

SANDERS TRANSPORT COMPANY LTD.

Plaintiff

- and -

BROWN RIVER TIMBER COMPANY LTD.

Defendant

J U D G M E N T

PORT MORESBY.

SMITHERS J.

16/8/62.

Sanders Transport Company Ltd. sues Brown River Company Ltd. for the sum of £3,820.13.5. as money due under what is described as a logging contract made between it and the Defendant pursuant to which the Plaintiff carried out certain work of felling, snigging and hauling logs from a forest in the vicinity of the Brown River Bridge some twenty-four miles from Port Moresby to a Sawmill of the Defendant some seven miles from Port Moresby. Pursuant to an amendment of the Statement of Claim which I allowed the Plaintiff claims this sum and its various components as money due upon a basis of quantum meruit.

The Plaintiff alleges that in December 1960 it made a contract with the Defendant under which inter alia the Defendant agreed to pay to it 32/- per 100 superficial feet of logs which the Plaintiff should procure from the forest and deliver at the Mill and the Plaintiff agreed to do such felling, snigging and hauling as was required to procure logs in the forest and deliver them to the Mill. The Plaintiff concedes that it was a term of the agreement or that it was

provided by a subsequent agreement that the Defendant was to be entitled to deduct 6/- from each 32/- otherwise payable as the agreed rate for the privilege of using for the purposes of the work certain vehicles and a tractor belonging to the Defendant.

The Plaintiff says that during the months of January and February 1961 it procured in the forest and delivered 275 logs of a total quantity equal to 293,898 superficial feet. If so then there became due to the Plaintiff the sum of £3,820.13.5.

In support of its claim the Plaintiff called evidence that at the time it commenced operations there were some 108 logs lying in the forest comprising trees which the Defendant had already felled and which were suitable for delivery at the Mill for the Defendant's purposes. The Plaintiff says it snigged all these 108 logs to a loading ramp at the nearest convenient place on the road to which the timber jinkers designed for road haulage could approach and that these logs were then loaded onto such jinkers and carted to the Defendant's Mill. In addition the Plaintiff says it itself felled at least 227 trees thus creating 227 logs and that it snigged 167 of these to the loading ramp and delivered them to the Defendant's Mill. The Plaintiff says it delivered 275 logs in all and left in the forest at least 60 logs which it had felled.

It was the custom that before a log was removed from the forest it was "hammered", that is, impressed with a representation of a crown by an officer of the Forestry Department. At the same time the officer measured the log, gave it a number, examined it for defects and assessed the number of superficial feet of millable timber

therein. The number which was allotted to the log was either carved on the butt end with a chisel or written thereon with a crayon. The Plaintiff's particulars of logs delivered are contained in Exhibit "G" which purports to show that 275 logs were delivered and that of these the numbers of 69 are unknown, the numbers of 206 are known and stated, and with respect to each of 201 of these the superficial feet of millable timber as measured by the Forestry Department is set out.

The measurement of the Forestry Department as to the number of millable superficial feet is relevant because it was part of the agreement between Plaintiff and Defendant that for the purpose of assessing the number of superficial feet of logs delivered which were to be paid for by the Defendant the forestry "returns" were to be adopted. The reference to "returns" was a convenient expression to comprehend the official forestry record of the measurement in question.

According to Exhibit "G" the total superficial feet of these 201 logs is 214,815 and the average measurement per log was 1,068.7 superficial feet. The average of these logs also is important because the Plaintiff alleges and I find that it was agreed between the Plaintiff and the Defendant that with respect to logs the Forestry Department number of which was not known to the Plaintiff the same should be taken at the average per log of those logs delivered in the relevant month of which the Forestry Department measurement was known.

In fact Exhibit "G" refers only to 274 logs as having been delivered of which 205 bore numbers, 200 bore numbers with a stated measurement, 5 bore numbers but had no stated measurement and 69 were un-numbered. I think

the first question of fact to be determined is how many of these logs were delivered.

