9/1927

High Court of Australia
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DARLING

v

AURORA PACKING CO. LTD.

JUDGMENT. ISAACS J.

Delivered 28.9.1928

DARLING v. AURORA PACKING CO. LTD.

JUDGMENT. ISAACS J.

The ultimate question comes to this:- Did the Aurora Packing Company promise the appellant that it would take up and "finalise", that is, carry on to completion, the agency undertaking which the McClure Company had entered upon and partly performed, or did it promise an entirely separate and distinct agency undertaking, merely to sell and account for such portion of the appellant's fruit delivered to the McClure company as remained unsold on August 26th 1924, leaving the McClure company to account to the appellant for all transactions up to the point of severance?

The question has been answered in favour of the appellant, that is in the first alternative, by the Stipendiary Magistrate and Justices, and in favour of the respondent - - the second alternative - - by the learned Judges of the Supreme Court, though not altogether for the same reasons.

The matter has been very ably argued on both sides on this appeal.

It is with regret I find myself after the best consideration I have been able to bring to the case, at variance with opinions, all of which I sincerely respect. I therefore feel bound to express my own reasons with somewhat more detailed references than I could wish to those portions of the correspondence that have led me to the conclusion that the primary decision on what after all is as to how business men in the circumstances would read business letters, was correct.

By general assent the matter depends on the proper construction to be placed on some written business communications. It is further conceded that in order to arrive at the sense in which the parties understood, or must be taken to have understood, those communications, what are called the surrounding circumstances must be first ascertained. Words are always to be construed secundum subjectam materiam. In River Wear v. Adamson (2 A.C., at p. 763) Lord Blackburn in a classical passage emphasises this principle.

Now the circumstances so far as relevant are clear. They appear partly outside the documents and partly from their contents. It is common ground that the agency undertaken by McClure company - or, as I shall call it, McClure, as I shall also refer to the respondent as Aurora - was not an isolated agency. It was not as if a producer simply employed an agent to dispose of his goods according to personal instructions and subject to personal control, and unconnected with any other person's goods and simply with the ordinary obligation to account for all moneys received, the agent owing in the transaction no obligations but those ordinarily due to the employer.

Growers had formed an association called the Australian Dried Fruitgrowers' Association - shortly, A.D.F.A.. Rules had been framed which neither side thought important enough to put in as a whole. But it sufficiently appears, and both sides rely on the fact - that though each grower selected his agent from among those duly constituted A.D.F.A. agents giving security to the Association - the agency had to be executed consistently with the grower's relations to the associated growers, and so the agent's ultimate accounting to his employer was to be subject to those relations.

Both sides describe the sale of the fruit as for a "pool". There was to be in some sense a pool realization for each season, which connotes an accounting for that purpose to the Association, and then in proportion to individual quantities and standards supplied - identity of fruit contributed being disregarded, and indeed impossible so far as pecuniary returns were concerned - a distribution was to be made and the agent thereupon to account to his principal.

It is manifest that at all events from the individual grower's standpoint, the process for each season was in any case, and even if the agent kept tally of his sales of the principal's fruit, an entire undertaking, not expected to be segregated at any particular point. There was an interdependence of an indefinite number of individual sales, some in Australia and more in London, all possibly entering as factors into the ultimate result for each. When McClure's agent, fo

instance, in January 1924 requested Darling to entrust that company with the season's fruit, he as he deposes informed Darling that "we anticipated finalising in November". That phrase both exemplifies the necessity of waiting until the end of the season's operations before knowing the result, and also the sense in which McClure and Darling used and understood the word "finalise". Obviously it meant, as between them, the bringing the agency undertaking as an entirety to completion. I would add that that is the sense in which I would ordinarily understand the word, which is certainly a convenient expression, and has now acquired a business significance in accordance with the sense in which it was used on the occasion referred to.

