No. 10724
Prince George Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:	
BRINK FOREST PRODUCTS LTD.	REASONS FOR JUDGMENT
PLAINTIFF	
AND:	
MICHAEL GENE MADRIGGA, COUNCIL OF FOREST INDUSTRIES, NORTHWOOD PULP AND TIMBER LTD., NORANDA FOREST INC., and DAVID C. McELROY	OF THE HONOURABLE MR. JUSTICE TAYLOR
DEFENDANTS	

(No. 2)

D. Byl	Counsel for the Plaintiff
S.R. Schachter and G.B. Gomery	Counsel for the Defendant Noranda Forest Products
R.W. Lusk, Q.C. and B.J. Freedman	Counsel for the Defendant Council of Forest Industries

By reasons for judgment dated December 28, 1989, I made certain findings of liability against two of the defendants, Noranda Forest Inc. and the Council of Forest Industries, and invited counsel to provide the court with submissions in writing re-addressing the damage issues.

Because it proved impossible for counsel to complete their submissions until the end of the summer recess, the only opportunity offered by the court calendar for the detailed consideration appropriate to cases of such complexity was unfortunately lost. I must apologize that I find myself as a consequence unable in the end to deal with the issues as fully as I had originally hoped. Now that two years have passed since the end of this long and difficult trial, I can fully understand the desire of the parties to conclude this phase of the litigation, if only that the next may begin.

I will accordingly deal only with the two areas in which I find that damages have been proved.

I am able to find only one claim relating to a specific grading practice which falls within the scope of recovery limited by the December 28, 1989, reasons for judgment. This is the claim for material lost to the plaintiff by virtue of the decision of COFI inspectors to allow "wane dips"--that is to say, areas of wane completely across the face of the board--in grades above economy. The significance of this change, which was not authorized by the published rules nor taught to the plaintiff's graders, is highlighted by results of the Jefferson, Texas, reinspection referred to (at pages 25-26) in the December 28, 1989, reasons for judgment. That incident gives at least some indication of the

extent to which boards valuable to the plaintiff having this defect were diverted to purchasers of material in a higher grade, and shows the potential for mischief inherent in the adoption of informal changes in grading practice.

I do not accept that boards re-assigned by reason of this defect during the spring and summer of 1986 would have been both so numerous and of such high quality as the plaintiff claims. But nor, in light of the Jefferson incident, can the resulting loss be dismissed as of trifling importance.

The plaintiff relies on such cases as ***Wilson v. Roswell*** (1970), 11 D.L.R. (3d) 737 (S.C.C.) and the general principle laid down by Chief Justice Pratt in the old English case ***Armory v. Delamine***, (1822) 93 E.R. 664, adopted by Lord Cairns in ***Hammersmith & City Rail Co. v. Brand et al*** (1869), [1861-73] All E.R. 60 (H. of L.) and referred to in the Supreme Court of Canada in ***Lamb v. Kincaid*** (1907), S.C.R. 516. The authorities establish the proposition that where a plaintiff has proved damages but cannot with precision demonstrate the quantum of loss the court will assess compensation due as best it can, and will not insist on meticulous proof of the amount, and that it will lean in the plaintiff's favour in making its assessment as against a defendant whose wrong has been the cause of the plaintiff's difficulty of proof. This approach has to some extent been reaffirmed, albeit in

a very different context, in ***Huff and Donnelly v. Price et al*** (B.C.C.A. December 3, 1990, Vancouver Registry Nos. CA009320, CA009339 and CA009352).

The defendant COFI knew that the plaintiff would suffer loss by diversion of the pieces in question by Northwood to the higher grade, and that unless a tally was kept of the number of pieces so diverted the plaintiff would have no means of proving the amount of its loss. I do not believe either defendant can be heard to complain that the figure adopted by the court is necessarily an estimation. As against the defendant COFI, however, the estimation should properly lean in the plaintiff's favour, since it was COFI which knowingly and wrongfully created the problem.

I assess damages in respect of adoption of the unpublished "wane dip" grading change during the spring and summer of 1986 against the defendant COFI at $125,000, somewhat under half the plaintiff's claim. Since Noranda was a 'wholesaler' only, and not the manufacturer of the lumber, and since its affiliate's knowledge of the unauthorized diversion cannot in law be ascribed to it, I assess damages against Noranda at $75,000. These damages reflect the difference in value between wood supplied by Noranda to the plaintiff and that which ought to have been supplied. The damages are awarded in contract against both defendants and as against the defendant COFI also in tort law negligence for breach

of the duty of care which arose as a result of inducement of the plaintiff, as a purchaser, to rely on the COFI grading system. The "market" pricing system applied under the contract between Noranda and the plaintiff would not have resulted in a higher price having been charged to the plaintiff by Noranda had the lumber been graded according to the published rules, because those in the market knew nothing of any change having taken place in applicable grading standards, and must have assumed they were at all times receiving wood graded to the published rule.

I have been unable to come to any firm conclusion from a consideration of the documents concerning wane dips dated November 4, 1986, which were prepared by the defendant Northwood for the guidance of its graders. I am unable to say from the evidence referred to that there is a basis for finding that across-the-face wane was accepted at any of the Northwood mills in grades above economy prior to April, 1986. There is evidence that COFI officials advised Northwood two years earlier that it would permit deviation from the published rules in the case of wide-face wane dips, but nothing to which plaintiff's counsel has pointed establishes a date earlier than April, 1986, for the actual adoption of this practice at Northwood mills.

As I have indicated, I have concluded that the other specific claims concerning grading practices advanced for the

plaintiff cannot be allowed under the findings made in December 28, 1989, reasons for judgment.

There is, however, another ground on which damages should be allowed against the defendant COFI. There is no doubt that COFI was in breach of its contractual duty to the plaintiff in failing to advise the plaintiff with respect to the grading guidelines which it was in fact applying. The plaintiff repeatedly asked COFI to investigate the quality of incoming material and COFI undertook that assignment as part of the services for which the plaintiff paid it. COFI could not discharge the duty which it accepted in this regard towards the plaintiff without informing the plaintiff of the guidelines which it was using in grading Northwood production. The withholding of this information imposed on the plaintiff damages which, while not readily quantifiable, cannot be dismissed on that account. They resulted from the plaintiff's continuing investigation of the quality of the incoming wood and its inquiries of, and altercations with, its supplier, which led in the end to the break-down of their business relationship. I assess general damages under this heading at $50,000.

There will be judgment against the defendant Noranda for $75,000 and against the defendant COFI for $175,000, this judgment being to the extent of $75,000 jointly and severally against them

both. There will be pre-judgment interest at the registrar's rates from June 1, 1986, to this date.

I am, of course, aware that in the result the plaintiff receives relatively modest compensation in relation to the effort which it has devoted to these difficult proceedings. That it may have established a point of importance to the North American lumber business generally is a factor which may, perhaps, be relevant in dealing with the disposition of costs, one of the remaining matters reserved by agreement for further submission.

If directions are required with respect to the concluding exchange of argument counsel may, of course, apply.

Vancouver, British Columbia
February 18, 1991