

*Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of Livingstone v. Ross, from the Court of Queen's Bench for Lower Canada, Province of Quebec; delivered 16th February 1901.*

---

Present at the Hearing:

LORD HOBHOUSE.  
LORD ROBERTSON.  
LORD LINDLEY.  
SIR FORD NORTH.

[*Delivered by Sir Ford North.*]

The Appellant Livingstone, who is described in his case as an accountant of modest means, but enjoying the confidence of financial men, obtained a judgment against the Respondent Ross in the Superior Court of the city of Quebec, declaring that he was entitled as purchaser to a conveyance from Ross of the Buckingham property hereinafter described. Ross was the surviving partner of the firm of Ross Brothers, who were owners of that and other property; and Ross was winding up the business of that firm. The judgment above referred to in favour of Livingstone was reversed by the Court of Queen's Bench of the Province of Quebec (Appeal Side), and Livingstone's action was dismissed with costs. Hence this Appeal by him.

Livingstone's claim to a conveyance of that property was founded upon the following letter

from Ross to him, which he contended gave him an option to purchase it for himself:—

“ Mr. John Livingstone,  
 “ 105, Temple Building,  
 “ Montreal.

Quebec,

“ Dear Sir,

23rd August 1897.

“ We hereby agree to sell and convey all our rights and  
 “ titles to lands, timber limits, farms, water powers, slides,  
 “ joint interest in slides with Maclaren, new saw mill, store  
 “ and stores goods, crops, shanty supplies and keep over,  
 “ goods, booms, piers, houses, workshops, all equipments and  
 “ appurtenances, horses, cattle, and all utensils and effects of  
 “ every kind other than saw logs and sawn lumber, the whole  
 “ situate in the county of Ottawa.”

Further details were then given which it is unnecessary to state verbatim; but they included a new sawmill and machinery, a machine shop fitted with lathes, planes, and other woodworking machinery; blacksmith's and carpenter's shops and tools; a farm of 600 acres; and also slides, booms, piers, chains, rigging, and every equipment or appurtenance belonging to the said mill and properties, described or not, and 1,400 square miles timber limits (therein described by reference) on which were large supplies of standing timber. The letter then proceeded:—

“ The whole of the said properties, moveable and im-  
 “ moveable, belonging to the concern, whether described or  
 “ not, except as aforesaid, for the sum of 120,000 dollars.  
 “ Terms— Cash or equal thereto, with interest thereon or  
 “ any part thereof at 4 per cent. per annum; \$30,000 to be  
 “ paid at even time with the execution of the deeds of con-  
 “ veyance and not later than the 15th January next, and not  
 “ less than \$30,000 each year thereafter in semi-annual payments  
 “ of \$15,000 until the whole amount with interest is paid.”

“ The said sawmill is quite new, and its capacity is about  
 “ 170,000 feet per day.

“ We to have reasonable and sufficient time to saw and move  
 “ said logs and timber with use of plant and means of handling  
 “ free of charge, but at our own expense, unless otherwise  
 “ arranged by sale of such to you.

“ You to have reasonable and sufficient time, not exceeding  
 “ three months from the 1st Sept. next, for correspondence  
 “ and communication with foreign and near correspondents;  
 “ and for inquiry, explanation, exploration, and for arrange-  
 “ ments for development, the said offer not prejudiced by the  
 “ continuance of the business as a going business by us,  
 “ pending the arrangements by you for completing sale.

“Two and a half per cent. commission payable to you on  
“the said sum after completing sale.

“Yours truly,  
“ (Signed) Ross Bros.,  
“ In Liq.

“All outlays in connection with logging for next year’s  
“business to be borne by purchasers.”

On the 29th of November Livingstone wrote and sent the following letter, which was delivered to Ross on the next day:—

“Frank Ross, Esq., 105, Temple Building,  
“Messrs. Ross Bros. in liq. Montreal,  
“Dear Sir, 29th Nov. 1897.

“For answer to yours of the 23rd of August last, delivered  
“to me by you, in your office in Quebec, on that date, I beg to  
“say I accept the offer and agreement therein.

“Yours truly,  
“JOHN LIVINGSTONE.”

Livingstone alleges that by this letter the relation of vendor and purchaser was constituted between Ross and himself.

To that letter Ross replied as follows:—

“Mr. John Livingstone,  
“105, Temple Building, Montreal. Quebec,  
“Dear Sir, 6th Dec. 1897.