I must also add by way of anticipation that the pool referred to - which may conveniently be called the A.D.F.A. pool - was not the only pool which we have to take into account. There was another pool - an inner pool - quite unnecessary from the Association standpoint, but which McClure created for itself, and for the purpose of its own business convenience, and which the Aurora took up and continued. This inner pool so entangled the McClure "business for 1924 season" that, as will be seen, it became utterly impossible to disentangle the so-called "unsold fruit" of any of McClures' principals, from their fruit already sold. The matter had to be dealt with as an entirety - by amalgamating returns and paying on the final balance. This will appear clearly. In the meantime I proceed with the circumstances attaching to all A.D.F.A. agencies. Advances by agents were made up to 30 per cent of the estimated net value of the fruit. The agents were manifestly secured by the proceeds both as to advances and any agency outlay. Interest on the advances was charged, because the money advanced was that of the agent. But later, when sales were actually made, progress accounts were rendered, and where practicable provisional payments were made, subject to agency debits in the meantime, and subject to revision on ultimate results, that is, on "finalisation", and of course, as these payments were out of moneys belonging really to the employer, no interest was charged.

Darling, in response to McClure's invitation, placed in their hands as his agent part of his "pack" for 1924, namely, 80 boxes of currants, 70 boxes of sultanas, and 103 boxes of lexias. He had sent them to a packer named Lehmann, who after packing them sent them to McClure. Approximately, the fruit so sent came to two tons of currants, a ton and a half of sultanas, and two tons of lexias. Darling received from McClure about £76 as advances on account of this fruit. He had by the end of August received from them no account sales, and apparently McClure had received no money from any purchasers on account of the fruit they had sold.

In those circumstances, the appellant Darling received simultaneously two documents, both dated 28th August 1924, one from McClure and the other from Aurora.

Those documents are the first that call for construction, and as they convey both information and undertakings, it is desirable to separate these portions, and add in the first place the new information to the circumstances already stated, whereby the undertakings will be better understood. In point of fact, McClure's per se is mainly information, and it is only so far as the Aurora letter constitutes portion of that information into a promise that there is an undertaking by Aurora at all.

The McClure document informs Darling of the following circumstances:-

(1) McClure's have already and without any prior communication with Darling, handed over his fruit to Aurora, on conditions.

(2) This has been done "owing to certain recent developments", and to better protect growers' interests."

(3) McClures have, by reason of having received the principal portion of their fruit for the 1924 season, and by reason of the Aurora having its head office at the same address as McClure's office, and as Aurora has now being constituted A.D.F.A. agents, sufficient confidence in Aurora to make arrangements with them.

(4) The arrangements have already been "finalised", and are "to carry on the business of McClure Valentine and Company so far as the completion of the 1924 season is concerned".

(5) The A.D.F.A. has agreed to this transaction and retain

McClure's deposit as security for (i) due performance of "all A.D.F.A. conditions", and (ii) accounting to growers' contracts with them.

(6) All unsold fruit "is being transferred" to Aurora, who (i) will in future control same, (ii) will issue account sales, (iii) make payments, (iv) invoice to buyers, (v) do all things, whatsoever necessary, for finalising the 1924 pack, and (vi) will include in the final account sales all transactions prior to this date as affecting your fruit.

To this information three observations are added, namely:-

(a) A hope is expressed that Darling will "approve of the action taken", and will feel that the best has been done that was "possible in your interest";

(b) that any otherwise disquieting rumours as to McClure's may now be disregarded, as "the only effect on your good self will (we sincerely hope) be the more efficient, speedy and satisfactory handling of your fruit in the future, and the finalising of your accounts at all times with the least possible delay."; and

(c) a hope that the Aurora Company "will be authorised to finalise your 1924 fruit in the ordinary course."

Now before coming to the Aurora letter, I would observe that the central feature of the McClure circular is that the two companies for their own mutual reasons, with their own special knowledge of each other's business and position, "finalised" their arrangements for transferring the 1924 season's agency undertakings from McClure to Aurora, independently of any request by or communication with the individual growers. All the growers were asked to do was to accept the substitution, without any detailed information as to the terms of the arrangement. Darling was assured he would not suffer - and I cannot hesitate to accept that circular as assuring him that his accounts, if he approves of the substitution, will be rendered and pai by the Aurora, so far as he is concerned "in the ordinary course", that is, on exactly the same basis as if McClure had remained. All that is part of the "conditions" - as he is assured in the opening

paragraph - of the transfer of the unsold fruit. The fact that the arrangements had been completed - "finalised" - without consulting the growers, is a complete answer to the suggestion of improbability that any ordinary Agent No. 2 would as part of his undertaking to his principal accept responsibility for the financial obligations of Agent No. 1 who had failed. There is no parity of circumstances. The evidence of Mr. Wilkin, the secretary of Aurora, is instructive as to this:- "When the growers agreed to Aurora Company's proposal, the Aurora Company did not know what fruit McClure had sold or where some of it was. Aurora Company knew in what places McClures had stocks, but not to what quantities there were. Nor whom it belongs to, I should say McClures did not know".

