

105, 1930

No. 37 of 1930.

In the Privy Council.

ON APPEAL

FROM THE APPELLATE DIVISION OF THE
SUPREME COURT OF ONTARIO.

BETWEEN—CHARLES E. CAMPBELL

(Plaintiff) APPELLANT

— AND —

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NATIONAL TRUST COMPANY
LIMITED, Executors of the last Will and
Testament of E. A. Wallberg, deceased

(Defendant) RESPONDENT

CASE FOR RESPONDENT.

RECORD.
—

1. This is an appeal by the Plaintiff from the judgment of the First Appellate Division of the Supreme Court of Ontario, pronounced on the twenty-third day of April, 1929, allowing in part an appeal by the late E. A. Wallberg (then Defendant) from the judgment of Mr. Justice McEvoy, pronounced after trial on the twentieth day of July, 1928, and directing that the Plaintiff
20 recover from the Defendant, National Trust Company, Limited, as Executor of the last Will and Testament of E. A. Wallberg, deceased, out of his property coming into its hands the sum of Ten thousand dollars (\$10,000) without costs.

2. The Appellant's claim is put in the alternative :—(a) for
a commission by way of percentage upon the sale by Lake St. John
Power & Paper Company Limited (hereinafter referred to as the
Lake St. John Company) of a large quantity of newsprint paper
extending over a period of ten years, or (b) for remuneration by
way of *quantum meruit* for his services in bringing about the
30 contract of sale, and is entirely based upon an alleged verbal agree-
ment between the Appellant and the late E. A. Wallberg, said to

RESPONDENT'S CASE.

p. 2 have been made on or about the 17th day of April 1926. The action was originally brought against both Wallberg and the Lake St. John Company, it being alleged that Wallberg as President was agent of the latter Company in making the bargain.

p. 70, l. 20
p. 72, l. 3
Ex. 1, p. 95
p. 74, l. 32

3. The only witnesses who gave evidence at the trial as to the alleged agreement were the Appellant and Wallberg, their evidence being directly contradictory. The Trial Judge accepted the evidence of the Appellant, chiefly because he considered his account—"more probable and reasonable,"—and found that the Appellant was entitled to a commission of 1 per cent. upon the purchase price of newsprint paper to be delivered and paid for during ten years under the contract finally made on the 29th December 1926 between the Lake St. John Company and Newspaper & Magazine Paper Corporation of New York. The Judgment directed a reference to be taken from time to time during the currency of the contract to ascertain the amount which the Appellant was entitled to receive as aforesaid and awarded Judgment against both Wallberg and the Lake St. John Company for the amount so found to be due.

p. 86, l. 30
p. 92
p. 81
p. 90

4. From that Judgment Wallberg and the Company both appealed to the Appellate Division of the Supreme Court of Ontario. Upon the argument of the Appeal, the present Appellant abandoned his claim against the Lake St. John Company and elected to claim against Wallberg alone. Following argument and before Judgment Wallberg died, and by Order to continue proceedings, the present Respondent as his Executor was substituted for him. The Judgment of the Appellate Division was pronounced on the 23rd April 1929. That Court held that while the Appellant was entitled to remuneration for his services in introducing a prospective purchaser, he was not entitled to a commission calculated at a percentage rate upon the sale price of all the paper that might be supplied under the contract. In the result the action was dismissed with costs as against the Lake St. John Company and judgment was given for the Appellant against the present Respondent as Executor of the Defendant Wallberg, deceased, for the sum of Ten thousand dollars (\$10,000) without costs. From this Judgment the Appellant now appeals.

THE FACTS MAY BE STATED AS FOLLOWS :

p. 46, l. 13

5. On or about 27th March 1926, Leaside Engineering Company Limited, a private Company in which Wallberg owned or controlled practically all of the capital stock (hereinafter referred to as the Leaside Company), purchased at an auction sale

held by the Government of the Province of Quebec the right to lease certain timber limits and water-powers in that Province, subject to the obligation of erecting and operating a Mill for the production of paper and certain other conditions. The Lease from the Province to the Leaside Company was subsequently executed as of the 6th April 1926. The auction and lease of these important rights received a good deal of newspaper publicity in the Province of Quebec and in the City of Montreal, where it was common talk that Wallberg had purchased the limits and was bound to erect a mill.

