AKHIL MINES LIMITED A

v.

METAL TRADERS INC.

[COURT OF APPEAL, 1962 (Hammett P., Marsack J.A., Trainor J.A.), 8th, 26th February] B

Civil Jurisdiction

Cause of action—account stated—essentials thereof— mutual agreement as to sum due—absolute admission of debt due and payable—admission of part claim coupled with claim of set off insufficient—Rules of the Supreme Court 1883 (Imperial) 0.14 r.3. C

The respondent company obtained leave under the provisions of Order 14 of the Rules of the Supreme Court to sign judgment against the appeallant company for £20,891-15-7. The claim in the specially endorsed writ was upon an account stated. A letter written by the respondent company to the appellant company enclosed an account showing various debits and credits between the parties and D a balance in the respondent company's favour of £30,685-19-6. The document relied upon as an account stated was a reply by the appellant company dated the 12th March, 1958, (1) denying liability for the sum of £30,685-19-6 (2) not disputing liability for six items totalling £20,891-15-7 (3) claiming a set off of £12,630 for the sale of ore and (4) offering to pay £8,261-15-7 if accepted in full settlement E

Held: 1. In order to constitute an "account stated" there must be a mutual agreement as to the amount payable and an unqualified admission of liability; the principle to be applied to an "account settled" is that there must be an absolute admission of a debt accrued due and payable. F

2. The letter of the 12th March, 1958, did not contain the attributes of an account stated; it was not an unqualified admission of liability and contained no promise, express or by inference, to pay the sum of £20,891-15-7.

Cases referred to: *Irving v. Veitch* (1837) 3 M. & W. 90; 150 E.R. 1069: *Bishun Chand Firm v. Seth Girdhari Lal* (1934) 50 T.L.R. 465; 78 Sol. Jo. 446: *Laycock v. Pickles* (1863) 33 L.J.Q.B. 43; 9 L.T. 378: *Chisman v. Count and Hawley* (1841) 10 L.J.N.S. 124; 133 E.R. 763: *Camillo Tank Steamship Co. Ltd. v. Alexandria Engineering Works* (1921) 38 T.L.R. 134: *Siqueira v. Noronha* [1934] A.C. 332; 103 L.J.P.C. 63. G

Appeal from an order giving leave to sign judgment upon an account stated. The facts sufficiently appear from the judgment of Marsack J. A. The judgments of Hammett P. and Marsack J. A. H

appear below and the President is recorded as saying that he had been asked by Trainor J. A. to say that he concurred with the judgment of Marsack J. A.

A *K. C. Ramrakha* for the appellant company.

G. M. G. Johnson for the respondent company.

The following judgments were read: [26th February 1962]—

B MARSACK J. A.:

This is an appeal from an Order made in the Supreme Court on the 27th October, 1961, giving leave to the respondent to sign final judgment against the appellant for the sum of £20,891.15.7d. with interest thereon at the rate of 5%.

C The respondent's claim in the court below, on a specially endorsed writ, was as follows :

Statement of claim

D The plaintiff's claim is for £20,891.15.7 being the amount found to be due from the defendant to the plaintiff on an account stated between them in writing and contained in a letter from the defendant's then solicitor to the plaintiff dated the 12th day of March, 1958.

Particualrs

1958 March 12th amount due as aforesaid £20,891.15.7.

E The appellant entered an appearance, and the respondent then applied under Order XIV of the Rules of the Supreme Court for leave to sign judgment for the amount endorsed on the writ. This application was supported by an affidavit to which was annexed a copy of the letter from the defendant's solicitors referred to in the Statement of Claim and relied upon to support the claim on an account stated.

F At the hearing of the summons for judgment, Counsel appeared for the appellant and opposed the application, but no affidavit in opposition had been filed. The appellant sought an adjournment for reasons which were held inadequate and an adjournment was, properly in our opinion, refused.

G Counsel for the appellant did, however, oppose the summons for judgment.

After both Counsel had been heard the respondent was given leave to sign judgment.

It is against this Order that the appeal is brought, on the main H ground that the letter of the 12th March, 1958, was not an account stated, and that the respondent was not entitled to succeed in the action based on the claim framed in this way.

