3/92

SUPREME COURT OF VICTORIA

LEWENBERG v ADAIR

Southwell J

3, 9 July, 1991

CIVIL PROCEEDINGS – CLAIM FOR COST OF REPAIRS – CLAIM FOR MONEY DUE UPON AN ACCOUNT STATED – REQUIREMENTS TO MAKE OUT SUCH A CLAIM – NO UNQUALIFIED ADMISSION OF DEBT – NO ACCEPTANCE THAT ACCOUNT CORRECT – WHETHER CLAIM MADE OUT.

1. For a claim upon an account stated to be made out, there must be either an absolute acknowledgement of the debt due and payable or an agreement by one party for valuable consideration to accept the claim as correct.

2. Where one party agreed to pay for work done if the claim were fair and reasonable, a cause of action based upon an account stated was not made out as there was no unqualified or unambiguous admission of the debt nor any agreement to accept the account as correct.

SOUTHWELL J: [1] This is an appeal from an order of the Magistrates' Court at Melbourne whereby the applicant (Lewenberg), who was a defendant in the Court below, was ordered to pay to the respondent (Adair), who was the complainant in the Court below the sum of $8,828.50 with interest and costs. The appeal is brought upon a question of law pursuant to s109 of the *Magistrates' Court Act* 1989.

Adair carried on the business of repairing and selling motor vehicles. In June 1989 Lewenberg was the owner of a Porsche motor car which, for financial reasons, he wished to sell. His brother-in-law, Dr Richard Ward (Ward) who was also a defendant in the proceedings, had previously done business with Adair in relation to motor vehicles. With Lewenberg's permission, the car was delivered to Adair to enable him to sell it. The precise terms of the agreement then arrived at were the subject of conflicting evidence in the Court below, and it became necessary for the Magistrate to make findings as to those terms. In any event, the car was not promptly sold, and Adair carried out repairs to a value of $2,031 in order to render the car a more attractive purchase.

The cost of these repairs was the subject of the claim which in the particulars of demand, is termed "the second agreement". Again a sale did not eventuate, and Adair carried out further repairs to a value of $2,276; this was the basis of a claim upon what was termed "the third agreement". Thereafter, when no sale was effected, Adair carried out repairs to a value of about $4,500, a claim made under "the fourth agreement". Each of the agreements was alleged to have been entered into by both Ward and Lewenberg, under the **[2]** terms of which Adair would carry out repairs and Ward and Lewenberg would pay a fair and reasonable charge for them. Alternatively, it was claimed that Lewenberg was indebted upon an account stated in the sum of $9,366.80.

In his notice of defence, Lewenberg denied entering into any of the agreements referred to in the particulars of demand; it was said that the car was delivered to Adair for sale upon terms that Lewenberg would receive $45,000 from any sale. It was said that in August Lewenberg raised the price to $80,000, that he had demanded the return of the car, and that Adair wrongfully retained possession of the car.

The hearing in the Magistrates' Court occupied 4 and 5 October 1990. There was no transcript of proceedings. The evidence before this Court as to what occurred in those proceedings comes from an affidavit of Lewenberg, based upon his recollection and notes, and an affidavit of Adair which is "from my own recollections, from inspecting the notes of the learned Magistrate, from conferring with counsel who appeared for me at the proceeding ...". The Magistrate's notes are exhibited, and they are commendably detailed. However, it is impossible for this Court to

make confident findings as to the precise words used at two crucial conversations which, in the end, as the parties agreed, formed the basis of the Magistrate's decision.

The evidence in the Court below came from Adair, Ward, Lewenberg and Mr Monichino, a barrister, who said that at the relevant time he had agreed to pay $48,000 for the **[3]** car, upon condition that the repairs referred to in an expert report were carried out. After the close of evidence and the submissions of counsel for Ward and Lewenberg, counsel for Adair sought leave to amend the particulars of claim to add a claim for *quantum meruit*. The Magistrate heard argument upon that submission and retired to consider the matter. Upon his return to Court the Magistrate refused the application upon the basis that substantial prejudice would be caused to the defendants and he then proceeded to give his reasons for his ultimate conclusion.

The Magistrate stated his view that Adair's evidence as to his initial conversations with Ward was "completely unsatisfactory"; on the other hand he found Ward's evidence unsatisfactory in relation to Ward's claimed belief that the cost of repairs would be covered by the proceeds of sale at a sum in excess of $45,000. The Magistrate said that he could make no findings as to what passed between Adair and Ward except that neither had told the whole truth as to the circumstances in which the car was delivered to Adair or as to what passed at "the August meeting", a meeting to which I later refer. In his evidence Adair did not claim that Lewenberg had personally entered into any agreement with him, rather, it was said, Ward was acting as agent for Lewenberg. The Magistrate was not satisfied as to the existence of any particular agreement.

