 and 1996. I agree with this approach. This results in a price of $453.00 per thousand board feet for 1997 and $480.00 for 1998. The annual volume allowed by the licence was 31,250 cubic metres. There was evidence that the government, notwithstanding arguments from Patterson, adopted a conversion rate of 5 cubic metres per one thousand board feet. I accept this rate. This would result in an annual volume limit of 6,250 thousand board feet.

[35] Patterson also testified that while the licence allowed an annual harvest of up to 31,250 cubic metres, one would be allowed a 10% over-run as well. I do not accept this since this too had to be approved by Renewable Resources and there was no evidence they would have done so. It is too speculative.

[36] Patterson also estimated the damages on the assumption that the plaintiff would have been able to harvest at least half of the allowable volume during the 1995-1996 season. I think this also is speculative. There was nothing in the evidence that convinces me that there was even a remote likelihood that the plaintiff would have been able to harvest that season. The

earliest realistic start to operations would have been the 1996-1997 season thereby leaving only two complete seasons on the licence.

[37] Patterson gave evidence of his dealings with lumber brokers. I am satisfied, on a balance of probabilities, that the plaintiff would have been able to market the production from this project and hence realize profits. I therefore accept the claim for loss of profits but not in exactly the manner in which it has been set forth by the plaintiff.

[38] Based on the estimated prices for 1997 and 1998, the total gross amount of revenue, based on 6,250 thousand board feet per year, would be:

(i)	1996 - 1997 (6,250 x $453.00)	=	$2,831,250
(ii)	1997 - 1998 (6,250 x $480.00)	=	3,000,000
			$5,831,250

[39] To the gross amount must be applied some contingency factor. In Waddams, *The Law of Damages* (1983), it is noted "that, in estimating lost profits, the uncertainties of business must be taken into account, and that the plaintiff's optimistic estimate cannot be accepted at face value" (page 623). We are, after all, dealing here with future probabilities and thus damages cannot be assessed as if all of the hoped-for profits were a certainty. In this case there are a number of contingencies that must be considered. The plaintiff may not have been able to harvest the total allowable volume in any one season. The plaintiff may not have been able to sell the total production. There may have been price fluctuations. None of these can be said to be fanciful.

[40] What is an appropriate contingency factor? There is no set guide. One can look, for comparison, to personal injury cases where a contingency factor of 20% to 25% is applied to future loss of income claims: see for example, *Andrews v Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229; *D'Amato v Badger*, [1996] 2 S.C.R. 1071. This may be arbitrary and simplistic but it is the application of simple probability principles. The probability of getting everything as expected is less than 100%. In my opinion a contingency factor of 25% is reasonable.

[41] Applying the contingency factor to the gross amount, one is then able to arrive at an estimated profit:

(iii)	gross amount	-	$5,831,250
(iv)	less contingency (25%)	-	1,457,812
(v)	sub-total	-	4,373,438
(vi)	profit margin (25%)	-	$1,093,359

[42] There are two deductions to be made from the profit. One is the royalty payment of $2.00 per thousand board feet pursuant to the 1994 contract. If one applies the same contingency factor of 25% over the two year production one arrives at $18,750 (12,500 mfbm

x $2 less 25%). Also, one must deduct the sum of $240,000 which Patterson testified was the anticipated cost of refurbishing and relocating the mill as required by the licence. This then leaves a final loss of profits amount of $834,609.

Conclusion:

[43] There will be judgment entered against Anderson Mills Ltd. in the sum of $834,609 plus prejudgment interest as allowed by the applicable statute.

[44] I indicated to counsel at the end of the trial that they will have an opportunity to make submissions as to costs. I will entertain them if necessary but it seems to me that, with the application of the usual rule as to costs following the event, the only point to decide is the appropriate scale of costs. If counsel are unable to agree, they may schedule a special chambers application before me within the next 90 days.

J.Z. Vertes
J.S.C.

Dated at Yellowknife, Northwest Territories
this 23rd day of September, 1997

Counsel for the Plaintiff: James D. Brydon

Counsel for the Defendants: Tracey M. Foster

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