In the notice of appeal the appellant asks that the whole of the final judgment be set aside except as to the sum of £8,261.15.7d. By consent an amendment was allowed at the hearing by the deletion of the words "except as to the sum of £8,261.15.7d.", with the result that the appellant asks that the Order of the Court below be set aside *in toto*.

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It is clearly necessary to look carefully at the letter of the 12th March, 1958, from Messrs William Scott and Co. and Rice Solicitors, to the Secretary of the respondent Company.

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This letter, after some preliminary matters, refers to a communication dated 14th February, 1958, received from respondent's Fiji agents with, attached to it, a statement of debits and credits as between the parties, showing a balance owing by appellant to respondent of £30,685.19.6d. The letter of 12th March proceeds :

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"Turning now to your Corporation's account enclosed with the letter of the 14th February and showing the debit of £30,685.19.6 above referred to, we must make it clear that our client Company denies liability for this sum. On the other hand it does not dispute liability for the following amounts expressed in Fiji currency in that account :

	£ 9,647.	10.	8
	2,600.	0.	0
	53.	6.	7
	83.	0.	8
	1,364.	9.	10
	7,139.	8.	6
Total	£20,891.	15.	7

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"Against this total however must be set off a substantial counterclaim by our client Company for 2105 tons of low grade ore sold to your Corporation in 1957 of which 1974.0714 tons were shipped on the vessel the 'Union Banker' and the remainder left on your Corporation's dump at Lautoka. The last mentioned tonnage is of course the ore in respect of which your Corporation claims in its said account against our client Company, the sum of £11,535.17.9. This claim is quite definitely denied. On the contrary Akhil Mines Limited claims against your Corporation as the purchase price of the abovementioned 2105 tons the sum of £12,630 because it is quite clear that there was a sale of the ore in question to your Corporation at a flat rate of £6 per ton.

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The net result of the foregoing is that against your Corporation's admitted claim of £20,891.15.7, our client Company has a counterclaim of £12,630 thus leaving a difference of £8,261.15.7. If your Corporation is prepared to accept the above sum of £8,261.15.7 in full settlement of all claims of whatsoever nature against our client Company we shall be happy to arrange for payment of that sum either direct to you (if Fiji exchange control legislation

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permits) or alternatively to Messrs. Burns Philp (South Sea) Co. Ltd. on your behalf. We should accordingly be glad to hear from you in the matter at your earliest convenience."

A The Order permitting the entry of judgment for the full amount claimed is based on an acceptance of the respondent's contention that this letter constitutes an account stated establishing the liability of the appellant to the respondent in the sum of £20,891.15.7. The construction of the letter in question is therefore of great importance, and the Court must examine the document carefully to ascertain if it can properly be held in law to be an account stated. The appeal was B argued largely on this point. The appellant strongly contended that it is impossible to regard the letter of the 12th March, 1958, as an account stated, and that accordingly the judgment should be set aside.

A great many authorities were quoted to us as to the definition of the term "account stated", authorities which it is only fair to say were not brought to the attention of the Judge in the Court below. A C sharp distinction was sought to be drawn by Counsel for the respondent between an "account stated" and a "settled account".

It seems to me that the essential basis upon which this simplified form of action, by means of a special endorsement on a writ, may be taken is that there should be no real dispute as to the amount for which defendant is liable. If this view is correct, the reason for D permitting action to be taken in this manner upon an account stated would appear to be that the account definitely establishes the amount due from defendant to plaintiff, and expresses or implies either a promise to pay that amount or, at least, an acceptance of liability therefor. This would certainly be the case in what is referred to as a settled account, because that represents a document in which the credit and debit items are set out and considered and both parties E agree that the final amount owing from one party to the other is the balance shown in the account.

The term "account stated" has been considered in a number of authorities and is defined clearly and comprehensively in 8 *Halsbury's Laws of England* (3rd Ed.) 252 para. 439 :

> F "Where parties mutually agree that a certain sum is due from one to the other an 'account stated' is said to arise and the law implies a promise on the part of the one from whom such sum has been agreed to be due to pay the same, on which the other party may sue without being put to proof of the details or correctness of the account . . . The admission of liability and of the amount due must, however, be absolute, and not qualified by any condition or reservation. An unaccepted offer to pay a sum G of money being less than the amount claimed is not an account stated : *Atkinson v. Woodhall* (1862) 1 H. & C. 170."

