

**CHEAPSIDE SYNDICATE LTD. v. LEWIS**  
**JUDICIAL COMMITTEE OF THE PRIVY COUNCIL**  
**1<sup>ST</sup> JUNE, 1960**

**CORAM: LORD TUCKER, LORD JENKINS AND LORD MORRIS OF BORTH-Y-GEST**

*Contract of employment | Offer by company to pay respondent share of profits in lieu of salary | No agreement reached | Respondent subsequently dismissed | Claim for arrears of salary and share of profits on account stated.*

**CASE SUMMARY**

G.S.L., the respondent, was employed for many years as district agent by C.S. Ltd. In 1948, at G.S.L.'s suggestion, C.S. Ltd. made a written offer of revised working terms under which G.S.L. would receive a third share of profits in lieu of salary. G.S.L. did not reply to this letter and on the 28th March, 1949, the offer was withdrawn by the company.

G.S.L. was dismissed on the 8th February, 1950, and thereupon instituted a claim in contract for arrears of salary and one-third share of profits due under the abortive agreement. This claim was later amended to a claim for £G645 11s. arrears of salary and £G3,571 14s. 8d. for the one-third share of profits on an account stated.

Judgment was entered for G.S.L. for arrears of salary but his claim for one-third share of profits was dismissed. On appeal to the West African Court of Appeal, this judgment, in so far as it rejected the claim for one-third share of profits, was set aside, and an order was made remitting the action to the Supreme Court to determine the market value on the 31st March, 1949, of certain goods referred to in a suspense account. C.S. Ltd. had always been willing to agree with G.S.L. on this basis but he had never sought to amend his claim to take advantage of this admission, nor at the trial did he intimate his willingness to accept this in lieu of his claim. C.S. Ltd. appealed.

Held:

(1) no agreement on the revised working terms was ever reached between the parties and the original claim on this basis was abandoned;

(2) paragraphs in C.S. Ltd.'s defence relating to G.S.L.'s recommended share of profits as shown in the suspense account merely put forward what C.S. Ltd. had at all times been willing to do. They did not admit the respondent's claim and were never accepted by the respondent. They were not relevant to any issue in the case and should not have been pleaded;

(3) the order of the West African Court of Appeal was not justified either on the pleadings or on the evidence and the judgment of the Supreme Court should be restored.

Judgment of the West African Court of Appeal reversed.

#### CASE REFERRED TO

Siqueira v. Noronha [1934] A.C. 332; 103 L.J.P.C. 63; 151 L.T. 6, P.C.

#### NATURE OF PROCEEDINGS

APPEAL (No. 12 of 1959) from the judgment of the West African Court of Appeal (Coussey P., Korsah and Ames JJ.A.), delivered on the 7th February, 1956, (unreported) reversing in part the decision of Acolatse, J. in the Supreme Court of the Gold Coast, Eastern Judicial Division.

#### JUDGMENT OF LORD TUCKER

Lord Tucker delivered the judgment of their Lordships. [His Lordship. referred to the previous proceedings and continued:] No question arises on this appeal with regard to the sum awarded for salary, the sole question at issue is whether the plaintiff is entitled to any further relief in respect of his claim to a share of profits. The defendants are a limited company, trading as merchants in Accra. The plaintiff had for many years been employed by the defendants as a district agent at a salary plus residential accommodation. The record does not show what, if any, was the agreement as to salary or how it was fixed.

It seems to have varied from £G400 to £G500 until the last year of his employment when he was credited with £G700, but his salary is irrelevant to any issue in this appeal which relates solely to his claim for a share of profits in addition to salary. In September, 1948, the plaintiff approached Mr. Francois, the defendants' managing director, suggesting he should have a share of profits instead of salary.

Correspondence subsequently passed between the parties and on the 15th October, 1948, the defendants, by their managing director, wrote to the plaintiff a letter containing the following:

"The Cheapside Syndicate Ltd. offers you the following terms:—

1. Quarters . . .

2. Passages . . .

3. Conveyance . . .

4. Emoluments. The company offers you 33 1/3 per cent. of the net profits as shown at the close of each financial year. Permission is given to draw up to £G500 before the figures for the year are ascertained.

5. Net Profits. This will be ascertained on the basis of deduction of all company working expenses and reasonable provision for bad or doubtful debts from gross profits but will not include personal amount drawn by yourself towards remuneration.

6. These terms specifically exclude the carving out of spheres of activity on which to base percentage of profits.

We hope you will find the terms acceptable when an agreement embodying these and other usual terms can be drawn up."

No reply to this offer was received and on the 28th March, 1949, the defendants wrote as follows:—

Dear Sir,

The company made you an offer of revised working terms on 15 October, 1948. As there has been no acceptance of the offer it is hereby withdrawn."