In August a meeting took place between the three men concerned, at which Monichino's offer of $48,000 was discussed, and was recommended by Adair as a reasonable **[4]** price. The Magistrate found that Lewenberg refused to sell, although he was not satisfied of the correctness of Lewenberg's stated reasons for that refusal.

In findings critical to this appeal the Magistrate went on (and I now quote from his notes of his reasons for judgment):

> "However I accept that (sic) the evidence of the complainant that at that meeting and subsequently when the possession of the vehicle (illegible word) given to second defendant he agreed to pay for the repairs which had been done. I accept that the work detailed in paragraphs 6, 9 and 12 had in fact been done totalling $8,828 and that the second defendant knew and accepted that the work was done and acknowledged that the work was done had substantially improved the value of the vehicle (sic).

The Magistrate did not there specifically refer to the claim being made as upon an account stated, but since he had rejected the claim based upon the alleged agreements, and had refused an amendment to plead a *quantum meruit* claim, it is clear that the Magistrate in fact found for Adair upon the claim for an account stated. That this is so is confirmed by the fact that when the defendant's counsel specifically asked the Magistrate if the decision was based upon an account stated, the Magistrate agreed that that was so. Written reasons were requested and the Magistrate said the reasons "would be available in the usual way", but for reasons not explored in this Court, no further document embodying those reasons has been put before the Court.

The question of law as stated for present determination is "whether the Magistrate was in error in finding that there was evidence to support the claim for an account stated". Other grounds are set out in the Master's order, but the stated ground subsumes them.

[5] Upon this appeal it was common ground that the only basis for a successful claim upon an account stated was to be found in the evidence relating to two conversations, one at the August meeting, and the other in a conversation between Adair and Lewenberg in late September or early October 1989, when Adair agreed to allow Lewenberg to retake possession of the car. The evidence relating to those two meetings is as follows (where there is a conflict in the affidavits, that of Adair must be accepted): Adair said that repairs had been done and he gave an estimate of the amount required to "fix the car". Lewenberg wanted the car back because "he didn't want to spend the $8,000 to $9,000 that I had told him had been spent on the car by way of repairs". Adair told Lewenberg that he could have the vehicle back if the invoices were paid. Lewenberg said that he would pay for the work if he knew it had been satisfactorily performed.

The Magistrate's notes of Adair's evidence of this conversation show Adair as saying "I said

I'd prepare invoices and when he paid he could have it. He didn't pay – it sat in our workshop for four to six weeks.".

On 22 September 1989 the solicitors' firm of A. Lewenberg & Associates wrote to Adair, accusing him of "the criminal offence of illegal use of a motor vehicle", claiming compensation for that use and threatening proceedings in respect to it. As to the arrangements for sale and the cost of repairs, it was said that Lewenberg "may consider reimbursing you for the costs incurred if such work and repairs were fair and reasonable".

[6] The evidence relating to the second conversation upon which reliance is placed for the claim of an account stated is as follows: Lewenberg told Adair that he wanted the car and would pay for the work if Adair could provide proof of that work. The Magistrate's notes state "Lewenberg said he needed car urgently if given he'd pay it. I released the car to him on that promise". The invoices were not in fact prepared by Adair until 15 October 1989, although the information from which they were prepared (in the form of work cards) were brought into existence at the time the work was performed. There was no evidence that any precise amount had ever been spoken of by Adair to Lewenberg – the only evidence being that Adair said to Lewenberg at the first meeting that the repairs amounted to $8,000 to $9,000.

Mr Morehead, counsel for the appellant, submitted that this evidence did not form a basis upon which it could be found that Lewenberg was liable as upon an account stated. It was said that some of the requirements of proof of an account stated were missing – there was no absolute acknowledgement of debt, there was no unequivocal agreement to pay, and there was no account of such particularity or precision as could form the basis of an account stated in relation to an existing debt. It was said that there was no evidence of an existing debt, the Magistrate had not found that any contract was in existence between Adair and Lewenberg, and there had been no acknowledgement of any debt.

It was submitted that the claim had not been put upon the basis that Adair was entitled as against the true **[7]** owner to a lien over the car to the extent of the cost of repairs, and that in consideration of Lewenberg's promise to pay, the lien was foregone and the car handed over. That, it was said, might have been the claim, but was not, and issues in relation to it were not explored at the hearing. For the respondent, Mr Hyde (neither Mr Morehead nor Mr Hyde appeared in the court below) at first submitted that it was open to the Magistrate to find that the money was due upon a new agreement entered into at the time Lewenberg obtained possession of the car, albeit that such an agreement was not pleaded.