This accords with the statement in Aurora's letter of September 29 1924 in the second paragraph, which will be presently referred to. It also accords with the following statement in Aurora's letter of July 19 1926 (Exhibit DD.):- "The whole of the fruit received by McClure, Valentine & Co. was, so far as the identification of any particular grower's fruit was concerned, considered and treated as one pool. This course was adopted among other reasons because (a) it was desired to follow as closely as possible the basic principle of the A.D.F.A., viz. a pool system for ensuring 'equity among all growers', and (b) because it was felt that under the circumstances then existing it would be practically impossible to identify either the fruit which had been sold by McClure, Valentine, or the fruit remaining unsold as at 26th August 1924, which would be sold by Aurora".

This passage is of the highest importance. The 'pool', it will be observed, is not the A.D.F.A. pool. It is an inner 'pool', constituted by McClure alone, in respect of the fruit entrusted to it by the various growers delivering their fruit to McClure for sale, and McClure had constituted this pool by analogy to the general A.D.F.A. pool. But the plain consequence was that no individual sale could be attributed to grower "A" or grower "B", and so the sales by McClure had to be worked out proportionately, certainly as to price, and apparently also as to quantity. That appears further on in the same letter.

Aurora followed this, it seems, until after McClure's liquidation. On legal advice it later corrected the system as to the packing charges, but as far as appears proportionate allocation had to continue as to other expenses and as to receipts.

All this shews the general entirety of the accounting to Darling, and the impossibility of treating this case on the ordinary footing of separate agency for separate and distinct property. And particularly it shews that the expressions in the letters of August 28th 1924, namely, "hand over your fruit" and "unsold fruit", were metaphorical only, and meant not the physical substance of the fruit belonging to any specific grower, but a proportionate interest in the inner McClure pool. As a matter of actual fact, it might have been true on August 28th 1924 that either not a single case of Darling's fruit remained in McClure's possession, or that every case of the fruit he had delivered was still held by that company.

And yet arrangements were "finalised" between the companies, clearly on the basis that McClure had adopted, and that Aurora had accepted and followed and the growers were asked to agree, to the transfer on terms which certainly accord with what we now know were the methods of the agent, and which, to say the least, fail to lay down in anything like clear terms what Aurora now insists upon.

Now, the second document is from Aurora. It confirms the McClure document. It emphasises the salient points, including:-

(a) The Aurora is now A.D.F.A. agent.

(b) Security not lessened, because McClure's security still held "for the due and proper performance of all their responsibilities to growers under their original agreement to sell growers' fruit". This would include settlement on the footing of the final accounts. It invites Darling "to leave your 1924 fruit transactions in our hands to finalise", and asks for confidence etc. "in completing the present season's transactions."

The word "all" and the word "transactions" are absolutely inconsistent with the segregation of some of these transactions from the rest.

Before summarising the effect of these documents since they were merely an offer, let us look at subsequent correspondence.

On September 12 Darling asks Aurora for Account Sales of past transactions, and as to payments to Lehmann, the packer.

On the 18th he gets from McClure, not the statement asked for, but a reason for not making any progress payments, and a hope that account sales will be rendered in the near future. McClure never rendered any further accounts. Apparently however, no money had yet been collected by them, otherwise the information was altogether misleading. The day before McClure had stated they had debited his account with £35/16/10 paid to Lehmann for packing, and asked if that amount were disputed to communicate with them direct. On September 20th Darling replied to the Aurora with reference to McClure's account and letter of the 18th, which shews that at all events at that date, he regarded their suggestion - though so far unaccepted - as amounting to a substitution all through. The expression "since delivering the fruit now to be accounted for by you" is a clear intimation that he understands that the whole of the fruit "delivered" is to be accounted for by Aurora, and the account (Exhibit D. 2) shews delivery took place from April 25th to July 7th - and is according to the Aurora suggestion to be accounted for by them.

The answer made by the Aurora on the 29th September is important. Mr. Cleland, of course, admitted that the bargain between that company and Darling must be interpreted by what that letter says. In my opinion, it is part of the contractual correspondence, but in either case it has the same effect.