6. The Appellant, who is a Newspaper Publisher in Western Canada, happened to be in the City of Montreal about the time of the publication of particulars of the lease and there met an old friend, Lester J. Clarke, President of Newspaper & Magazine Paper Corporation, a New York Company engaged in the purchase of newsprint paper for the many newspapers and publications owned or controlled by William Randolph Hearst of New York. It was common knowledge, and any paper mill man would know, that Clarke and his Company were the largest purchasers of newsprint on the North American continent and were always in the market for such paper.

7. The Appellant, who had never met Wallberg and was not a paper broker or in the business of negotiating contracts for newsprint, had known Clarke intimately for 7 or 8 years and following their meeting in Montreal within a few days after learning of the Lease of the limits, he had a conversation with Clarke as a result of which he accompanied Clarke to Ottawa about the 15th April 1926 and telephoned from there to Wallberg at Toronto and arranged an appointment to meet him there the next day, without apparently disclosing the business he wished to discuss or mentioning Clarke. The Appellant and Clarke accordingly together proceeded to Toronto and next morning, the Appellant, leaving Mr. Clarke at the hotel in Toronto, went to Wallberg's Office, and introduced himself as the person who had made the appointment over the telephone the preceding day.

8. According to the Appellant's account he then proceeded to ask Wallberg whether he had acquired the timber limits in question, whether he was putting up a Mill, and whether he would be interested in selling the output of that Mill, to which Wallberg replied in the affirmative, and then asked Wallberg—"would he pay me a commission if I could put him in touch with a party who was capable of buying the output?" The Appellant's account of what ensued is as follows:—

p. 12, l. 47

“ Mr. Wallberg, I am out to make some money. If I introduce you to this party and it results in a sale, or contract will you pay me a commission?”—and he said “ I will.”

p. 13, ll. 22-33

“ Q. What did he say? A. He said, ‘ Well, who is this party?’ At that time I kept pressing him on the point of a commission.

“ Q. What did you say when he said to you ‘ Who is this party?’ A. I said, ‘ Mr. Wallberg, this party is quite capable of buying this output. Now, will you pay me a com- 10 mission if I introduce you to this party and it results in a sale or contract for the paper?’ That was the words I used to Mr. Wallberg, and Mr. Wallberg in reply said, ‘ I will.’

“ Q. Having failed in his effort to get the man’s name? A. That is true.

“ Q. After he had said that, tell me what next was said between you? A. He asked me who was the party. I said ‘ Mr. Lester J. Clarke of New York City.’

p. 14, ll. 2-30

“ A. I think I mentioned at that time that Mr. Clarke bought about twenty-five to thirty million dollars’ worth of 20 newsprint in Canada and that he was the largest purchaser of newsprint. Mr. Wallberg says ‘ Where is Mr. Clarke?’ or ‘ Where is your party?’ I said, ‘ He is here in the City. He is at The King Edward Hotel,’ and I offered to take Mr. Wallberg over to Mr. Clarke at this time. He got up and got his hat and we went across the street. It is just about a block from the King Edward, or from the Royal Bank Building. I took Mr. Wallberg up to Mr. Clarke’s room, and I said ‘ Mr. Clarke, this is Mr. Wallberg, who has limits in the Province of Quebec. He is putting up a Mill,’ 30 and, ‘ Mr. Wallberg, this is Mr. Lester J. Clarke of the Newspaper and Magazine Paper Corporation.’ I said, ‘ I will leave you gentlemen to talk over the business.’

“ Q. And did you then retire? A. I did.

“ Q. Did you see Mr. Wallberg again in connection with the matter? A. No, I didn’t see Mr. Wallberg again that day, and I didn’t see him until some time the following February.”

9. The Defendant Wallberg’s account of what took place between himself and the Appellant was as follows:— 40

“ Q. Then will you tell me when you first heard of the

plaintiff Mr. Campbell? A. When he 'phoned me from Ottawa.

"Q. He 'phoned you from Ottawa some time in April?
A. Some time in April, yes, sir.

"Q. What was his 'phone message? A. He merely asked me if I would be in Toronto the following day, and I replied I would be in my office the following day.

10 "Q. Did you see Mr. Campbell on the following day?
A. I did. He called at my office in the Royal Bank Building, Toronto.