“In reply to yours of the 29th ult., I cannot accept  
“such notification as binding on me. You have given me no  
“principal in the transactions, on whom I have any hold; and  
“you are simply a broker in the matter, so far as my dealings  
“with you. However I am anxious to sell, and will consider  
“any proposition later on you may put before me on behalf of  
“responsible buyers.

“I remain, yours very truly,  
“FRANK ROSS.”

Ross’s contention is that there never was any question of sale or purchase between Livingstone and himself at all; that he never offered to sell to Livingstone, who was admittedly a person of no means; that Livingstone was merely employed by him as his agent to find a person or persons of means willing to buy the property from Ross on the terms contained in the letter of the 23rd of August; and if he did succeed in bringing about such a sale, he was to be paid a commission of 2½ per cent. on the purchase money after the sale was completed.

It is necessary now to consider carefully the letter of the 23rd August, and ascertain what are the rights of the parties thereunder. The opening words of that letter are "We hereby agree to sell and convey" without saying to whom. If the sale was intended to be to Livingstone alone, as he contends, is it credible that when he prepared this letter for Ross to sign, he would have omitted to insert here the words "to you"? which are found in the passage giving him the right to a commission.

Then there is the provision as to three months' delay from 1st September (which has already been read). What was that for? Obviously to give Livingstone the opportunity of finding at home or abroad responsible persons to examine and explore, and, if satisfied, to purchase the property; and thus earning his commission. Such delay for the purposes mentioned would have been quite unnecessary if Livingstone were to be the purchaser, for he had known the property for years. Then at the end of that paragraph is the provision that Ross may carry on the business pending the *arrangements by you* for completing the sale. What were these arrangements? The finding of substantial persons willing to buy and to comply with the conditions of the letter. If Livingstone had been sole purchaser the arrangements he would have had to make would be to complete the *purchase*, not the sale.

Again the passage at the end of the letter as to the outlay in connection with logging for next year's business being borne by the purchasers is entirely inconsistent with Livingstone's contention that he was to be the sole purchaser.

One other portion of this letter was relied upon by both sides. The saw logs and sawn timber were expressly excluded from the property sold; and a subsequent passage in the letter provides "we" (*i.e.* Ross) "to have reasonable and

“sufficient time to saw and move them, &c., unless otherwise arranged by sale of such to you.” The Counsel of both Livingstone and Ross in the Courts below seem to have assumed that “to you” meant to Livingstone personally; and the Judges apparently accepted that view. Proceeding upon that basis Livingstone’s Counsel contended that it was not business to suppose that Livingstone should be an agent merely for the sale to others of the saw mills and machinery and at the same time should be personally the purchaser of the logs and timber, which could only be prepared for the market by the use of those mills. But this is doing violence to the terms of the letter. Livingstone did not in fact agree to purchase the logs and timber. The letter provides that they are to be the property of Ross, unless some subsequent arrangement should be made for the sale of them to “you”; and certainly the person or persons referred to would never make any such subsequent arrangement without first seeing some way to having the logs dressed and forwarded to market, at a fair profit.

The use that Ross’s Counsel made of this passage was to say that where, as here, a sale to Livingstone personally is meant, the words “to you” are inserted; and as they are not found in the opening words of the letter, a sale to Livingstone could not have been meant there.

There is one overriding answer to all criticisms upon this passage. In their Lordships’ opinion the words “the sale of such to you” does not mean to Livingstone personally. Looking at the agreement as a whole it clearly is not a vendor and purchaser agreement, but an agency agreement; and it would be wholly altering the position of the parties to read it as Livingstone desires us to do. The phrase “to you” means to the persons whom Livingstone might find to

buy the property ; and it has the same meaning as if the phrase had been " to your parties, your " friends, your syndicate, your purchasers," or the like. One must not expect to find legal accuracy of drafting in a letter which is the joint production of an accountant and timber merchant ; but the meaning is obvious.

It is a satisfaction to their Lordships to find that the view they have arrived at as to the legal construction of this paragraph of the letter corresponds exactly with Livingstone's own view of its meaning before he fell into the hands of his legal advisers. He never considered that he had come under any personal liability, present or future, to purchase the timber and logs ; on the contrary, the possible future arrangement to purchase them was on behalf of those who he then contemplated would acquire the property. *See* Record p. 92, lines 4-10 : p. 94, line 2.