Mr. Kilduff for the Defendant admitted that 38 of the numbered logs had been delivered namely the 35 logs mentioned by number at the foot of the second page of Exhibit "G" and logs numbered 562, 563 and 590. He admitted that the logs which were numbered and in respect of which the Forestry measurement figure was stated in Exhibit "G" were felled, snigged and hauled by the Plaintiff and that there were 163 of these. In fact there were 167 of these and it is a question of whether Mr. Kilduff's admission should be taken as referring to 167 or 163. The discrepancy arose because there are 200 logs in respect of which the number and measurement are stated in Exhibit "G" and only 33 of these are amongst the 38 which are specifically admitted to have been delivered. 5 of the 38 are numbered logs but without stated measurement. This leaves a balance of 167 of those logs of which the number and measurement are given. I think the admission was intended to cover all the logs in Exhibit "G" which are numbered and with stated measurement but I hesitate to carry an admission further than it can unequivocally be said to go. As a result, felling, snigging and hauling of only 163 of these logs may be taken to be admitted and I do not know which particular 4 of the 167 are not covered by the admission. If therefore the Plaintiff is to recover in respect of the whole of these 167 logs he must prove that 167 of them were delivered.

As to the 69 un-numbered logs and 5 numbered logs having no stated measurement, the felling, snigging and delivery thereof is also in dispute.

We may dispose of these last mentioned 5 at

once as they are part of the 38 delivery of which is expressly admitted.

The Plaintiff's evidence of delivery falls into the following pattern:

It is said that it was the system of the Plaintiff to make entries in duplicate in what have been called docket books (Exhibits "B1" and "B2") with respect to logs which were actually loaded on to the timber jinkers at the ramp. It is said that each load was separately entered. The relevant docket book was taken by the driver of the timber jinker to the Defendant's Mill where the original entry was torn out by the Defendant's appropriate employee and the book with the carbon copy intact was handed back to the driver.

The practice of the Defendant on delivery of logs and receipt of the relevant docket was to enter in a book kept especially for the purpose of the Plaintiff's logging contract the contents of the docket and then destroy the docket.

If the Plaintiff's employee knew the number of a log loaded at the ramp then the docket bore the number. If they did not know the number of a log an entry was made in the docket in terms of "1 log" or "2 logs" or as the case might be.

The number of a log would be known to the Plaintiff's employees unless the number was in crayon which had become obliterated by mud. The evidence is that conditions of muddiness were extreme and that crayon numbers were made indecipherable thereby in many cases. There can be no doubt that this was so.

The Defendant's book mentioned above was called the log diary. Into this log diary against the delivered

log number the Defendant's Managing Director, Mr. Starke, would enter the Forestry Department's measurement of volume for the log which the Defendant obtained from the Department for itself. As to logs which were not numbered the Defendant measured them and entered its own measurement. This gave the Defendant a record of every log delivered and a general guide to the volume of un-numbered logs but it did not allow for deductions from the gross measurements which the Department may have made for defects in such logs.

The timber jinker drivers were called and they gave evidence of the docket practice outlined above and that all logs loaded were taken by them from the ramp to the Defendant's Mill at the Seven-Mile.

I believe the practice mentioned above was observed by the Plaintiff and Defendant with respect to the logs delivered after the 13th January. It could hardly have been observed in all respects in the period up to at least the 10th January because the dockets for that period are physically in such a form with entries for various dates appearing in little sections on the one page and so arranged that detachment of a docket relating to any date or log could not have been performed without great difficulty. The entries are obviously not designed for any such practice.

It appears however that up to the 13th January one, Willis, an employee of the Defendant, performed duty at the ramp for the purpose of supervising operations on behalf of the Defendant and that in the course of his duty he made the entries in the docket books of logs actually loaded on the jinkers and actually initialled the entries confirming the despatch of the logs referred to therein.

No doubt Willis took the completed pages and gave them to Mr. Starke. Mr. Starke then had these pages either to check with entries of deliveries already made in his log diary or to use as a source for making his entries therein. This is however of little consequence because as to the logs for the period up to the 13th January, Willis says that every log which was entered in the docket book was duly despatched on a jinker and the drivers say they took these logs to the Mill. I have no doubt this was so.