I have already referred to the Magistrate's refusal to grant the application to amend to add a claim as upon *quantum meruit*. It might be thought that the evidence of Adair as noted by the Magistrate and in particular the claim that "I released the car to him on that promise", having regard also to his earlier statement that he would prepare invoices and that Lewenberg "could have the car when he paid them", could form at least an arguable basis for a claim upon a new agreement – that in consideration for the promise to pay, Adair was prepared to abandon his lien and deliver the car to Lewenberg.

However, the Magistrate was not free to proceed upon that basis. If such a contract had been pleaded, the probability is that the question of Adair's reasons for handing over possession of the car would have been the subject of close examination. It may have been said, for example, that he handed over possession not so much on the basis of Lewenberg's promise to pay, but because of the threats in the letter of 22 September 1989.

[8] Mr Hyde went on to submit that proof of liability upon an account stated does not necessarily depend upon any particular document being in existence at the time the promise to pay was made. It was said it was not necessary that an exact figure be agreed upon – the party making the promise does not have to know the precise amount of the money he is promising to pay. It was said that the important finding was that the Magistrate was satisfied that Lewenberg had agreed to pay a fair and reasonable sum for the repairs and the Magistrate had found that the sum charged was in fact fair and reasonable. However, notwithstanding the Magistrate's findings, it seems to me that at its highest for Adair, the evidence is as appears in his affidavit to which earlier reference has been made: "I was told by Mr Lewenberg that he would pay for the work if I

could provide proof of the work I had done, so I prepared the invoices".

The question is whether that evidence can form the basis of a claim as upon an account stated. Mr Hyde submits that this was not a contingent or qualified acknowledgement, but was a sufficient acknowledgement of debt and a sufficiently precise agreement as to the amount of that debt as to enable the Magistrate to be satisfied that the cause of action was made out. *Halsbury*, 4th Ed., Vol. 9**,** para.698 states:

> "The plaintiff who sues on an account stated proceeds on the assumption that the defendant has admitted a debt to be due to him."

In Bullen and Leake, *Precedents of Pleadings*, 13th Ed, p7 it is said:

> "For the claim to an account stated to lie there must be an absolute acknowledgement ... made by **[9]** the defendant ... to the plaintiff ... of a debt ... due from the defendant to the plaintiff ...".

In my opinion, in this case there is no evidence that Lewenberg ever admitted that there was a debt due and payable by him to Adair. On the contrary, he seems to have been careful to avoid making any admission of the existence of such a debt. *Halsbury* goes on to state that the term account stated "has been used to cover three different situations". The third, relied upon by Mr Hyde, is that —

> "there is an account stated where a claim has been made by one party, and the other party has for valuable consideration agreed to accept it as correct. The consideration may be a reduction of the claim, a consent to wait for payment, or any other matter involving a consideration for the agreement to pay. There is a real agreed account and according to English law cannot be reopened except for fraud or on some other ground which would enable a party to an agreement to have it set aside (sic)."

In my opinion, the evidence does not show that Lewenberg agreed to accept any account as correct, within the meaning of the passage just quoted. Indeed, the evidence seems to me to fall short of Adair specifically claiming that Lewenberg was legally liable to Adair for the cost of repairs to the car. It seems to me that Adair was doing no more than saying that someone, either Ward or Lewenberg, had to pay for the cost of repairs before he would release the car. Upon the Magistrate's findings, it should be said, no repairer's lien existed, for the reason that no contract to repair was proved.

As it seems to me, in the circumstances of this case, it was necessary to prove an unqualified and unambiguous admission by Lewenberg that he was indebted to **[10]** Adair for the costs of repairs. Quite apart from any question as to inexactness of amount, there was in my view no evidence upon which it could be held that Lewenberg had made such an unqualified and unambiguous admission.

It is with considerable regret that I have come to this conclusion, for the reason that the Magistrate found, as it was open to him to do, that Lewenberg promised to pay, and he has not honoured that promise. However, in law, the cause of action was not made out. For the reasons given the appeal must be allowed, the order below set aside, and in lieu thereof there be an order that the complaint be dismissed with costs. The appellant must have the costs of this appeal.

APPEARANCES: For the appellant Lewenberg: Mr FG Morehead, counsel. Finkelstein Lipshutz & Alter, solicitors. For the respondent Adair: Mr DF Hyde, counsel. Mills Oakley, solicitors.
