IN THE FIJI COURT OF APPEAL

Civil Appeal No. 4 of 1987

Between:

DHIRAJ LAL (s/o Bhukhan) — Appellant

- and -

RAMANLAL BROTHERS LIMITED — Respondent

Mr.H.K. Nagin for the Appellant
Mr.H.M. Patel for the Respondent

Date of Hearing: 10th March, 1987
Date of Judgment: 13th March, 1987

JUDGMENT OF THE COURT

Speight, V.P.

This appeal is against a Judgment of Rooney J. given in the Supreme Court on 12th December, 1986. The Respondent (in liquidation) had sued the Appellant for $102,337.27 allegedly due by him as a former director/shareholder of the Company. A Statement of Defence was filed and Respondent then took out a Summons for Summary Judgment pursuant to Order 14 of the Rules of the Surpeme Court.

This summons came on (first call) before Rooney J. on 19th September, 1986 along with identical proceedings for a similar amount against one Chandra Kant who was the other director/shareholder. The history of the first day's hearings, which primarily concerned procedural objections are fully set out in this Court's judgment in the Chandra Kant case also being delivered today, and we do not repeat all we have said there - however, that judgment should be read in conjunction with this.

This Appellant was given leave to file an affidavit and the matter was adjourned. The Appellant filed an affidavit and a Statement of Defence and a Counter Claim. The Respondent's agent, Mr. Lal, a chartered accountant, filed a second affidavit and there was a Reply to the Statement of Defence and also an Amended Statement of Claim.

The matter was heard on 12th December. Mr Nagin who has appeared for the Appellant in both Courts raised a number of matters in support of his submission that much of the debt was bona fide disputed. He also pointed to a claim by the Appellant that he was owed $63,000 by the Respondent in respect of unpaid director's fees - which matter had been raised in the statement of defence and made the subject of the Counterclaim.

The learned Judge obviously examined the merits of the dispute. He satisfied himself that $55,991.10 was undoubtedly owing and in this Court Mr Nagin for Appellant conceeded that to be so. The Judge said the balance of Respondent's claim was in doubt and should be tried along with the $63,000 set off. He entered judgment for $55,991.10 and costs with a stay of execution and ordered trial of the other matters.

It will be noticed that he described the $63,000 director's fees as a set-off - not as a counterclaim, and in our view rightly so.

Although the distinction is usually of no importance there is a difference between the two concepts.

A set-off is a monetary cross claim which is also a defence to the claim made in the actions.

It is only available in respect of debts or liquidated demands due between the same parties in the same right - Supreme Court Practice 0.18/17/2 (1967). If successful it extinguishes the claim in whole or in part - Hanak v. Green (1958) 2QB9 at 29.

A counterclaim is any claim for relief or remedy against a plaintiff in respect of any matter (whenever or however arising) and is pleaded as if it were a separate cause of action. Rules of Supreme Court 0.15 r.2 (1967). If successful it may balance or exceed a judgment given in a claim tried at the same proceedings or it may succeed on in its own.

Of course a set off can be also pleaded as a counterclaim in the same matter to allow an established surplus to lead to a judgment for Defendant. In such cases the practice is to describe the pleading as "set off and counterclaim."

In the present case the liquidator claims for goods supplied to (or taken by) the directors, for advances made and similar debts within the Company. The Appellant responds by claiming debts to him for director's services rendered within the Company, and this is, speaking strictly, a set off.

The distinction becomes important in Summary Judgment cases. If the Defendant's (Appellant's) reply to the claim is a set off then if he establishes it there is no debt owing and the Plaintiff (Respondent) would not be entitled to a judgment.

If the Defendant has a counterclaim but does not deny the claim, the Plaintiff is entitled to judgment but may be restrained in an Order 14 judgment from execution pending the resolution of the Counterclaim. See Sheppards & Co. v. Wilkinson and Jarvis (1889) 6 TLR 13 per Lord Esher M.R.

The set off situation was discussed in Morgan & Son. Ltd v. S, Martin Johnson & Co. Ltd (1949) 1 KB 107 which had to do with Order 14. The plaintiffs had stored the defendant's motor vehicles and sued for storage charges. The defendant acknowledged the charges but said that in the process of storage, damage or loss had been sustained by virtue of the plaintiffs' carelessness. The judge in chambers gave the plaintiffs leave to sign judgment for the amount of their claim, but granted a stay pending trial of the counterclaim.

On appeal it was held that judgement should not have been entered and unconditional leave to defend was granted. Tucker L.J. at p. 108 pointed out that all the matters arose out of the subject of the plaintiff's claim and he said:-

> "The effect of the order which the judge made, one very often made in cases of this kind, was to give the plaintiffs judgment for the amount of the claim, but to stay execution pending the trial of the defendants' counterclaim. Ordinarily speaking, such an order as made here will adequately protect the defendants in a case of this kind, and I find it a little difficult to follow the precise reasons which their counsel has advanced for the objection to this particular order. None

> the less, it was a wong order, he is entitled to take the point. Any litigant is entitled to prefer not to have a judgment subsisting against him even if he is adequately protected from any premature enforcement of that judgment, and that is the point which counsel takes."

The interchangeability of terminology can be seen in the annotations to that case in Supreme Court Practice (1985) at 4/3-4/13 where it is said:

> "Moreover, where the defendant sets up a bona fide counterclaim arising out of the same subject-matter of the action, and connected with the grounds of defence, the order should not be for judgment on the claim subject to a stay of execution pending the trial of the counterclaim, but should be for unconditional leave to defend, even if the defendant admits the whole or part of the claim."

The same annotation also refers to an earlier case of Court v. Sheen (1890) 7 T.L.R. 556 as authority to the proposition that the same procedure should be followed where the claim is admitted in part, but there is a "counterclaim" for a larger amount. That case may be of doubtful authority, for the report of the judgment is condensed to 5 lines and the nature of the counterclaim is not revealed - whether from the same transactions or otherwise. However, we do not doubt that the principle should be extended to such cases where it is a true set off which equals or exceeds the amount admitted and where (as here) the balance is also in dispute. In the present case, at trial, the Defendant (Appellant) may be able to disprove the challenged items and extinguish the admitted amount of $55,991.10 by his claimed set off for director's fees, and even finish up with a judgment for some amount up to $7,008.90.

The point is a narrow one, indeed Tucker L.J. in Morgan v. Martin (supra) described it, at p. 113, as "perhaps rather academic" but a party who has a climable credit arising in the same matter which exceeds the debit for which he is sued is entitled to say that he should not have a judgment entered against him until the matter has been tried. Entry of a Court judgment for debt could adversely affect a business' man's credit - especially in a comparatively small trading community.

On this narrow ground therefore the appeal succeeds, and Appellant is granted leave to defend but it was made clear before us and obviously before Rooney J, that the $55,991.10 was conceeded as owing. It was doubtless to ensure that the Plaintiff was not put to expense in proving that part of the claim, the Judge entered judgment - a procedure recommended by Lord Esher in appropriate cases.

Several other grounds of appeal were argued as alternatives - a Sale of Goods point was taken but abandoned - deficiency in the figures in the Amended Statement of Claim was pointed out, but this was obviously a typing omission, remedied by reference to the original Statement of Claim.

These and other points are now irrelevant in view of the decision reached above.

The appeal is allowed and leave is granted on condition pursuant to Order 14 rule 4(3)

that liability for the items totalling $55,991.10 already referred to continues to be conceded.

Costs reserved.

Vice-President

Judge of Appeal

Judge of Appeal