The evidence of Willis combined with his entries and initials in the docket book (Exhibit "B1) confirms the despatch of 48 of the un-numbered logs in Exhibit "G" during his tour of duty at the ramp, and I find that those 48 logs were delivered.

On 25th January the Plaintiff made up an account showing that it had delivered to the Defendant 127,143 superficial feet (Exhibit "D") and at the same time delivered to the Defendant details of delivery in the same general pattern as Exhibit "G". The Defendant does not produce this document but Mr. Sandbach swears that it contained the same particulars of logs as does Exhibit "G" up to the 25th January, 1961. Mr. Starke does not deny this.

Mr. Starke, who I am satisfied did his very best to assist the Court, states that he received a document in the pattern referred to and says that he went through it with Mr. Fox, the Company's Accountant, and checked it with Defendant's records and that it correctly stated the logs which had been delivered to him during the period it purported to cover.

If that statement contained the logs set out in Exhibit "G" this is strong evidence that the whole of the 69 un-numbered logs and the numbered logs referred to

therein were duly delivered.

I believe the statement delivered with Exhibit "D", which I call the January statement, did contain the logs set out in Exhibit "G" up to 25th January. I am persuaded of this partly because Mr. Sandbach, who was undoubtedly an honest witness, says so, and on the probabilities.

I am satisfied that there was a document delivered at about the end of January which purported to set out the logs delivered and I think that in relation to logs delivered it is unlikely that Exhibit "G" would depart from the terms of its precursor the January statement. This January statement like Exhibit "G" embodied Mr. Sandbach's effort to summarise the precise entries in Exhibit "C" and expend to precision those entries not precise.

Exhibit "C" was the attempt by Mr. Sandbach to transfer the entries of the dockets into a more convenient and legible form. He had no entries on dockets prior to the 4th January but he purported to write in Exhibit "C" from recollection of events and statements made to him by Willis what he thought had happened on the 2nd and 3rd January. Also he did not transfer all the actual docket entries quite correctly.

Exhibit "G" reflects accurately the entries in Exhibit "C" which are in precise terms of logs. It turns into numbers of logs those entries of the 2nd and 3rd January which are in terms of loads. No doubt the January statement did the same. It attributes two logs to each load. A translation from loads to logs had to be made for the purposes both of the January statement and Exhibit "G" if as I believe they were each made up from Exhibit "C". To attribute two logs to each load was not illogical and not extravagant as practically all loads were of more than one log and many were of only two.

It would be likely that no matter how many times Mr. Sandbach made up from Exhibit "C" a statement of logs he would attribute two logs to each load recorded without details as to the number of logs in the load.

It happens that Exhibit "C" records 63 un-numbered logs and three loads. Translating this with two logs for each load into Exhibit "G" and the January statement produced the result that both of these recorded 69 un-numbered logs. The dockets are not now all legible and are fast becoming less so but from the evidence of Mr. Sandbach as to Exhibit "G" and the surrounding circumstances and the contents of the dockets which were more legible at the trial than now, I am satisfied that the dockets also recorded 69 un-numbered logs for the period up to the 25th January.

The fact that Exhibit "G" and the January statement also recorded 69 un-numbered logs was a coincidence because Exhibit "C" does not fully agree with the dockets.

This does not matter however. The important point is that the January statement like Exhibit "G" did record 69 un-numbered logs and the numbered logs of Exhibit "G" up to 25th January.

This number corresponded with the number of un-numbered logs and numbered logs which ought to have been and probably were recorded in the Defendant's records. It is that feature which explains why the Defendant was satisfied with it.

Although the dates and loads at the commencement of the January statement might be erroneous the number of logs actually delivered was accurately stated and that was what concerned the Defendant. The numbered logs in the January statement would be accurate because they appear to

be accurate in respect of the period concerned in Exhibit "C". Many of them are logs in the 38 of which delivery is expressly admitted.

Having regard to the evidence of Willis concerning the 48 un-numbered logs, the evidence of the system and Mr. Starke's evidence that the January statement was accurate and Counsel's admission as to the 38 logs, I am satisfied that 69 un-numbered logs and the 60 numbered logs of which the measurement is stated in Exhibit "G" and the 4 un-numbered and averaged logs which were delivered up to the 25th January were duly delivered. If we consider the 69 un-numbered logs and the 38 numbered logs delivery of which is admitted (107 in all) there would appear from the summary at the foot of Exhibit "G" to be still outstanding 168 numbered logs in respect of which measurement is stated in Exhibit "G". In fact however there are only 167 of such logs actually mentioned in Exhibit "G".