The Company makes it clear:-

(1) That even then it does not know how much fruit is unsold, and explains the impossibility of ascertaining it (except, of course, in the way afterwards stated in July 1926 (Exhibit DD.)). Therefore it is clear to me the arrangement between the Aurora and McClures must have been of the most comprehensive character qua the growers.

(2) That "Messrs. McClure, Valantine & Co. have paid" (meaning 'advanced') "you 30% of the Commonwealth keyboard value of fruit delivered to them, and this Company is quite prepared to account to you for the balance due, representing the nett proceeds for Commonwealth and Export, when same are ascertained." That must mean when all final

adjustments of the McClure agency pool and its construction under Aurora control are finally made and embodied in the final account.

Before proceeding further, it may be pointed out that that is all to assure the appellant that ignorance of the actual sales up to the transfer makes no difference to him, because the Aurora will, as already stated, eventually account to him for the full proceeds, actual or as proportionately adjusted, of all his deliveries less the advances and proportionately adjusted expenses.

"Accounting for" includes and connotes payment. See for instance Turner v. Burkmishaw (2 Ch. App., at pp. 491 and 492) and Harsant v. Blaine (56 L.J. Q.B., at p. 513).

Continuing the letter, it points out that both McClure and Aurora are bound by a deposit of £250 each to comply with A.D.F.A. terms and conditions, and it concludes with the very definite assurance that "As this season's sales have been conducted by both companies, the returns at the end of this season will be amalgamated, and growers will receive the full nett proceeds due to them."

It concludes:- "You will therefore realise that your interests are fully protected."

Observe it is the "returns" that are to be "amalgamated" - that is the productive results of sales are to be amalgamated, not that "accounts" are to be amalgamated as Mr. Cleland contends, for the mere useless purpose of shewing what Darling would have received if one single agent had acted all through, leaving the "amalgamation" to be split up afterwards, to be annulled in fact, so that Darling might have to pay Aurora a debit against him and prove on McClure for a credit, though the nett proceeds in the amalgamated returns would shew a considerable credit to himself. For if growers are to receive the full nett proceeds due to them, notwithstanding some financial difficulties in which Aurora knew McClures found themselves, though apparently in August thought to be less serious then they turned out to be, it must mean that Darling is to receive the full nett proceeds as shewn on the account which amalgamates the returns.

And again, if his "interests are fully protected", that is, by the amalgamation of returns, it cannot in all reason and honesty be that

the net result is not to be paid to him as such, but that he is to be forced as to an unknown portion to take whatever he can get in competition with unknown creditors upon a proof of debt in the insolvent estate of the company with whom the Aurora is in intimate connexion, and with whom it finalised the transfer of business on its own terms, undisclosed to the appellant.

That letter of September 29th 1924 seems to have satisfied Darling, and I apprehend since both sides reject the notion of ambiguit and I agree with them as to this, whatever is the true construction of the correspondence up to that point determines the rights of the parties. The subsequent events, including correspondence, do not in my opinion alter the rights of the parties as they existed after the letter of September 29th 1924, which appears to have satisfied Darling and on which he apparently rested. Nothing took place until November 20th 1924.

On November 20 1924 Aurora forwarded to Darling a circular and two other documents enclosed, all of which appear to me utterly inconsistent with the respondent's present contention.

The circular stated that a Credit Note for progress payment on sultanas at £6 per ton, and on currants at £12 per ton, representing the amount due to growers "for sales up to and including 31st October last".

Naturally, that would include all sales from the beginning of the season. That implication is borne out by the credit note itself, because the sultanas referred to are 1 ton 15 cwt., and the currants 2 tons, representing - so we were told in argument without contradiction, and the evidence as to quantities supplied to McClures confirms it - the whole of the sultanas and currants delivered to McClure.

The Credit Note states "Credit by Aurora Packing Co. Pty. Ltd."

The circular also forwarded under date 20th November 1924, a debit note for the whole of the packing etc. charges, including the £35/16/10 which McClure had undertaken to pay Lehmann. The balance bringing the debit up to £49/10/11 represents railage and cartage, and the total represents the whole of the charges in connection with Darling's fruit.

But the circular letter concludes with a most significant paragraph, seeing that not quite two months have elapsed since Aurora was authorised to act. The paragraph runs thus:- "We are pleased to be able to advise that Account Sales are now coming forward steadily from London, and we are very hopeful of being in a position to make a further distribution in the near future."

