

LESTER W. DAVID (DEFENDANT) . . . APPELLANT;
 AND
 EDWARD F. SWIFT AND OTHERS }
 (PLAINTIFFS) } RESPONDENTS.

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 *Oct. 10.
 *Dec. 7.

ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA.

Construction of contract — Condition precedent — Arbitration and award — Right of action.

A contract for the sale of timber limits contained a guarantee by the vendor that the quantity of timber thereon at the time of the sale would prove equal to that shewn in a statement annexed and a covenant that he would re-pay to the purchasers the amount of any shortage found in proportion to the price at which the sale was made. In another clause, provision for arbitration was made in case of dispute as to the amount of any such shortage but it did not in express terms deprive the purchaser of the right to recover any claim for shortage until after an award had been obtained.

Held, affirming the judgment appealed from (15 B.C. Rep. 70), Idington J. dissenting, that an award by arbitrators had not been made a condition precedent to recovery for the amount of any deficiency in the quantity of timber guaranteed to be upon the limits.

APPEAL from the judgment of the Court of Appeal for British Columbia(1), reversing the decision of Mr. Justice Morrison, at the trial, and directing a new trial to be had between the parties.

The action was to recover \$250,000 for deficiency in the amount of timber on certain lands under a

*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Duff and Anglin JJ.

(1) 15 B.C. Rep. 70.

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guarantee contained in a written agreement between the parties for the sale by the defendant (appellant) to the plaintiffs (respondents), of timber limits, in British Columbia, wherein the defendant guaranteed that the quantity of timber thereon, as shewn by a statement annexed to the agreement, was true and accurate, it being made a condition of the contract that the timber should "at least run in quantity to the number of feet shewn in the attached statement." In the clause of the contract, which immediately followed the clause containing the guarantee, it was provided:—

"Fourth. Second parties (plaintiffs) are to have until September 1st, 1907, to cruise and verify the figures on the attached statement of April 30th, 1907, regarding the quantity of timber on said various tracts, and in event of all of the tracts, from a cruising or other verification, failing to reach the quantity represented in the attached statement, first party (defendant) is to repay second party in just proportion that the amount of shortage bears to the value of the total number of feet of timber estimated to be on said tracts as appears in said attached statement bearing date of April 30th, 1907.

"It is further agreed that in event second party fail to find the quantity of timber on said tracts represented by the statement of April 30th, 1907, attached hereto, and said first party fails to agree on a basis of settlement concerning such shortage, then and in that event an arbitration committee composed of three men, one named by each of the respective parties hereto, and the two thus named agreeing on and naming a third, which arbitration committee will and shall have full power to settle the matter regarding shortage,

and whose action and decision in the matter shall be final.

“In event the two parties so named as the arbitration members fail for any reason to agree on or name a third party within thirty days after their appointment on the committee, then and in that event the judge of the District Court of New Westminster, District of British Columbia, shall name the third party, and decision by any two of said committee above referred to shall be considered and treated as the decision of the whole and accepted as final.”

The plaintiffs claimed that the timber set out in the schedule to the agreement did not reach the quantity represented therein and claimed a refund in respect thereof. The defendant contended that the plaintiffs could claim no shortage until the matter went to arbitration and an award had been made according to the terms provided in the paragraph of said agreement above quoted.

At the trial Mr. Justice Morrison considered that the settlement of the shortage by arbitration was a condition precedent and dismissed the action. On appeal by the defendant the Court of Appeal for British Columbia ordered a new trial, with costs in the Court of Appeal and all costs thrown away by the abortive trial in the court below. From this judgment the defendant appealed to the Supreme Court of Canada.

Lafleur K.C. for the appellant.

Nesbitt K.C. for the respondents.

THE CHIEF JUSTICE.—I would dismiss this appeal for the reasons given in the court below.

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DAVIES J.—The question raised in the appeal is whether on a true construction of the contract made between the parties and sued upon in this action there arose a legal obligation on the defendant's part to pay plaintiffs certain monies, or whether the obligation or liability to pay was dependent upon an award first having been made in plaintiffs' favour under a clause in the agreement providing for a reference to arbitration.

I agree generally in the reasoning and in the conclusions of the Court of Appeal for British Columbia, as expressed by Mr. Justice Gallihier.

The question resolves itself into a finding of the intention of the parties as expressed in their agreement.

Is the true meaning of the agreement such that no liability or obligation to pay arose on the part of the defendant unless and until an arbitration had been held and an award made in plaintiffs' favour. In other words, was the finding of such an award a condition precedent.

It is unnecessary to refer to authorities from *Scott v. Avery*(1), down to date, as the answer to the question depends in each case upon the language the parties have used in their contract.