Delivery of the bulk of these 167 logs is admitted. In fact no attack was made in respect of them because Mr. Kilduff was under the impression that he had admitted that all of them were felled, snigged and hauled. However within these 167 logs may be the 4 logs to which his admission, if restricted to 163, does not extend. He also desired to attack the delivery of 4 identified logs numbered 609, 785, 788 and 794 as it was discovered after he had made his admission that the alleged dates of delivery of these was prior to the dates on which according to the Forestry Department file they were respectively measured in the forest.

Whether these logs should be found to have been delivered depends upon the inference to be drawn from all the facts. The number of each of them is clearly shown on a docket which I find to have been delivered by the Plaintiff

to the Defendant with a log to which that entry on that docket related.

I am helped also by the consideration that having regard to the working of the Defendant's system, at any rate after 13th January 1961 I think the probability is that Mr. Starke would have observed the absence of a log in respect of which a docket was delivered or the absence of a docket in respect of a log which was delivered. No such suggestion was made by him or to him. I think the Forestry date must be explicable on some basis consistent with the deliveries in question. That still leaves open however the question of the odd 4 logs, i.e., the difference between 163 and 167 because the unadmitted logs may still be lurking in the balance of 167 logs. If so they would be amongst the logs delivered after the 25th January of which numbers and measurements are stated in Exhibit "G".

As to these I have regard to the fact that the Defendant was under the impression in terms that all the numbered logs of Exhibit "G" for which measurements were stated were delivered to it and are identified by the correct numbers and state the correct measurements and has made a formal admission as to at least all but 4.

This is itself a testimony to the efficiency and accuracy of the system of loading and delivery in conjunction with the dockets. It is also significant that of these logs delivered after 25th January 1961, 11 are part of the identified 38 of which delivery is expressly admitted.

I am satisfied that the Plaintiff delivered a log for every numbered log in the dockets and there are 140 of them. I find that 140 logs purporting to be the logs delivered after 25th January 1961, in respect of which

a number and a measurement appears in Exhibit "G" were delivered; of these we know by admission that at least all but 4 were the logs of the numbers stated in Exhibit "G". This accounts for 69 un-numbered logs and 5 numbered logs without stated measurements, 60 numbered logs with stated measurements up to 25th January and 140 logs with measurements delivered after 25th January.

No suggestion is made that if the logs were delivered as alleged the measurement is wrongly calculated. However there is a possibility that certain numbered logs of measurement more than average may be wrongly numbered and their true numbers not known.

These are logs in respect of which the docket numbers have been altered otherwise than through the carbon. Because only 4 are in question in any respect, only 4 can be affected but it is unlikely that anything like that number are.

If the 4 most over average were wrongly numbered their total volume would exceed average by 2,773 superficial feet. The Defendant may legitimately argue that the Plaintiff has failed to prove that the volume of each of these possibly wrongly numbered logs was actually as stated. There is some doubt as to the actual total measurement in respect of the logs in this category but having regard to the fact that 163 out of 167 are correctly numbered and measured, I think the error if any could not exceed 500 superficial feet. An adjustment of 500 superficial feet should be made in the Defendant's favour.

It is also wrong for the Plaintiff to have claimed average measurement for logs of which it knows the numbers and can ascertain the correct measurement by

reference to Forestry Department "returns".

An adjustment in this respect however favours the Plaintiff. The logs in question are 353, 382, 383, 408 and 409 and the "returns" are in evidence and show that their measurements are as follows, namely:-

353	1,158
382	2,068
383	1,695
408	2,318
" 409	<u>1,202</u>
	<u>8,441</u>

I also think it was wrong for the Plaintiff to claim in respect of un-numbered logs for the average calculated with reference to the whole period it was operating. Mr. Sandbach's evidence was that it should be calculated with reference to each month of operating. Accordingly the average for January would be calculated with reference to the numbered logs delivered in January, of which the volume was known. The total for January as shown in Exhibit "G" was 86,602 superficial feet or 1,008 per log.

