

IN THE SUPREME COURT)
OF THE TERRITORY OF)
PAPUA AND NEW GUINEA)

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OF
PAPUA & NEW GUINEA
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FLOWER v. ROBERTS

and

ROBERTS v. FLOWER

JUDGMENT DELIVERED 10TH APRIL, 1957

By consent both actions were consolidated and Roberts' counter-claim against Flower is the main action between the parties.

Apart from credibility of the two main witnesses, Flower and Roberts, in their respective actions, it appears to me that the issues are as follows:-

1. Did Roberts receive timber from Flower in January, 1956.
2. Did Roberts rely on Flower to sell to Roberts timber which would be select grade and up to the standards of the specifications of Commonwealth Works Department.
3. Does the Sale of Goods Ordinance No.52 of 1951 come to the aid of Roberts.
4. Was Flower's timber condemned as alleged by Roberts.

Before dealing with the issues as mentioned, I shall deal briefly with the credibility of Flower and Roberts.

Only once in his evidence Flower gave me the impression that he was evasive - on the stacks of timber for a purchaser - but he explained that he does not stack timber in stacks for a particular purchaser; that his mill is in addition a Timber Yard with stacks of timber from one hundred to one hundred and fifty in all and in different lengths and sizes for the purchaser to "take his choice." Flower produced his records to substantiate his evidence.

On the contrary, Roberts did not produce any records. He claimed he had lost his records, and he relied upon his memory. When it suited him he was evasive. He alleged a concoction of a document by Flower; and he went to the extent of denying all knowledge whatsoever of a copy of a document although the copy of that supposedly fictitious document was in the hands of his two different legal advisers.

Where the evidence of Flower and Roberts conflicts, I accept the evidence of Flower.

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Dealing now with the issues:-

1. Flower's records show that Roberts received timber during March, 1956 only, and then on three loads only. Roberts claims several trips to Flower's yard - one by himself in January, and others by his employees. Roberts' employee, Connor, states that he made two trips, and, according to him, another employee, Hahne, may have made one trip to pick up timber between Connor's two trips.

Flower's records support his contention that only three loads of timber were received by Roberts - delivery dockets No.'s 65, 72 and 73. Exhibit "B".

Roberts claimed that he picked up the major portion of the material timber in question, 5x3, 4x2 and 3x2 in January, 1956 when Flower was present and selected the timber for Roberts. Flower says he was not in Moresby in January, 1956, that he was in Australia during that month.

As to any January load, Roberts has lost his ground in that in his replies to interrogatories when he would have had time, and no doubt legal advice, on his answer wherein he stated that he received his timber from Flower during the month of March, 1956.

I believe Flower and I find that Roberts' timber was picked up in three loads during March, as evidenced by Flower's records.

2. Although Roberts has failed on the first issue, he may still succeed if the evidence shows that Flower held out his timber to be select grade and to meet Department of Works' specifications.

Flower's evidence is that he does not deliver timber; that he sells to the buyer to come to the Timber Yard and choose his own timber from the particular stacks in different lengths and sizes. According to Flower, at the outset the timber comes from the docking bench and then graded - and so far as "select grade" applies, then with the course of time and movement in the timber, some of the timber firstly graded as "select grade" may deteriorate because of possible warp or twist or spring. But it is for the buyer in selecting his own timber from the different stacks to avoid taking any such defective timber.

I have disbelieved Roberts on his allegation that Flower selected timber for Roberts in January, 1956. The only other evidence I have before me on the point is that of Connor who states that on two trips he selected his own timber.

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I find that Flower did not warrant to Roberts that his, Flower's, timber would be up to Department of Works specifications.

3. Although Roberts has failed on the second issue, the relative provisions of the Sale of Goods Ordinance No.52 of 1951 could still possibly come to his aid. The relative provisions of that Ordinance regarding implied conditions as to quality or fitness are contained in section 19(2) (a) and (b). (Read these).

Despite the terms of those provisions, the Ordinance may come to the aid of Roberts if the timber was actually loaded on to Roberts' trucks by any employee of Flower.

Apart from Roberts' evidence alleging the January load, which I disbelieve, the only evidence before me on the point is that of Connor again, wherein he states that on his two trips he selected his own timber.

On the evidence there is nothing on which I can reasonably find that Flower or any of his employees at any time selected any timber for Roberts, or any of his employees.

4. Roberts claims that all the timber which was condemned in the four houses which he was building for Commonwealth Works Department was timber obtained from Flower in sizes 5x3 bearers, 4x2 joists and 3x2 studs. Those were the only sizes of those particular timbers obtained by Roberts from Flower.

Alan Forbes Anderson, Commonwealth Works Supervisor in charge of supervision of the building of the four houses, gave evidence that in the four houses timber was condemned in each - in three buildings up to 70% of the framework and in the fourth, about 10% or 15%.

Anderson stated that the condemned timbers were bearers some 5x4 and others 5x3 and joists 5x2 and studs 3x2.

Comparing these measurements, as evidenced by Anderson, with those claimed by Roberts, then there must have been in the condemned timber some timber other than that, if any, obtained by Roberts from Flower.

According to Anderson, all the condemned timbers were condemned between the period from "about 20th January, 1956 to perhaps about 10th February, 1956."

According to Flower's records, which I believe, the first load of timber which Roberts received from Flower was on 20th March, 1956. Delivery Docket No. 62. Part of Exhibit "B".

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On that evidence there could not possibly have been any of Flower's timber in the four houses when the defective timber was condemned by Anderson.

However, assuming for the moment in favour of Roberts, that Anderson's memory was playing him false regarding the period in which the timber was condemned in the four houses, I refer to two portions of Roberts' evidence which appear to me to be to the point.

In Mid-March, 1956, Roberts gave Flower a cheque for either £300 or £314 in payment of the timber which Roberts had received from Flower. That cheque was dishonoured. During a conference between Roberts and his Bank Manager and Flower, arrangements were made for the cheque to be honoured some ten days or so later. But in the meantime payment of the cheque was stopped on the advice of Roberts' legal adviser.

On cross-examination as to why he stopped payment of the cheque Roberts did not allege that it was because Flower's timber had been condemned. He was evasive as to the reason, but as best I can inform myself, it appears that the reason was because Roberts considered he had been overcharged by Flower and had asked Flower for an account but had not received that account.

Quoting now from Roberts' evidence:

In chief - "I used the timber. It filled in the gaps which were left by the southern timber which I could get. The 5x3 was for my bearers, the 4x2 were the joists for the top of the bearers, the 3x2 went into framework to make walls and the 3x1½ was stacked inside as I didn't require it yet."

On cross-examination - "Q: Why did neither you nor any adviser of yours complain to Flower or any of his representatives about the defective timber? A: I am not a legal man. Weeks slipped by. I did not know I could sue Mr. Flower. And it was only a small portion of the timber which had been condemned. Mr. Flower is not the sort of man you can complain to."

That probably is the truth. If any of Flower's timber was condemned, which I cannot find on the evidence, then any such timber represented such a small proportion of the whole of the timber condemned in the four houses that Roberts took no notice of it and it was not worth his while worrying about it so far as he was concerned in his then predicament.

But Roberts is now alleging that the whole of the timber condemned in the four houses was received by him from Flower, I cannot accept that submission. On the contrary there is nothing

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in the evidence which I believe in the case which will enable me to find that any of Flower's timber was condemned.

There will be judgment for Flower on his claim in the sum of £258.17.9. Roberts' counter-claim is dismissed with judgment thereon in favour of Flower.

A. Kelly J.