"Q. Will you tell me what took place when he called?
A. He introduced himself, told me his name was Campbell, who had 'phoned me from Ottawa the day before, and then he told me that Mr. Clarke from New York who was in the paper business was at the King Edward Hotel and would like to know if I would go over and see him.

"Q. What did you say to that? A. We immediately went over together.

20 "Q. How long did the conversation last? A. Inside of two or three minutes.

"Q. You have been here and heard Mr. Campbell's evidence? A. Yes, sir.

"Q. What do you say as to the conversation that Mr. Campbell states as to his asking you for a commission, and your saying you would pay one—what do you say to that?
A. I say that there was never a word or syllable or intimation of any kind that he was looking for or asking for a commission or gain in any way from me.

30 "Q. Did you go over to Mr. Clarke? Did you go over to the King Edward? A. We went over together.

"Q. And what took place while Mr. Campbell was there, because I can't ask you—— A. We walked into the room together and Mr. Campbell said to Mr. Clarke, 'This is Mr. Wallberg' and then Mr. Campbell said, 'I will leave you now,' and walked out, and I never saw him any more."

10. Clarke and the Defendant Wallberg agree that after the Appellant left them in the hotel together they discussed the newsprint business in general and the possibility of buying paper from the mill proposed to be erected, but that nothing definite was
40 arrived at at this interview. Subsequently, during the same year

p. 31, l. 41
p. 47, l. 28

1926 there were numerous meetings between Clarke, Wallberg and Sadler, the Mill Manager, and representatives of the Hearst interests in New York, which eventuated in December, 1926, in an elaborate contract between the Lake St. John Company and Newspaper and Magazine Paper Corporation.

Ex. 1, p. 95

11. In the meantime, the Lake St. John Company, which had been incorporated at the instance of Wallberg under the name of St. Anne Paper Company Limited early in 1925 purchased as of May 31st 1926 from the Leaside Company the lease and agreement with the Quebec Government covering the timber and power rights above referred to. The name of the purchasing Company was changed by Supplementary Letters Patent in June 1926 to Mistassini Power & Paper Company Limited, and again in December 1926 to Lake St. John Power & Paper Company Limited.

p. 50, l. 11

12. Thus at the date of the alleged agreement between the Appellant and Wallberg, the Lake St. John Company, which eventually entered into the contract with Newspaper & Magazine Paper Corporation, had no interest in the Lease of the timber limits and power rights, which was then the property of the Leaside Company, nor had construction of the Mill been commenced. Wallberg never had any interest in this Lease nor could he benefit from the contract in question, except as a shareholder of the Leaside Company, which in turn was a shareholder of the Lake St. John Company.

p. 59, l. 21

13. The Leaside Company advanced large sums for the commencement of the construction of the Mill which was further financed by means of the sale to the public of \$5,000,000 par value First Mortgage Bonds and \$3,000,000 par value Mortgage Debentures.

Ex. 1, p. 95

14. The contract, Exhibit 1, eventually made in December 1926 between the Lake St. John Company and Newspaper & Magazine Paper Corporation provided for the purchase by the latter of the entire output of two paper making machines, the estimated capacity of which was approximately 60,000 tons of newsprint paper per annum, the price therefor in any calendar year to be the price to be fixed for that year by three other Canadian Paper Manufacturers named in the contract, subject to certain maximum prices. The due performance of the obligations under the contract of Newspaper & Magazine Paper Corporation was guaranteed by William Randolph Hearst, who was really getting the paper, and the giving of this guarantee was made a condition of the contract.

p. 33, l. 28

Ex. 1, pp. 107-109

15. The real status of Newspaper & Magazine Paper Corporation appears to have been that of a Commission Agent and not a purchaser. Article XIII of the contract clearly shows that it was acting or buying for two New York newspapers controlled by Hearst and the contract was subject to suspension in the event of their inability to take the paper because of strikes, fires, or like contingencies. In addition, Article IX provides for a "discount" or commission to Newspaper & Magazine Paper Corporation of 3 per cent. on the net price of the paper as payment therefor should be made. The real purchaser was Hearst, whose guarantee Wallberg insisted upon, and the Appellant did nothing to bring about this guarantee.