It is common ground that at this date there was no agreement between the parties for any alteration in the plaintiff's remuneration but he continued in the service of the company until his employment was determined on the 8th February, 1950. It is therefore plain that in order to establish his claim the plaintiff had to rely on something which occurred between the 28th March, 1949, and the 8th February, 1950.

It is clear from the pleadings that the plaintiff did not rely at the trial on any agreement between these dates. His claim in the writ was originally based on contract in the following words: "both amounts claimed for salary and share of profits being due under the said defendants' agreement of employment of the said plaintiff." On the 12th March, 1951, he gave notice of amendment by which instead of a claim in contract he substituted the following:—

"The plaintiff's claim is for the sum of £G4,217 5s. 8d. payable by the defendants to the plaintiff on an account stated between them."

The particulars relating to that part of his claim to a share of profits were as follows:  
—

"23rd February, 1950.

The plaintiff's one-third share of profits computed up to 31st March, 1949, also acknowledged in the statement of account attached by the said defendants to their letter of 23rd February, 1950, addressed to the plaintiff's former solicitor Mr. J. Sarkodee-Adoo . . . £G3,571 14s.8d."

In his evidence the plaintiff said (at page 17 of the record): "This claim before the court is not based on a contract. I based my claim on an account stated". At page 21 he said:

"My salary on 1/4/49 on date of stocktaking was one-third of the net profits. The net profits would be the sales made after deducting expenses and costs of goods not including emoluments of myself and the managing director. I have no salary apart from the one-third share of net profits. My emoluments are one-third share of net profits."

This is a reversion to the offer of the 15 October, 1948, which was withdrawn and never thereafter renewed. After the trial in the Supreme Court the plaintiff gave notice that he would apply at the hearing of the appeal to add an alternative claim in contract as follows:

"In the alternative the plaintiff claims £G3,751 14s 8d. being plaintiff's one-third share of profits computed up to 31st March, 1949, agreed by the defendants to be paid to the plaintiff by way of remuneration for the year 1st April, 1948, to 31st March, 1949. Plaintiff also claims interest at 5 per cent. per annum from 1st April, 1949, to the date of judgment."

It is not surprising that, in view of the abandonment of such a claim as originally appearing in the writ by the amendment thereof on the 12th March, 1951, and the plaintiff's evidence referred to above, this application was refused by the Court of Appeal. The rejection of a claim in contract need not, however, be based solely on questions of pleadings as their Lordships are satisfied from a perusal of the evidence and the documents that no such agreement was ever reached. It is clear from the correspondence that after the withdrawal of the defendant's offer of the 15th October, 1948, all their suggestions for remuneration on a one-third share were based on the value of goods in stock. In a memorandum to the Board of Directors dated the 9th September, 1949, Mr. Francois stated in paragraph 6:-"Whatever is decided on, it is quiet clear that the company is in no financial position to meet one-third of net profits in cash: vide 1 (a) above and 8 below."

In a memorandum in reply thereto the plaintiff asked that a meeting of the Board be summoned immediately to discuss Mr. Francois' memorandum under review together with his (the plaintiff's) reply and to make recommendations. He added that he had continued in the service of the company doing valuable work on the understanding that his remuneration was still a third share of net profits.

He had, however, never accepted this offer and it had been withdrawn. The minute book of the directors' meeting of the 31st October, 1949, was not one of the exhibits transmitted to the Board, but it appears from the trial judge's judgment that while not considering themselves competent to deal with the financial year 1948-49, the board

advised that as there had been a previous offer it would be wise and make for smooth working of the company if this offer of one-third net profits were given to Mr. Lewis in a manner convenient to the company having regard to Mr. Francois' memorandum of the 9th September, 1949.

After his dismissal in February, 1950, by which date it is clear no agreement had been concluded, the plaintiff stated in evidence that there was a dispute between him and the managing director about payment of his one-third share in goods and he insisted on payment in cash. This divergence of view was never resolved, but the subsequent correspondence makes it clear that the defendants were at all times ready to accede to a settlement on the basis of a one-third share of goods in stock. The plaintiff never agreed to this and brought his action for a one-third share of net profits.

This brings their Lordships to the consideration of the document relied upon as constituting an account stated. It is a document which was enclosed in a letter from the defendants dated the 23rd February, 1950, addressed to the plaintiff's solicitor. The document enclosed contained three statements:-

- (a) personal account showing salary due;
- (b) transfer from advance account to personal account;
- (c) suspense account.

It is the last of these three that is relied upon. It is as follows:

"J3"

STATEMENT "C". SUSPENSE ACCOUNT, G. S. LEWIS

STATEMENT "C"

GEORGE STANLEY LEWIS

SUSPENSE ACCOUNT

31/3/49 One-third profits of £G10,715 4s. 7d. being goods in stock reckoned at Cost price and unrealisable at Cost Price . . . £G3,571 14s. 8d.