One other clause remains for consideration one of the utmost importance. It supplies the keynote to the whole. It is the provision for 2½ per cent. commission being payable to Livingstone on the purchase money after the completion of the sale, a phrase already made the subject of comment. This provision as to commission is in their Lordships' opinion absolutely inconsistent with Livingstone's contention. It shows that he was an agent for sale to be paid by commission ; and not a purchaser. His Counsel suggested that " discount " probably was intended when commission was mentioned ; but the suggestion that an accountant did not know the difference between commission and discount ; or confused one with the other ; is too large a draft on their Lordships' credulity. Moreover discount would be an abatement made from the purchase money in favour of the purchaser, in the course of completing the

purchase; whereas this commission is made payable after completion of the sale, to the vendor's agent.

But if there could be any doubt as to the construction of that letter, standing alone, a reference to the surrounding circumstances makes the matter still clearer.

Livingstone in his pleadings refers to certain dealings between Ross and himself in 1894, as to this very same property; and contends that Ross gave him an option to purchase it in 1894, and did the same again in 1897.

On 30th October 1894, Livingstone wrote to Ross with respect to certain large American capitalists who contemplated a considerable expenditure on mills at Buckingham and elsewhere, and stated that he was requested to get three months' option to enable them to have the limits explored, and to get expert's reports on the water powers; and added "you can trust me that no misuse will be made of the options; that the business is *boná fide* and the combination one of the strongest in the United States."

On 5th November Livingstone wrote again to Ross asking for two letters for the two properties, Buckingham and Ouiatchouan, and continued "you can make me the private holder of the options as a trustee"; and added "the whole matter would be strictly private, until ready to close or bring you together."

On 14th November 1894 Ross replied to Livingstone:—

"We hereby give you an option on our Buckingham property for 3 months for \$250,000 cash or equal thereto—purchasers to pay in addition all the costs of this winter's output of logs."

Then followed a general description of the property; and the letter concluded as follows:—

"Trusting this information will be of some use, but if the intending buyers wish to send explorers I will do all I can to aid them."

These negotiations led to nothing, and the matter dropped for a time—but it is idle to suggest that under those letters Livingstone could have elected to take the property himself, and could have compelled Ross to convey it to him.

The subject of a sale of this property was brought up again by Livingstone in the following letter :—

“ Confidential.

“ Frank Ross, Esq., Quebec.

Rosedale, Toronto,

“ Dear Sir,

2nd August 1897.

“ Owing to the owner of the Jacques Cartier property being in a lunatic asylum, and two of his brothers shrinking from exposing this in Court, on an application for a factor, as was contemplated, to give a title thereto, I may be able to induce those who proposed joining in the purchase of that property to become purchasers of your Lièvre property, though larger than contemplated. Now please do say the very lowest at which you will sell as before described with interest vesting in you as you contemplated in 1894. If your reply justifies the expense, and I can leave a very sick wife, I will be down; and if the Ouatichouan is unsold I may get the same parties to go in for the latter, if not the former, for development at once.

“ Yours truly,

“ JOHN LIVINGSTONE.”

The property there called the Lièvre property is the same as the Buckingham property.

It is difficult to appreciate exactly the meaning of the phrase “ with interest vesting in you as you contemplated in 1894 ”; but it seems to treat the two transactions as of a similar nature, and certainly does not indicate how a man who was merely an agent for sale in 1894 could be a purchaser on his own account in 1897. And one thing is quite clear, that the proposed purchasers referred to in the letter of the 2nd August did not mean or include Livingstone.

The next step was that about 20th August, in consequence of that letter, Ross and Livingstone met in Montreal, and had some conversation about the property; and then Livingstone drafted the letter dated the 23rd of August and brought it over to Ross at Quebec;



and it was altered on one or two points, and was then signed by Ross.

Reference may here be made to Livingstone's own statements as to the position he occupied in the transaction. At Record 99, line 22, he says "it was distinctly understood I was to syndicate the property. I was to get others that were financially responsible and obtain the deed for the property." And at Record 100, line 36, he says: "the terms were cash or equal to cash, and the understanding was that I was to have associated with me parties who could carry it out."

Certain letters were written by Livingstone to Ross during the three months' delay, dated the 25th and 27th October and 12th November 1897. It is not worth while stopping to read them; but they are just the letters an agent for sale would write to his principal. There is not a word in them as to Livingstone being purchaser; but there are references in two of them to the syndicate he was trying to form.