It is to be noted that in this definition emphasis is laid upon the necessity for a mutual agreement between the parties that a certain sum is due from one to the other. It is from this mutual agreement that the law may imply a promise on the part of one to pay the sum H which has been agreed upon. The admission of liability and of the amount due must be absolute and not qualified by any condition or

reservation. It is urged for the appellant that the letter of the 12th March, 1958, does not contain these necessary ingredients, in that there is no mutual agreement as to the amount payable and the admission of liability is not unqualified. This contention is supported by the opinion expressed by Lord Abinger C.B. in *Irving v. Veitch* 3 M. & W. 90 at p. 107; 150 E.R. 1069 at p. 1076 : A

> "The account stated is nothing more than the admission of a balance due from one party to another; and that balance being due, there is a debt; and when a man is indebted there is always a good consideration for his promise. The very statement of the account, and admission of the balance, implies a promise in law to pay it." B

In *Firm Bishun Chand v. Seth Girdhari Lal & Another* (1934) T.L.R. 465 at p. 468 Lord Wright giving the judgment of the Privy Council says :

> "The essence of an account stated is not the character of the items on one side or the other, but the fact that there are cross items of account and that the parties mutually agree the several amounts of each and, by treating the items so agreed on the one side as discharging the items on the other side pro tanto, go on to agree that the balance only is payable. Such a transaction is in truth bilateral, and creates a new debt and a new cause of action. There are mutual promises, the one side agreeing to accept the amount of the balance of the debt as true (because there must in such cases be, at least in the end, a creditor to whom the balance is due) and to pay it, the other side agreeing the entire debt as at a certain figure and then agreeing that it has been discharged to such and such an extent, so that there will be complete satisfaction on payment of the agreed balance. Hence, there is mutual consideration to support the promises on either side and to constitute the new cause of action." C D E

In the same judgment Lord Wright refers, with approval, to the judgment of Blackburn J. in *Laycock v. Pickles* (1863) 33 L.J.Q.B. 43 at p. 47. Blackburn J. says :

> "In common talk an account stated is treated as an admission of a debt due from the defendant to the plaintiff; but there is also a real account stated .... when several items of claim are brought into account on either side and being set against one another a balance was struck and the consideration for the payment of the balance was the discharge on each side." F

The necessity, in order to constitute an account stated, of having both a mutual agreement as to the amount payable and an unqualified admission of liability, is stressed in all the judgments quoted. It is, however, contended for the respondent that a simple acknowledgment of indebtedness may be an "account stated"; and that the sentence in the letter of 12th March to the effect that the appellant does not dispute liability for amounts totalling £20,891.15.7, together with the further use of the phrase "your Corporation's admitted claim of £20,891.15.7", can be taken out of the context and used as an account G H

stated acknowledging a liability to pay that amount. In support of this proposition the Court was referred to the note in *Bullen and Leake*, Precedents of Pleading, 10th Ed. p. 61 :

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> "As a general proposition an account stated of the second kind" (i.e. an account stated and not an account settled) "lies wherever there is an absolute acknowledgment or admission by the defendant to the plaintiff of a debt accrued due and payable at the time of action brought : *Buck v. Hurst* (1866) L.R. 1 C.P. 297 : *Highmore v. Primrose* (1816) 5 M. & S. 65."

B But even here the principle is applied that there must be an absolute admission of a debt accrued due and payable.