The rule cannot, I think, be better stated than it was by the Lord Chancellor Herschell in *Caledonia Insurance Company v. Gilmour*(2) :

The question is not whether, where a contract creates an obligation to pay a sum of money, it is a good answer to an action to recover it that disputes have arisen as to the liability to pay the sum and that the contract provides for the reference of such differences to arbitration, but whether, where the only obligation created is to pay a sum ascertained in a particular manner, where, in other

(1) 5 H.L. Cas. 811.

(2) (1893) A.C. 85, at p. 90.

words, such ascertainment is made a condition precedent to the obligation to pay, the courts can enforce an obligation without reference to such ascertainment.

In my judgment the obligation to pay under the first part of clause four was complete in itself and enforceable in the courts. The obligation of the defendant to pay for the shortage found on the cruising to exist was not made conditional on a finding of such shortage or other finding by the arbitrators. Such arbitration and award as is provided for was not made a condition precedent to the obligation to pay.

The latter part of section four providing for an arbitration in the double event of their being a shortage of timber and the defendant (vendor)

failing to agree on a basis of settlement concerning such shortage whatever these words may mean, doubtless intended that there should be an arbitration between the parties in case of dispute which "would settle the matter with regard to shortage," but the language used providing for such arbitration falls far short of making the arbitration and award a condition precedent to the defendant's obligation to pay for such shortage.

No express words either taking away the right to sue in the courts to recover the shortage or making the arbitration a condition precedent to such right are used, nor are any words used from which, in my judgment, it can be reasonably concluded that it was the intention of the parties to make the defendant's (vendor's) obligation to pay for the shortage conditional on there having been first an arbitration and an award under it.

IDINGTON J. (dissenting).—The appellant bought from respondents a block of shares in a saw mill company.

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The value of these shares depended on the assets of the company.

The assets consisted largely of timber limits of which there were five or six specified classes and an estimate based on such classification was set forth in a schedule annexed to the written contract the parties entered into for carrying out the bargain and sale of the said shares.

The total was accepted no doubt as basis of approximate value that the shares would have.

It might happen, however, that the estimate was too high.

Whether it was or not in no way affected the stated terms of the bargain and sale which was concluded and made to appear in the first two paragraphs, as if quite independent of the right to abatement of price if justice demanded any on account of the estimates having been placed too high.

The agreement was set forth in a long written contract which was divided in the operative paragraphs into thirteen different paragraphs each intended as far as possible to deal with and dispose of its subject-matter as a whole.

The third paragraph states that the appellant was to give a satisfactory guarantee to second party that the quantity of timber on the different tracts of land as shewn by the statement of the Fraser River Saw Mills, Ltd., corporation, under their statement of April 30th, 1907, copy of which is attached hereto and made a part hereof, is true and accurate, it being the intention and made one of the conditions of this trade that the timber shall at least run equal in quantity to the number of feet shewn in the attached statement.

This paragraph almost does, but does not altogether give the guarantee.

It seems expressly to avoid giving any covenant or anything upon which an action might be founded — and why so ?

It seems to me clear that the draftsman abstained because an action was not to be given or any chance thereof, unless and until the machinery in the following paragraphs provided had been first applied.

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I see with this introduction to the fourth paragraph declaring for a guarantee, but abstaining from giving it more clearly than I would from reading paragraph four by itself, that the fourth paragraph as a whole constituted the kind of guarantee that was to be given.

It was a most complex problem the parties had thus to have resolved for them if within the time named a shortage could reasonably be claimed.

It was clearly the honest purpose of both that the appellant's cruisers should produce for comparison if need be with the schedule a report of results of the cruising and then both sides, if need be, should attempt to agree, but failing agreement the reference provided was to take place and an award got before any liability to an action could arise.

Stress was laid by respondents on the fact that the first part of paragraph four shews the party of the first part is to repay the second part "in just proportion, etc."

But surely what consequences had ultimately to flow from a shortage had to be stated some place, and when we find the principle of procedure pointed out in the next line, and in the very next sentence the procedure for fixing and settling "the matter of shortage," it does seem to me that to hold the first part quite independent, and the next merely collateral and not necessarily interdependent, the true intention of the parties is frustrated.

A consideration of the entire scope and purpose of

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paragraphs three and four, seem to me to point to a creation of a liability only when everything provided had been done to weigh and measure that liability.

The action was, I think, for these reasons, properly dismissed.

The appeal should be allowed with costs.

May I be permitted to add that decisions of other cases are of little help. But of the cases cited and distinguished by Mr. Justice Gallihier's judgment, several seem to me, I say it with great respect, rather hard to reconcile with the result arrived at, if comparison of phraseology can ever serve one.

DUFF and ANGLIN JJ. concurred with Davies J.

Appeal dismissed with costs.

Solicitors for the appellant: *Bowser, Reid & Wall-bridge.*

Solicitors for the respondents: *Davis, Marshall & Macneill.*