Ex. 1, Article XIII,
p. 104

p. 103, l. 13
p. 33, ll. 18-34

16. Following his introduction of Clarke to Wallberg the Appellant took no part in the negotiations leading up to the contract and first learned that a contract had been arrived at in the latter part of January or the first week of February 1927. A few days later he saw a copy of the contract. Following this, he wrote to Wallberg on February 14th, 1927, as follows:—

p. 14, l. 20
p. 14, l. 40

20 " You will remember that in April 1926, after a conversation in your office, you agreed, that if a sale of newsprint paper from your proposed Mill was made to the Company represented by Mr. Lester J. Clarke, *I would be remunerated for my services in bringing you and Mr. Clarke together.* I then introduced you to Mr. Clarke at the King Edward Hotel.

Ex. 2, p. 110

" I am now informed that you have completed an arrangement by which the output of the Mill you are building at Lake St. John is sold to Mr. Clarke's Company, *and I am, of course, now entitled to be remunerated for my services as agreed. . . .*"

30 On the 12th March 1927 the Appellant telegraphed Wallberg as follows:—

Ex. 6, p. 120

40 " Not having received a reply to my registered letter to you from the Mount Royal Hotel Montreal I turned the matter over to my solicitors Brown Montgomery and McMichael to take the matter up with you stop solicitors advise me to-day you have done nothing in the matter stop I would like to reach an amicable settlement with you as to my remuneration and would thank you to wire me here care of the Edmonton Bulletin if you desire to do so otherwise it will be necessary for me to take the necessary steps without further delay.—CHAS. E. CAMPBELL."

Subsequently there was some exchange of correspondence between

Exs. 3, 4 & 5,
pp. 111-112

Exs. 7, 8 & 9,
pp. 121-122

the Appellant's solicitors and Mr. Wallberg's office, none of which is important, except that neither in the letter of February 14th 1927, nor the subsequent telegram nor in any other communication did the Appellant or his Solicitors mention or refer to any agreement for a commission in the sense of a percentage.

p. 26, l. 5 to
p. 28, l. 12

17. At the trial, as appears from the extract from his evidence above quoted, and upon his examination for discovery, the Appellant was careful to use the word "commission" although at no time did he say that any rate or percentage of commission was referred to or discussed.

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18. The only evidence given at the trial as to any rates of commission payable on the sale of newsprint paper was that of Clarke, whose evidence was to the effect that brokers who negotiate a sale of "domestic" paper (which includes Canadian paper) regularly have a commission of 3 per cent.

p. 74, l. 18

19. The Trial Judge, as previously stated, allowed the Plaintiff a commission of 1 per cent. on the net selling price of the paper as delivered over the ten year period of the contract, which, on the basis of 60,000 tons a year for ten years, or 600,000 tons at an average price of \$50.00 per ton (present price about \$40.00) would amount to \$300,000 in all. The Plaintiff's cross-appeal to the Court below was for 3 per cent. or over \$900,000.

p. 77, l. 12

20. On the Appeal to the Appellate Division all the Judges (Mulock, C.J.O., McGee, Middleton and Grant, J.J.A.) agreed that the Trial Judge's finding upon the contradictory evidence of the Appellant and Wallberg as to the fact of an agreement for remuneration to the Appellant could not be disturbed, but they held that the remuneration should be upon the basis of a *quantum meruit* and not upon the basis of a percentage commission. Mulock, C.J.O., considered that "there is no evidence which enables the Court to determine the amount of remuneration, if any, to which under all the circumstances the plaintiff is entitled, and I therefore think it should be referred to a Jury to find the amount."

p. 82, l. 35

p. 87, ll. 30-40

21. Middleton, J.A., with whom Grant, J.A., concurred, while considering the Appellant's story incredible, felt himself unable to say that there was such clear proof of error as to justify the reversal of the finding of fact of the Trial Judge, but considered that even giving credit to the Appellant, the statement in his own letter of February 14th 1927 should be accepted as setting forth the true bargain rather than "his self-serving

Ex. 2, p. 110
p. 87, l. 41

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evidence at the trial." The learned Judge considered that the "remuneration" referred to in this letter should be—"a suitable financial reward for introducing a person with whom a contract might thereafter be made, or through whom it might be negotiated,"—and in view of the large nature of the transaction he proposed—"to err upon the side of generosity"—and award the sum of \$10,000 to the Appellant. p. 88, l. 5

