

Editor's note: 79 I.D. 567; Reconsideration denied by order dated Dec. 22, 1972; Appealed -- settled, Civ. No. 74-986 (D.Or.)

JOHN D. HUFFMAN

IBLA 71-229

Decided September 7, 1972

Appeal from the decision of the District Manager, Coos Bay, Oregon, January 27, 1971, in which demand was made for payment of the balance due under government timber sale contract.

Affirmed

Timber Sales and Disposals

A timber sale is a lump-sum sale where the purchase price is not contingent on the volume of timber to be recovered. Where a timber sale contract provides for a lump-sum payment for removal of all trees marked with blue paint within a designated area, liability for payment may not be adjusted to the volume of the timber so designated and sold.

Timber Sales and Disposals

Where the BLM timber sale contract specifically disclaims the warranty as to volume, none arises.

Timber Sales and Disposals

A disclaimer of warranty of quantity in a BLM timber sale contract is not unconscionable pursuant to § 2-302 of the Uniform Commercial Code.

APPEARANCES: Leonard B. Netzorg, Esq., for appellant.

OPINION BY MR. STUEBING

John D. Huffman has appealed to the Secretary of the Interior from the decision of a District Manager, Coos Bay, Oregon, dated January 27, 1971, in which demand was made for \$ 35,711.57, the remaining payment due to the Government under timber sale contract 14-11-0008(8)-247. This liability was arrived at by subtracting the amount already paid by Mr. Huffman from the total purchase price after giving credit for the timber remaining on the contract area and adding the balance due for road maintenance.

In his statement of reasons appellant raises several points pertaining to the relation between the volume of timber recovered and the contract agreement pertaining thereto. These points will be considered in the order in which they logically relate to the disposition of the case.

First, appellant asserts that the sale in question was not a contract for a specific lot where the timber sold was to be identified by independent circumstances. Thus, the appellant reasons that the quantity specified governs the contract. Appellant bases his reasoning that the contract is one for a specific amount of timber on the fact that each tree which was to be sold was individually identified with blue paint on its trunk. Although the subject contract did not involve the sale of all the trees within a certain boundary, it did involve all the trees marked with blue paint within a set out area. Therefore, it was a contract for a sale of timber in accordance with circumstances independent of any volume estimation. Brawley v. United States, 96 U.S. 168 (1877); Brock v. United States, 84 Ct. Cl. 453, 459 (1937). Also, the contract of sale states in sections 1 and 37:

Sec. 1. Timber Sold. The government hereby sells to the Purchaser and the Purchaser hereby buys from the government, under the terms and conditions of this contract, all timber, except that reserved to the government under sec. 37 of this contract, within the area designated by the government, comprising the contract area and situated in the county of Douglas, State of Oregon * * *.

Sec. 37. Timber Reserved from Cutting. The following timber on the contract area is hereby reserved from cutting under the terms of this contract and is retained as the property of the Government:

a. All trees shown on the reserve area and previous sale areas on Exhibit A and all blazed or posted trees which are on a marked boundary of the reserve area, except approximately eight hundred seventy-six (876) dead, down, or green Douglas fir trees, thirty-four (34) dead, down, or green hemlock trees, seventeen (17) dead, down, or green western cedar trees, four hundred seventy-five (475) snags, culls, and hardwood trees marked for cutting with blue paint on the stump in the approximate area in which trees are marked for partial cutting in reserve area as shown on Exhibit A * * *.

In addition, in relation to the gross sale nature of the contract, the purchase price is set as not being contingent upon the volume of timber logged. The method of payment is expressed as follows:

Sec. 3. Installment Payments. (a) This is a lump sum contract which may be paid in installments as set forth in this section. The following estimates are made solely as an administrative aid in determining when installments become due. * * *

The contract then goes on to set out the table of costs for the different types of timber to be removed. The contract continues:

Except as provided in § 2, the Purchaser shall be liable for the total purchase price, even though the quantity of timber actually cut or removed or designated for taking is less than the estimated volume or quantity shown above. (Emphasis supplied.)

Thus, from the face of the contract it is apparent that the agreement is one for a lump-sum sale and not in any way dependent upon the amount of timber recovered. This result has been reached before in cases where the wording in the questioned contract was similar to that involved here, and the contract was held to be one for a lump sum. Russell and Pugh Lumber Co. v. United States, 290 F.2d 938 (Ct. Cl. 1961).

Appellant next raises the point of whether the designation of estimated amounts of recoverable timber in the prospectus and in the sale contract was itself a warranty of quantity. As discussed above, the sale was not for a specific volume. However, in support of his warranty contention, appellant cites Everett Plywood and Door Corp. v. United States, 419 F.2d 425 (Ct. Cl. 1969), which he asserts has changed the established law of BLM lump-sale contracts and now incorporates a warranty as to quantity when a volume estimate is set out in the prospectus and the sale contract. While many of the factual aspects of the two cases are similar, appellant himself points out the critical distinction. In Everett there was no express disclaimer of warranty as to volume, whereas in the present case the contract expressly provides that the purchaser shall be liable for the total contract price even though the quantity is less than that estimated.