However logs 353, 382, 383 and 409 have to be brought into the average calculation and produce a total of 92,725 for 90 logs giving an average of 1,030.2 per log, not 1,068.7.

As to the 74 logs in Exhibit "G" being 69 un-numbered logs and the 5 numbered but averaged logs, the true measurement is therefore 69 logs of average 1,030.2 superficial feet a total of 71,084 superficial feet and for the 5 logs, 8,441 superficial feet.

The correct total measurement therefore should be:-

200 logs	
addition corrected	214,754
69 logs	
(un-numbered)	71,084
5 numbered logs	
previously averaged	<u>8,441</u>
	294,279
Less adjustment in respect	
of logs of which the	
numbers may be incorrectly	
stated	<u>500</u>
Total	<u>293,779</u>

For this the Defendant is liable to the Plaintiff for 32/- less 6/- per 100 superficial feet, a total of £3,819.2.0.

The Defendant says however that the Plaintiff did not fell, snig and haul all of the 274 logs. In fact of those delivered 107 had been felled by the Defendant and only 167 of those delivered were felled by the Plaintiff. Mr. Kilduff argues from this that in respect of at least 107 of the logs delivered the Plaintiff is not entitled to 32/- (less 6/-) because the 32/- was payable only in respect of logs which the Plaintiff did all three operations of felling, snigging and hauling.

I find that all the logs delivered were snigged and hauled but it is true that the Plaintiff did not fell 107 of the 274 delivered. I do not agree with Mr. Kilduff's contention. I think the proper interpretation to be

placed on the conversations and conduct of the parties relative to the terms of the contract is that the Defendant promised to pay 32/- per 100 superficial feet in respect of all logs which were brought to the Mill from the forest by the Defendant. The contract was to do the Defendant's logging and references to felling, snigging and hauling were only to such felling, snigging and hauling as might be necessary to procure and bring the logs from the forest.

Each party knew that there were many logs on the ground and Mr. Starke knew that the logs he was getting throughout most of January were those which had been felled by the Defendant. Yet many of these are the un-numbered logs in respect of which he agreed to average the volume for the purpose of calculating payment under the contract. Further, when the Plaintiff submits its account as at 25th January, Mr. Starke considered it was in order. It claims 32/- for many logs which Mr. Starke knew were not felled by the Plaintiff. The background of the contract was that Mr. Starke was desperate for logs and although there were logs on the ground the parties contemplated that the logs on the ground would be brought in and that the contract would extend beyond the time necessary to bring those to the Mill and would go on for three months to test the reasonableness of the financial arrangement after which they both hoped for a long period of operation at some negotiated price.

The Plaintiff was expected by the Defendant to bring in all logs available and to make more available by commencing felling forthwith. I believe that Mr. Sanders and Mr. Starke understood one another quite well on these points. Mr. Starke gave evidence for the Plaintiff but no suggestion was put to him by the Defendant that the contract to pay 32/- per 100 superficial feet was exclusive of the logs already on the ground on 1st January. I think he would

have been very surprised by such a suggestion.

It is to be observed that in language very like that used by the parties the Defendant Company's Minute of 22nd December, 1960 recites a Resolution of the Defendant's Directors that "the Company contract for Sanders Transport Company to do the Company's logging for 32/- per 100 superficial feet log volume delivered to the Mill in accordance with forestry returns for a three months' trial period from 1st January 1960. Sanders Transport Company agreed to pay 6/- per 100 superficial feet log volume for the Company's tractor and vehicles as required, Sanders Transport Company being responsible for fuel, oil and repairs to the Company's vehicles and tractor."

What was to be done was "the Company's logging." This meant getting logs from the forest and doing such felling, snigging and hauling as was necessary to deliver them at the Defendant's Mill. If some logs did not require to be felled or snigged that was just an incident of the requirements of "the Company's logging" during the relevant period.