22. Magee, J.A., was of the opinion "that the plaintiff should fail who had not taken the precaution of having so important a transaction evidenced." However, conceding that the Trial Judge was right in finding an agreement for remuneration, he considered the amount awarded by the Trial Judge as "far beyond what would be reasonable or in contemplation of the parties." He considered that there was no actual benefit derived by Wallberg from the plaintiff, but, in the circumstances, concurred in the amount which Middleton and Grant, J.A., were willing to allow as, in his opinion "ample remuneration" to the Appellant. p. 83

23. Upon the assumption that the finding of the Trial Judge as to Wallberg having agreed to remunerate the Appellant for his services in effecting the introduction was correct the questions that arise in this Appeal are:—

- (I) Whether the Appellant is entitled to remuneration by way of *quantum meruit*, or upon the basis of a commission calculated as a rate or percentage.
- (II) If the former, whether the award by the Appellate Division of \$10,000 should stand;
- (III) If the latter, what should be the proper percentage and upon what should it be calculated.

24. The Respondent submits that the basis of remuneration should clearly be by way of *quantum meruit* and not be way of commission calculated as a rate or percentage. No other conclusion is consistent with the only documentary evidence upon this point viz: the Appellant's own letter and telegram set out in paragraph 16 above. This conclusion is moreover consistent with the Appellant's oral testimony if the word "commission" as used by him be taken in the sense (in which it is commonly used) merely of pecuniary remuneration. No suggestion was made by the Appellant that anything was said at the relevant interview as to his "commission" being by way of rate or percentage and it is

unreasonable to suppose that in a matter of such magnitude this would not have been mentioned if the parties had so intended.

25. With regard to the amount of the Appellant's remuneration upon the basis of a *quantum meruit* it is to be observed that the Appellant even upon his own account did no more than effect an introduction. He took no part in negotiating the contract or in procuring the guarantee of Hearst which was a vital element in the contract moreover the Appellant elected to claim against Wallberg alone and not against the Lake St. John Company which made the contract for the sale of the paper, and would receive the price therefor. Wallberg was not a party to this contract, had nothing to sell, and would receive no part of the price. Wallberg could benefit from the contract only indirectly as a shareholder of the Leaside Company and through it of the Lake St. John Company, if the operations of the latter should be profitable and if its Directors should deem it advisable to declare and pay dividends. It should be noted that the contract for the sale of the paper was made at a time when the Lake St. John Company had no mill whatsoever and owned nothing but the bare Lease of certain timber limits and water powers subject to the obligation to build and operate a mill. This contract with the Newspaper & Magazine Paper Corporation called for the erection of two paper making machines and the sale of the output of these two machines. Moreover it is obvious that many contingencies might happen which would render the contract unprofitable.

26. The Respondent submits that this Appeal should be dismissed for the reasons given by the majority of the learned Judges of the Appellate Division, and for the following amongst other

REASONS.

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1. Because the Appellant's statement in his letter of February 14th 1927 and his telegram of the 12th March 1927 as to the nature of the bargain should be preferred to his evidence at the trial.
2. Because according to that letter and telegram the whole bargain was that he should be remunerated for his services in effecting the

introduction of Wallberg to Clarke—in other words by way of *quantum meruit*.

3. Because even if the bargain was for a “commission” this word means the remuneration payable to an agent for his services and is not necessarily a percentage on the money value of the transaction.
- 10 4. Because the parties could not in the circumstances have intended that the Appellant’s remuneration should take the form of a commission based upon a percentage of the sale price of the paper.
5. Because the Appellant was not, nor did he represent himself to Wallberg to be, a factor or agent whose services would be expected to be engaged on the basis of a percentage commission.
- 20 6. Because the Award of the Appellate Division of the Supreme Court of Ontario should not, in the circumstances, be disturbed.

I. F. HELLMUTH.

WILFRID GREENE.

In the Privy Council.

ON APPEAL

FROM THE APPELLATE DIVISION OF THE
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BETWEEN

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(Plaintiff) APPELLANT

— AND —

NATIONAL TRUST COMPANY LIMITED

Executors of the Last Will and Testament
of E. A. Wallberg deceased

(Defendants) RESPONDENTS.

CASE FOR RESPONDENT.

LEE & PEMBERTONS,
44, Lincoln's Inn Fields,
London, W.C. 2,
Solicitors for the Respondent.