(Sgd.) GEORGE FRANCOIS,

Managing Director

The relevant extracts from the letter are as follows:

"There remains your client's one-third share of profits vide statement (c). It is only necessary here to state why this amount is placed in suspense and how and when the company will settle.

This one-third profit was not a cash profit but was arrived at on the ground stock value of goods at cost price on stocktaking at 31/3/49 . . .

It was discovered in the interim between our financial stocktaking at 31/3/49 and the preparation of our balance sheet for the year 1/4/48-31/3/49 that most of the goods shown at cost price at the financial stocktaking were not being sold at all and a large proportion of what was being sold was sold at under cost which made our statement of profits based on cost price rather inflated in the circumstances.

The suggestion was made that the ground stock really represented only a percentage of the actual value and should be so treated. Your client resisted this suggestion on the ground that it was an attempt to cheat him of his full third share. The accounts were therefore submitted to the Income Tax authorities as they stood. The suggestion that the ground stock represented only a percentage of the actual value (this must have been anathema to the Income Tax authorities) as well as your client's repudiation of such a suggestion of percentage were all submitted. Your client's third share was placed in a Suspense Account for obvious reasons. If your profits are in unsold goods that you have ordered and cannot sell and when you do sell you sell below cost, equity, in our view, does not demand that the company has to find money outside of these goods to meet in cash unreal profits on 'errors of experience' . . .

Your client has the option of accepting from the company a third section of the remaining goods at cost price and payment in cash of what his third of sales already made represents. This is one alternative mathematically ascertainable. The other is that at 31/3/50 when we devalue this old stock and ascertain what his third profit represents at the devalued price plus what his third share on sales represents a total can be arrived at and we will make proposals for settlement."

These proposals were rejected and counter proposals were put forward in the plaintiff's solicitor's letter of the 25th February, 1950.

The suspense account cannot be considered apart from the letter of the 23rd February in which it was enclosed and which explains its nature and why it was brought into being. Taken in the context of this letter and the preceding correspondence, it is manifest that it cannot be construed as an acknowledgment of a debt of £G3,751 14s. 8d. and a promise to pay it, which is the inference necessary to sustain an action on an account stated of the nature relied upon in this action, which is to be distinguished from one where items on each side of an account have been set off against each other and a balance struck. (See per Lord Atkin in *Siqueira v. Noronha*1.) The trial judge rejected the claim for a share of profits principally on the ground that the plaintiff's remuneration as to one-third share of net profits for the financial year 1948-49 was never adopted by any lawful authority under the company's articles of association.

Their Lordships agree that any agreement would have required the directors' sanction, but as indicated above they are of opinion that no agreement was ever arrived at between the plaintiff and the managing director and that the original claim of this basis was abandoned. It is unnecessary therefore to consider whether the

directors had power under articles 11 and 12 of the company's articles of association to award the plaintiff remuneration on the basis of a share of profits in the circumstances of this case.

The Court of Appeal made an order remitting the action to the Supreme court to determine the market value on the 31st March, 1949, of the goods referred to in the account (exhibit J3) headed "George Stanley Lewis: Suspense Account" and therein shown as being at cost price of £G3,751 14s 8d. Their decision was based on the following paragraphs of the defence:

"4. The defendants further aver that the plaintiff's recommended share of profits was in goods and a list of goods showing quantities and values was prepared and forwarded to his said solicitor under registered cover dated the 23rd day of February 1950. Plaintiff was requested to collect his goods.

"5. The plaintiff returned the cheque for undrawn salary. Plaintiff made no attempt to collect his goods.

"7. The defendants are prepared to account for the plaintiff's goods sold through their organisation and for the residue handed to an auctioneer."

## DECISION

These paragraphs do not in any way admit the claim put forward by the plaintiff. They merely put forward that which the defendants had at all times been willing to agree. They are not relevant to any issue in the case and should not have been pleaded. The plaintiff never sought to amend his claim so as to take advantage of this admission, nor did he at the trial intimate his willingness to accept this in lieu of his claim. The defendants have been ordered to do that which they have throughout been willing to do and which the plaintiff neither before nor at the trial had ever claimed or accepted, and the defendants have been ordered to pay costs. Their Lordships are of opinion that neither on the pleading nor on the evidence was such an order justified and will humbly advise Her Majesty that the appeal be allowed and the judgment of the West African Court of Appeal be set aside and the judgment of the Supreme Court restored. The respondent must pay the costs of this appeal and in the West African Court of Appeal.

## **COUNSEL**

**R. MILLNER FOR THE APPELLANT COMPANY.**

**J. G. MONROE FOR THE RESPONDENT.**