Their Lordships have no doubt as to the meaning and effect of the letter of 23rd August. It was an employment by Ross of Livingstone as his agent to find substantial persons willing to purchase the Buckingham property upon the terms and within the time mentioned in that letter; and if he succeeded Livingstone was to have a commission of 2½ per cent. upon the purchase money after completing the sale. If no sale was effected, there would be no commission. If before any purchaser had been found and accepted Ross had desired to revoke the employment of Livingstone to sell, he might have done so, as he could not be bound as vendor when there was not any purchaser; but whether under those circumstances Livingstone could have obtained payment for any work he had done under a *quantum meruit*, or could have recovered

against Ross in an action for damages for depriving him of the opportunity of earning his commission, might depend upon the circumstances under which the employment was revoked. But there is one thing which that letter clearly is not, viz., an offer or authority under which the agent, employed for commission to sell for the vendor, could himself become the purchaser.

In support of his contention that he was himself the purchaser Livingstone relies upon a conversation with Ross on 1st December, and a letter from Ross to his own manager Parker on 14th December, alleging that upon each of those occasions Ross recognised and adopted the purchase by Livingstone individually. With respect to the conversation there seems some doubt whether it is admissible in evidence under the Code; except so far as relates to the statements by Ross, which would not help Livingstone. But, assuming it to be admissible, there is nothing in it. Although Ross refused altogether from the first to accept the impecunious accountant personally as purchaser, he was still willing and anxious to sell his property on the terms mentioned in the letter of the 23rd of August, although the three months had expired; and this was expressly stated by him at the interview of 1st December, and in his letter dated the 6th of December already read; and it was such a sale as this that he referred to as still possible. Then, as to the letter from Ross to Parker, it contains this passage "Livingstone has been down, and says " he will be prepared to pay over the money on " or before the 15th of January. Would you " please draw up particulars of all the lands and " lots which now belong to the concern, so that " I would be prepared to act if I see fit." It is the fact that Livingstone had said he would be prepared to pay over the whole purchase money by 15th January; but even then Ross does not

admit that he would be bound to sell to Livingstone, but wishes to be in a position to act, if he should think fit. It may be that if the \$130,000 had been paid down in cash on the day named Ross would have been content to convey even to Livingstone; but the proposal for payment of the whole purchase money on 15th January was very soon dropped. Livingstone could not raise the money. He had not even promises for the whole by the 15th January.

Having regard to their Lordships' decision as to the construction of the letter of 23rd August the rest of the case is not very material: but as it was very fully argued here it may be shortly dealt with. After that letter was signed Livingstone did attempt to find buyers, and had negotiations with Messrs. Blackwell and the Wilsons, father and son, who would have been responsible purchasers. They, however, after a time refused to entertain the proposals. Livingstone then attempted to get some other persons to take the matter up; but time was running short, and these negotiations were far from being completed by the end of November. Expecting them to go through ultimately, but being apprehensive that if no purchasers were found by the end of November the whole matter might collapse, Livingstone tried to keep it alive by giving in his own name as the purchaser. He then continued his negotiations with his friends, and by the middle of January had found several persons who it is not disputed would have been responsible purchasers, if they had come forward as such. This, however, was not the case. These persons did sign a memorandum between Livingstone and themselves, by which they agreed with Livingstone personally that they would find part of the money required. But Ross was not a party to that instrument, and could not have made any claim thereunder against the persons

who signed it. They would not come under any obligation whatever to Ross. Then on 15th January Livingstone made a tender of \$30,000, and claimed to have a conveyance of the property made to himself alone; but he did not tender any deed for execution, nor make any provision for payment of the balance in cash or equal to cash; leaving Ross' claim for the balance of the purchase money, and also for the outlay in connection with logging for the next year's business, to rest solely on the personal liability of Livingstone, who was not worth that amount or anything like it. Ross had never refused to sell the property on the terms of the letter of 23rd August; he was willing down to the last to sell and convey to solvent and responsible purchasers who would become personally liable to him; but this demand by Livingstone for a conveyance to himself alone, leaving him the only person liable to Ross for the \$100,000 balance of the purchase money and for the logging outlay, was too much. Ross, therefore, the time for completion being up, chose to treat the whole matter, as between himself and Livingstone, as at an end; and in their Lordships' opinion he was justified in so doing.

They will therefore humbly advise His Majesty that this Appeal should be dismissed. The Appellant must pay the Respondent's costs.

---