In case it should be that on the correct view of the contract the Plaintiff is only entitled to 32/- less 6/- per 100 superficial feet for trees actually felled, snigged and hauled by it, I make certain findings: I find that the Plaintiff felled, snigged and hauled 167 logs. I find also that it felled 60 logs which it was unable to deliver to the Mill because the contract came to an end.

It is clear in my opinion that it would be entitled to a fair and reasonable remuneration for snigging and hauling the 107 logs it did not fell. That work was accepted by the Defendant. It is clear also I think that it would be entitled to a reasonable remuneration for felling the 60 logs which were not snigged or hauled. I think

this follows from the circumstances in which this work was done and from the fact that the contract was wrongfully brought to an end by the Defendant in that the Defendant made further performance of the contract by the Plaintiff impossible by failing to pay the Royalties to the Forestry Department upon which the removal of logs was conditional. Logs which the Defendant was bound to make available were not available because of the Defendant's default. In these circumstances the Plaintiff would be entitled to reasonable remuneration for work commenced but uncompleted because of the fault of the Defendant. Compare Lodder v. Slowey 1904 A.C. 442. I think it is a sound approach to treat the 26/- per 100 superficial feet as a fair remuneration for felling, snigging and hauling, and I so find. It follows that the Plaintiff felled 227 and snigged and hauled 174. A fair remuneration for the whole of the Plaintiff's work would be 26/- per 100 superficial feet for 227 logs. In respect of 47 logs snigged and hauled a fair remuneration would in my opinion be such portion of 26/- as represented the work of snigging and hauling.

The only information I have as to the relative rates for each separate operation of felling, snigging and hauling is given by Mr. Flower whose evidence is that the rates would be in the ratio of 3 for felling, 10 for snigging and 9 for hauling. This means that in respect of 47 logs snigged and hauled but not felled a fair remuneration would be 19/22nds of 26/-, namely 22/6d. Assessing these logs as average logs they would constitute 51,026 superficial feet in respect of which the Plaintiff would be entitled to 22/6d instead of 26/- per 100 superficial feet. This would result in a deduction from the amount otherwise due to the Plaintiff of £86.14.0.

It remains to consider the Defendant's counter-

claim. In my view this must fail in all respects. It comprises a claim that the Defendant is entitled to recover from the Plaintiff:-

- (a) £1,260 for hire of two trucks with timber jankers attached.
- (b) £1,260 for hire of D7 tractor.
- (c) £84 for supply of two truck drivers.
- (d) £28 for supply of a tractor driver.
- (e) £210 for supply of a European bushman.
- (f) £140 for supply of eight tree-fellers.

These counter-claims total £2,982.0.0.

As to £2,520 representing items (a) and (b) of this counter-claim, I do not think a claim in respect of it should have been brought. Although a doubtful but plausible claim may legitimately be litigated, this claim does not fall within that category. There is obviously no basis in the evidence upon which the claim can be supported.

In addition the slightest inquiry would have shown the Defendant Company's Directors that the Defendant did not in any relevant sense supply any of the workmen referred to in claims (c) (d) (e) and (f) and that the Plaintiff bore the expense of all workmen who worked for it in the contract. In effect, these claims were abandoned at the hearing.

The action proceeded on the basis that there was in the counter-claim as pleaded included a claim for damages for failure by the Plaintiff to maintain and return the Defendant's vehicles in good working condition. However no allegation or particulars of such failure appear

in the pleadings. The attempt made at the trial to support the suggestion that there was a failure for which the Plaintiff was liable was extremely weak and so far as it went to support a cause of action quite incomplete. Some evidence was given by Mr. Flower that the tractor and the vehicles were out of condition in some respects when he saw them some time after the Plaintiff's contract had come to an end, but it would be difficult to assess the significance of this evidence even if it were accurate. However this evidence is not supported where if sound it could be supported, and Mr. Flower's approach and his demeanour were such that in my view his credit in this case is materially affected. As a result I would not be prepared to act upon this evidence.

So far as the pleadings are concerned, I have decided the case by reference to the issues fought at the trial and I treat any necessary amendments as having been made.

As a result, I give judgment for the Plaintiff for £3,819.2.0. with costs, and dismiss the counter-claim with costs.

JUDGE.