The respondent places great reliance on the old case of *Chisman & Or. v. Count and Hawley* (1841) 10 L.J.N.S. 124. In that case plaintiffs showed to a clerk of the defendants an account consisting of three items, to only one of which, a small amount of £3.10.0, the clerk C objected. It was held that by objecting only to one item the clerk admitted that the other sums in the account were due and owing; and that this constituted an account stated between the parties as to the whole of the sum claimed with the exception of £3.10.0. In the course of his judgment Maule J. expresses the opinion that if the argument for the defendants were correct — that this was not an D account stated because of the disputed item — there never could be an account stated between parties except after a final settlement of all claims on either side. The facts of that case, however, are very easily distinguishable from those applying to the matter now before the Court. There was what could undoubtedly be accepted as an unqualified admission of liability to pay the amount shown in the account, with the exception of £3.10.0. In the instant case, however, E there is no such admission. The account submitted by the respondent Corporation claimed £30,685.19.6. Of this sum appellant admitted that certain items totalling £20,891.15.7 had been correctly charged against the appellant Company, but the only unequivocal admission of liability, from which a promise to pay could be inferred, affected the sum of £8,261.15.7 and no more. As was said in *Camillo Tank Steamship Company v. Alexandria Engineering Works*, 38 T.L.R. 134, F if the evidence proves an admission of money being due, a promise to pay the amount is inferred by the law; but the liability may be rebutted by disputing the debt charged in the account. In the present case there is no admission of a debt due from appellant to respondent except in respect of the sum of £8,261.15.7.

G Counsel for respondent relied also on *Siqueira v. Noronha* [1934] A.C. 332 where a distinction is drawn between the two forms of account stated. The first of these, it is said, is a mere acknowledgment of the debt which in certain circumstances may be rebutted. The second is the form usually employed between merchants in business in which there are entries on both sides and the parties have agreed upon the balance which is payable. In the latter case an H account stated would amount to an acknowledgment of liability for the amount agreed upon and a promise to pay could properly be inferred.

Applying to the matter before the Court the principles which seem to me established by the authorities, I am of opinion that it is not open to the respondent to take one or two sentences or phrases from the letter of the 12th March, 1958, in which liability for certain items is admitted, and treat those as an account stated without any reference to the rest of the letter or to the fact that the appellant acknowledges only a sum of £8,261.15.7 as being due on final balance from the appellant to the respondent. It is perhaps significant that although respondent has in these proceedings sued for the sum of £20,891.15.7, the Corporation has not abandoned the balance claimed in its statement sent with the letter of 14th February, 1958. The Court was informed at the hearing that separate proceedings have in fact been taken to recover that balance. If the essence of an account stated is that one party finally acknowledges a debt of a specific amount and that is accepted by the other party, then the documents in question cannot be held to be an account stated. There is no suggestion that on balance of the disputed accounts the respondent is prepared to accept in full settlement any sum less than the total amount set out in his original claim, which, it must be remembered, is £30,685.19.6. The letter from the appellant's solicitors of 12th March, 1958, while agreeing that certain items totalling £20,891.15.7 have been properly charged against the appellant in the statement of account, is very far from acknowledging that that sum was due and payable by the appellant to the respondent. The whole tenor of the letter is a contention that the total amount due from the appellant to the respondent is £8,261.15.7 and no more. In my view the letter of the 12th March, 1958, does not contain the attributes of an account stated. The respondent has maintained throughout that the amount due by the appellant is £30,685.19.6. In the letter of 12th March the appellant strongly opposes that claim, and while conceding that certain items, totalling £20,891.15.7 have been properly charged against the company, maintains on the other hand that the amount due is only £8,261.15.7. The letter accordingly is not an unqualified admission of liability. No promise to pay the sum of £20,891.15.7 is expressed in the letter, and no such promise can, in my opinion, properly be inferred from the letter.

A B C D E

That being so I consider that the respondent was not entitled to an Order for leave to sign judgment under the provisions of Order XIV. In my view the appellant was entitled to unconditional leave to defend the action.

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For these reasons I would allow the appeal, set aside the Order giving the respondent leave to sign judgment, and would grant the parties liberty to apply to the Court below for further directions.

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On the question of costs, I consider the appellant largely to blame for the failure to oppose the summons for judgment by filing an affidavit as is required by Order XIV, Rule 3. If this had been done it is quite possible that the Order appealed from would not have been made but that the appellant would have been given unconditional leave to defend the claim, or at least the disputed part of the claim. The appropriate pleadings would then have been filed in due course. If such an affidavit had been filed, it is by no means certain that this appeal would have been necessary.

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In these circumstances, I would order that each party pay its own costs in the Court below and that the respondent pay to the appellant one-half the appellant's taxed costs of this appeal.

A HAMMETT P.: I concur.

Appeal allowed; order set aside.