



of contract document which was dated October 16, 1989 and was signed by both Mr. Wookey, the plaintiff, and by Mr. Huffman, the Woods Manager on behalf of Apollo Forest Products Ltd.

Under the agreement between the parties, Apollo agreed to purchase the wood from A32858 for a price of \$43 per cubic meter. Mr. Wookey commenced logging operations and one hundred and sixty-six loads of logs were delivered from that timber sale license to Apollo's mill at Fort St. James.

The written form of agreement between the parties contains a number of somewhat cryptic conditions, one of which was that advances will be paid on 820 kilograms per cubic meters five days after the 1st and 16th of each month. And the other, and perhaps central term for the purpose of this trial, "Final payment will be on actual conversion for your timber mark". That particular wording is at the centre of the litigation between these parties.

On the one hand, Mr. Wookey suggests and submits that that means, and was meant to be, the official or actual conversion rate fixed by the Ministry of Forests with respect to the strata - in this case, stratum 03 in which this T.S.L. lay. Apollo submits that this was to be based on the actual conversion of the loads and timber brought from the particular timber mark as a result of Mr. Wookey's logging activities. There are other subsidiary issues that have been raised during the case before me, but that is the central issue between these parties.

Mr. Fletcher has challenged, on a number of bases, Mr.

Wookey's credibility. With the greatest of deference for the able submissions made in that respect, I reject the suggestion that Mr. Wookey's evidence is unreliable. I was impressed with his manner of giving evidence, and more importantly, the care with which he approached that evidence.

Mr. Huffman, the Woods Manager, who testified on behalf of Apollo is a very busy man obviously, from the terms of his employment. Although Mr. Huffman purported to remember the conversations with Mr. Wookey in general detail, he was, in reality, wholly unable to relate portions of that conversation or those conversations. I fully appreciate that expecting exact words out of individuals four years after the event is not something that people doing business on an every-day basis necessarily do. However, despite again Mr. Fletcher's able submissions, there are difficulties, in my mind, with Mr. Huffman's evidence. He purports to have a specific recollection of discussing the details of the way in which they would calculate the actual conversion, with Mr. Wookey during the course of his meetings with him.

Mr. Byl has referred to a passage in Mr. Huffman's examination for discovery - and I refer to page 14, question 62. That passage reads as follows;

- Q At that time did you discuss with him how the actual conversion would be calculated?
- A I don't remember. I mean, whether we -- I mean -- we -- we discussed that it was going, you know -- it was for the timber mark, not the stratum, exact calculation. Yes, I guess we probably did, I usually do with most people.

The reference with respect to that passage does appear to be

the second meeting when Mr. Wookey came back and the document had been prepared. It does not refer directly to the first meeting at which the terms and the conditions were discussed. However, I find that Mr. Huffman's recollection is inaccurate in other respects as well. In the evidence before me, he testified that they agreed on a price of \$45 per cubic meter. Now, perhaps he misspoke himself - that simply was not true, either on the evidence of Mr. Wookey who suggested he asked for \$45 but was told by Mr. Huffman that they could pay no more than \$43, nor on the basis of the document produced by Mr. Huffman.

I have considered carefully Mr. Fletcher's submissions concerning, in particular, the conduct of Mr. Wookey. I am satisfied that the conduct of Mr. Wookey, during the actual execution of this contract, is perfectly consistent with his anticipating and reasonably expecting that the final adjustment at the end would meet his needs.

I accept Mr. Wookey's evidence and I accept his evidence where it differs with that of Mr. Huffman. I had the distinct impression, on occasion in that evidence, there was opportunity for Mr. Wookey to pad his evidence or state things which would have advanced his position, he did not do so. He was careful and meticulous, in my view, in his presentation of the evidence. I accept his evidence, as I have already said. In particular, I accept his evidence that there was not a discussion about how the actual conversion for his timber mark would be calculated and that he left the meeting and the

formation of that agreement with the understanding it would be based on the conversion fixed by the Ministry of Forests for the strata

The agreement prepared by Mr. Huffman, and the specific terms which I have already identified, in my view, falls to be interpreted within the context of what is common in the industry. The evidence before me is that the actual conversion number is understood in the industry to mean the Forest Ministry's determination of the conversion rate for the stratum. That, in my view, is the proper interpretation of the contractual term.

I have no doubt whatsoever that the parties to a private contract for the purchase and sale of timber are not bound to apply such a conversion rate, but can agree to whatever terms they wish. However, the terms must be clear and precise, and in this case it is not, in the sense of advancing the particular interpretation urged on me by counsel for Apollo. Even if I am incorrect in that contractual interpretation, it falls, in my mind, to be determined on the basis of the sampling techniques used. If it was possible to view the contractual term in the manner advanced by Apollo, that, in my view, is a contractual term which requires Apollo to determine an actual conversion rate for the particular timber mark. What Apollo did in this case is take four samples, in addition to the two which were taken by the Ministry of Forests from the loads brought from A32858, bringing to a total number of six samples out of a hundred and sixty-six loads.

On the evidence that I have heard, including that of Mr. Gordon, the employee of the Ministry of Forests, there is in place a detailed statistically based sampling system conceived of by the Ministry of Forests to sample, on a broad basis, stratum or areas of similar timber types and volumes, to determine the appropriate conversion factor on the basis of a broad series of samples which give a high statistical degree of accuracy. The heart of that sampling system is a computer process which generates random indications of the loads which will be taken and scaled as sample loads from the stratum. The object of that exercise is to achieve a high level of statistical validity. That is evident from s. 7(3)(b) of the Forest Act Scaling Regulations which indicate that;

Where timber is to be scaled under the Act by use of a sampling plan, sufficient units of the population sampled shall be measured to provide a volume that has a statistical reliability of plus one percent 19 times out of 20.

In this case, the control of the sampling plan apparently implemented by Apollo with respect to Mr. Wookey's timber was conducted by them and under their control.

Mr. Huffman's evidence was to the effect that no one at Apollo determined that there would only be four samples taken other than two Forestry samples. He said, "It was a matter of time. We knew we needed more. There was a plan for more. If we had the time we would have taken more." The danger of such a scenario is precisely that which was identified in the evidence. What was conducted by Apollo was not a random sampling exercise but a very few loads which yielded results

which are very favourable to Apollo and unfavourable to Mr. Wookey.

I have not had put before me any expert evidence analysing the sampling process undertaken by Apollo but, in my view, it is, in any event, inadequate to meet the duties cast upon them by the contractual term, if it is properly interpreted in the manner suggested by the defendant, and in the circumstances, in any event. If I am incorrect on my first finding, I would apply the broad based statistically accurate sampling process of the Ministry of Forests, in any event.

In the result, the plaintiff is entitled to judgment against the defendant in the amount of \$13,562.20.

**MR. BYL:** Court order interest from March 30, 1990, My Lord?

**THE COURT:** Mr. Fletcher?

**MR. FLETCHER:** I think that is the law, My Lord.

**THE COURT:** I think it is too, Mr. Fletcher.

**MR. BYL:** And cost on scale 3?

**THE COURT:** Mr. Fletcher?

**MR. FLETCHER:** No submissions, My Lord.

**THE COURT:** Costs will follow the event.

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