It is practically inconceivable that this should be limited to goods sold in London by Aurora since September 1924, and it is altogether contrary to the notion that amalgamation of returns involved no liability to pay on the amalgamated result. The circular as framed applied primarily to growers in credit - as witness the error in copying the exhibit, and the word "distribution", for the circular had to be altered from its general terms so as to fit this case. Next day, November 21 1924, McClure Valentine & Co. went into voluntary liquidation on account of "excessive liabilities".

On December 22nd 1924 Aurora sent to Darling a circular letter which I think does not accurately state the position as constituted in August and September. It encloses a circular letter from the liquidator of McClures, and says the position of the growers had been fully explained to him. It asserts that all that Aurora took over from McClure was fruit unsold as at 26th August 1924 - as advised in letters of 28th August. It says:- "This Company therefore is responsible to growers only for the fruit which was actually received and sold by them." It adds:- "It did not take over the business of McClure Valentine & Co., nor its assets and liabilities."

Why all that explanation? In one sense - a very limited sense - it is true that the letter of 28th August 1924 advised that the unsold fruit was taken over. Of course, none else could be. It is also no doubt true that Aurora did not take over all the assets and liabilities of McClure. But the intermediate position remains - namely, what is stated in the letter of 28th August 1924 in these words:- "Arrangements have been finalised with them to carry on the business of McClure Valentine & Company so far as the completion of the 1924 season is concerned", and as later stated, Aurora will "do all things necessary for finalising the 1924 pack, and will include

in the final account sales all transactions prior to this date as affecting your fruit", and as conclusively, "finalise your 1924 fruit in the ordinary course."

It is plain that in the expression "all transactions prior to this date as affecting your fruit", means all the fruit delivered ab initio, and "transactions" means transactions of sale of Darling's fruit. Otherwise, "transactions" would have to mean all transactions of sale of everybody's fruit in every agency so far as they affected the ultimate value of Darling's fruit, and in that case they would not be limited to those prior to August 26th. The new letter of December 22nd, seems rather an afterthought, intended to re-interpret rather anxiously the earlier correspondence, and to some extent force the position.

Quite unnecessarily otherwise does Aurora go to the trouble of drafting a claim and suggest it should be forwarded to the liquidator.

It is not strange to me in the circumstances that the grower should do as directed and send in his "probable" claim, and subsequently support it by affidavit. It hardly lies in the mouth of Aurora to charge Darling with inconsistency through acceding to their request. For all we know, this may have been some protection to Aurora in relation to its arrangements with McClure. In any event, I cannot find in it any release from Aurora from its plain undertaking. Darling swore:- "I sent a proof of debt to liquidators of McClures. I do not claim that McClures are responsible for the balance of fruit sold by them, the liquidators told me I was a creditor, therefore I signed it . . . . the liquidator has sent me further statements, but I have not signed them."

Indeed, on October 10th 1925, Darling by Exhibit "M" claimed from Aurora £15/3/- on the basis of their responsibility for prior transactions. By the Credit Note of November 20 1924, covering so far the whole of the sultanas and currants originally delivered, a credit of £34/10/- for progress payments was shewn. This was converted into a debit of £15/-/11, but only by setting against it £49/10/11 which were McClure's charges. But since the liquidator had

debited Darling in McClure's account with £30/3/11 of the £49/10/11, Darling objected to a double debit. The correction of that reconverted the Aurora debit of £15/-/11 into a credit for £19/7/-, and in respect of McClure transactions, or at all events, partly McClure transactions, probably all, since prima facie it so appears and Aurora, who alone could have shewn the contrary, did not shew it.

Aurora's answer of October 16th is hardly understandable on their present view. It admits the debits which in the note were claimed by Aurora, were for goods sold by McClure; it says it was "pro forma" only - which is extraordinary; it says it withholds payment by instructions from McClure's liquidator, and says that after adjustment of McClure's returns it will endeavour to "finalise your returns for the whole season and pass over to you any proceeds due."

On November 30th 1925 Darling objects to the withholding the £15/3/- and to Aurora yielding to the liquidator's instructions. On December 7th 1925 Aurora writes to Darling a letter which I consider almost conclusive against the Company.

It says that as the liquidator accounts are not yet regarded as final, he holds a "lien over proceeds from sales of fruit held by us".