In the Everett case the rationale and language of the decision shows that the lack of an expressed disclaimer was an essential point. The opinion states:

It is concluded that a warranty of quantity of timber was extended to plaintiff by defendant in the subject contract of sale under all of the relevant facts of circumstances in evidence, based primarily on the cumulative effect of the following facts:

1. The contract prepared by defendant, is [sic] prospectus of sale, and its cruise and sale report, all available to plaintiff before bidding, all stated that there was a total of 73,100 M board feet of merchantable timber to be cut on the sale.
2. None of such documents, nor any other issued by defendant prior to consummation of the sale, contained a disclaimer of warranty as to quantity, or any cautionary language to the effect that prospective purchasers should not rely on defendant's cruise estimate. * * *

Finally, pursuant to the Court of Claims' holding in Everett applying the Uniform Commercial Code as a "federal" law of sales, appellant charges that the disclaimer clause in the present timber sale contract is void due to U.C.C. sec. 2-302 which states:

(1) If the court as a matter of law finds the contract or any clause of the contract to have been unconscionable at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result.

(2) When it is claimed or appears to the court that the contract or any clause thereof may be unconscionable the parties shall be offered a reasonable opportunity to present evidence as to its commercial setting, in effect to aid the court in making the determination.

In the comment to the Code 1/ provision on unconscionable contracts set out above, the Editorial Board 2/ stated that the test to be applied in using that provision to be one of whether:

* * * In light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. * * * The principle is one of prevention of oppression and unfair surprise * * * and not of disturbance of allocation of risk because of superior bargaining power.

Thus, the standard is one of "oppression and unfair surprise", with the needs of the particular trade and its commercial background being the primary evidence. Appellant is, as pointed out by his own brief, a logger of many years' experience. Therefore, he can hardly claim surprise in the methods and practices used by the BLM in conducting timber sales. In addition, as pointed out in the comment above, the unconscionability clause is not to be used to alter the risk inherent in any sales situation due to differences in bargaining power.

1/ U.C.C. § 2-302, Comment 1. (1962).

2/ The Permanent Editorial Board for the Uniform Commercial Code to the American Law Institute and the National Conference of Commissioners on Uniform State Laws.

While not essential to the disposition of this case, we believe that a recitation of some of the facts might prove illuminating with reference to the appellant's contention that the denial of warranty was "unconscionable". First, appellant had four weeks from notice of sale until the sale date in which he could have made his own volume estimate. Second, he has contracted for five other BLM timber sales in the same area since 1963, indicating his familiarity with the terrain and physical conditions in the area, such as underbrush; as well as the terms of sale. Third, appellant worked on the completion of this contract during 1968, 1969, and 1970, having applied for and received an extension from November 1969 to November 1970. During the term of the contract he made no complaint regarding volume shortage, although on more than one occasion he complained that his operation was hindered by the state of the market. It was only after the extended term expired and a request for another extension was denied, when demand was made for the payment of the balance due that appellant raised the issue of volume.

The facts of timber sales in gross bear out the Government's assertion that it would be impracticable to try to carry out timber sales in any way other than for a set sum regardless of the volume involved. The Government states in its contract and prospectus that any volume estimates are to be regarded as an administrative aid only. The disclaimer clause is used not only because the sale is

one for a lump sum but also because the nature of timber cruise reports are such that generally no two men will arrive at the same conclusion as to the volume of timber in a set area. Thus, the cases show that often there is as much as a one-third variation between the cruise report and the timber actually realized. Russell and Pugh Lumber Co. v. United States, supra, and cases cited therein. It should be noted that appellant asserts at most a 30 percent variation between the estimated recoverable amount of timber and the amount actually recovered.

In conclusion, the mere fact that all the trees to be cut were marked with blue paint does not require a finding that the sale was for a specific volume of timber. Brock v. United States, supra. Appellant's assertion that such "lump sum" sales have been altered by the effect of Everett Plywood and Door Corp. v. United States, supra, so as to create a warranty as to volume, must also be rejected; the distinction being that in this case the contract specifically disclaimed any warranty as to quantity, whereas the opinion in the Everett case relied heavily upon the point that there was no such disclaimer. Finally, appellant's contention that the disclaimer of warranty in this contract is unconscionable within the purview of section 2-302 of the Uniform Commercial Code cannot be sustained, as the "unconscionability clause" in the U.C.C.

was drafted to protect against unfair surprise and to prevent oppression. Here, appellant is well versed in BLM timber sale practices and was provided with adequate written notice of the terms of sale.

Moreover, the practice of not guaranteeing the volume of recoverable timber cannot be said to be oppressive, since it is well known in the trade that the volume which is recovered frequently does not correspond directly with the pre-sale estimates of volume. Russell and Pugh Lumber Co. v. United States, supra.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is affirmed.

Edward W. Stuebing
Member

We concur:

Newton Frishberg
Chairman

Martin Ritvo
Member