Now over what proceeds could the liquidator hold a lien? Not over proceeds of fruit taken over by Aurora and sold by it? The proceeds must be of fruit sold by McClure and collected by Aurora - no doubt as part of "the business of the 1924 season". But, says the letter, as soon as the liquidator notifies the finality of the accounts, "we will proceed to issue final returns to growers together with cheques where same are due". Obviously adjustments as between McClure and Aurora were necessary, but whatever Aurora's anxiety to complete these before paying the growers, it is clear that Aurora did not then consider it was limited in its obligation to paying over proceeds of fruit sold by itself.

On December 21 1925 Darling claimed from Aurora payment as per Credit Note previously mentioned, and threatened proceedings.

On December 24 1925 Aurora definitely took its stand that it would pay only in respect of fruit sold by itself, and referred

Darling to the liquidator.

On January 5th 1926 there were sent to Darling what were called in a letter of the 6th "final account sales" for such portion of your 1924 season fruit as was sold by this Company, shewing a balance of £26/1/8 in his favour. But the description bears no resemblance to what was promised as "include in the final account sales all transactions prior to this date as affecting your fruit."

The reply raises some detailed objections and suggests there should be no repudiation of the Credit Note of November 20 1924. In answer, the Company on February 2 1924 says it was pro forma only. It may be so as to amount, but hardly so as to date of sales.

The virtual impossibility of segregating "sold" from "unsold" fruit, at least before December 24 1925, is made quite clear. So it is evident that whatever information is contained in Darling's proof in McClure's liquidation must have come from Aurora.

The claim originally made by Darling in these proceedings certainly did not extend so far as his present contention, but the position became somewhat complicated, and I think blurred, by the later attitude of Aurora after McClure's liquidation. It is not necessary to reconcile Darling's larger claim with his more restricted one. A more careful examination of the bargain as made by the correspondence disclosed to his legal advisers his larger rights and those have not been diminished by the earlier error. In any case there may by way of off-set be remembered those letters of Aurora already mentioned, which are inconsistent with their present contentio

The appeal ought in my opinion to be allowed and the primary judgment restored.

JUDGMENT KNOX C.J.

The question for decision in this case turns solely on the true construction to be put on correspondence which is said to establish the agreement on which the appellant relies. I agree with the learned Judges of the Supreme Court in thinking that this correspondence does not bear the meaning which the appellant seeks to put upon it, but as the majority of this Court holds the contrary view, and as no legal question of general importance has been raised, no useful purpose would be served by my stating in detail the reasons which have led me to the conclusion that the appeal should be dismissed.

Appeal allowed - order of Supreme Court set aside and order nisi discharged with costs. Respondent to pay costs of this appeal.

DARLING V AURORA PACKING COMPANY LTD.

JUDGMENT: HIGGINS J.

This case has been well argued on both sides; but it is my clear opinion that the appeal must be allowed. The facts I need not repeat. The issue becomes finally an issue as to the construction of the contract, and in particular of exhibits A, B, E and F. In exhibit B (which is incorporated by the defendant in its letter of the same date, 28th. August 1924) McClure Valentine & Co. (I shall say McClures for short) use words which in themselves seem to be sufficient to show that the Aurora Packing Co., in taking over the control of the fruit as yet unsold, which had been delivered by the growers to McClures, contracted to accept liability for what McClures had sold as well as for what the company should sell. The company was to " carry on the business of McClures so far as the completion of the 1924 season is concerned." This expression might be in itself ambigous; but there are additional words:-

> "All unsold fruit is being transferred by McClures to the Aurora Packing Co. who will in future control same, will issue account sales, make payments, invoice to buyers, and do all things whatsoever necessary for finalising the 1924 pack, and will include in the fianl account sales all transactions prior to this date (28th. August 1924) as affecting your fruit. "

At that date, no account sales had been rendered to the plaintiff,

by McClures or otherwise; and the company contracts to include in its final account sales all transactions prior to that date as affecting your fruit. " With all respect to Napier J., I am unable to limit the meaning of the words " your fruit " in this clause to the unsold fruit; as is shown by the 2nd. paragraph of the circular it means the fruit of the plaintiff " for 1924 season ". It is contended, however, that it is one thing to include transactions prior to 28th. August in the final account sales, and quite a different thing to promise to pay the full amount shown by the final account. The words of the third clause are not confined to account sales for the unsold fruit, or the payments for the unsold fruit; but even if it be granted that the words as to final account sales may not necessarily involve payment of what appears in the final account sales, the intention is made clear by the letter of 29th. Sept. following, written by the company to the plaintiff (ex. F):-

> " McClures have paid you 30per cent of the Commonwealth key-board value of fruit delivered to them, and this company is quite prepared to account to you for the balance due representing the nett proceeds for Commonwealth and export when same are ascertained. "

These words mean a promise to pay the balance due for all the fruit that had been delivered to McClures, the balance due after

deducting the 30 per cent already paid; they are not limited to the balance due for the unsold proprotion; and the letter goes on:- "as this season's sales have been conducted by both companies [McClures and the defendant] the returns at the end of the season will be amalgamated and growers will receive the full nett proceeds due to them. " Obviously these words refer, not to mere amalgamation by the pool of the growers, but to amalgamation of the plaintiff's returns as between the period before the 28th. August and the period after; in other words, they refer to amalgamation of McClures' sales and the company's sales.

The form of the credit note issued by the company in November 1924 for progress payments (Exhibits G1, G2, G3) show that the company treat the plaintiff as direct party with the company even as to packing charges,&c. paid on fruit sold by McClures.

Although we are bound to give effect to the words used, as they are clear, it is reassuring to find that their meaning is quite consistent with obvious business motives and probabilities. The company and McClures had a common secretary and some common directors; the company had been acting as packing agents for McClures; and McClures being in difficulties it was for the interest of the company that the transactions of McClures as to the growers of fruit should not be mixed up with the rights of McClures' general creditors - either as to fruit unsold or as to fruit sold. McClures went

into liquidation on 21st. November 1924. There is no question here of fraudulent preference of the company by the arrangement of 28th. August preceding. Moreover it appears from the evidence of Mr. Wilkin, the company's secretary, (as well as secretary for McClures) that the company had its eye on future business; and nothing was more likely to aid the company in future business than to be treated by the growers as full successors to McClures in the agency business as well as in the packing business. The promise as stated in ex. B was made at a time when the company was eager to secure the consent of the individual growers to the transfer of the business to the com-pany; and nothing was more likely to secure that consent than a promise to give the growers full satisfaction as to what each grower was entitled to in respect of his 1924 crop, whether already sold or in process of sale.

At first I was impressed by the fact to which Angas Par-sons J. refers in his judgment that in no part of the correspondence is there any suggestion by the plaintiff that he looked to the appel-lant to make good any deficiency whih might arise as to McClures' sales. This fact may not be relevant to the issue which we have to consider, the construction of the agreement; but it certainly should compel us to look more closely into the language used. But even if the plaintiff has not in his letters suggested that he look-ed to the company to make good any such deficiency he has not said

anything that is inconsistent with such a view. In the same judgment it is said that it is " shown by various statements [of the plaintiff] in his letters that he regarded the liability of the appellant [the company] as limited to the portion of the 1924 crop which the appellant itself handled ". I cannot find any such statement in the plaintiff 's letters. The passage which most nearly approaches such a statement seems to be that at the end of the letter of 18th. February 1926 (exhibit X.) -

> " As regards other matters mentioned in your letter, I cannot comment until seeing Mr. Evans; he has not reported in this district the result of his investigations; in the meantime, please forward payment of £19/7/0 wrongly deducted as referred to therein."

The sum of £19/7/0 represented picking charges,&c. which had been already retained by McClures out of proceeds of fruit sold by them, and are now admitted not to be chargeable by the company; but the specific demand of this sum " in the meantime " cannot in any fairness be treated as an admission by Darling that payment of the £19/7/0 would exhaust all his claims against the company.

I concur with the opinion expressed by Angas Parsons J. that the principles for the interpretation of a contract laid down in Proprietas,&c. of English and Foreign Creditors v Arduin L.R 5 H.L. 80 is not to be applied unless and until it be shown tha

" the offer is ambiguous, if it fairly and reasonably admits of two interpretations. " In my opinion, the ambiguity does not here exist. But, of course, if there is such an ambiguity, the principle is applicable in favour of the plaintiff. The point as to which I find myself compelled to differ from the learned judges of the Supreme Court is the point on which Piper J. expresses no opinion. I think that the words used by the company do import a promise to pay the balance which should appear on the fianl account sales; and as the decision in this case is likely to affect the claims of many other growers, I think it to be my duty to state the grounds on which I base my opinion.

In my opinion, the appeal should be allowed, and the verdict of the Local Court for £43/11/3 restored.