JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 60/96

COR: THE HON MR JUSTICE FORTE, J A
THE HON MR JUSTICE DOWNER, JA
THE HON MR JUSTICE HARRISON, J.A.

BETWEEN	**NORTH EASTERN DISTRIBUTORS LIMITED**	**DEFENDANT/ APPELLANT**
AND	**DESNOES & GEDDES LIMITED**	**PLAINTIFF/ RESPONDENT**

Enos Grant for the Appellant

Dennis Goffe and **Mrs. Sandra Minott-Phillips** instructed by **Myers, Fletcher & Gordon** for Respondent

10th, 11th June & 10th November, 1997

FORTE, J A

This is an appeal from an order for Summary Judgment against the appellant in which on the 5th June, 1996, the learned judge inter alia made the following orders:

1. The defendant pay to the Plaintiff the sum of $3,407,827.71 with interest at the rate of 6% per annum from October 14, 1993.

2. Costs to the Plaintiff.

The Plaintiff had issued writ of summons and filed Statement of Claim in which it claimed the sum of $3,407,827.71 being a balance due to the plaintiff, as a result of three dishonourned cheques which are detailed as follows:

a) National Commercial Bank cheque No.576059 dated the 4/6/93 in the sum of Two Million Two Hundred and Eight-six Thousand, One Hundred and Eighty-eight Dollars and Eighty cents ($2,286,188.80).

b) National Commercial Bank cheque No. 576060 dated 11/6/93 in the sum of Three Hundred and Seventy-six Thousand Dollars ($376,000.00).

c) National Commercial Bank cheque No. 576061 dated 11/6/93 in the sum of One Million Two Hundred and Fourteen Thousand Six Hundred and Eighteen Dollars and Forty cents ($1,214,618.40).

On the 19th October, 1993 the appellant filed a defence and set-off the latter which, having regard to the concession by Mr. Grant for the appellant which will be referred to later is of little significance in relation to the issues on appeal. In the face of the defence and set-off, the respondent nevertheless took out a summons for summary judgment, on the 10th December, 1993, resulting in the order (supra) from which this appeal is brought.

The appellant in its attempt to challenge the order of the learned judge filed two grounds of appeal which are as follows:

1) "The learned Judge wrongly exercised her discretion in favour of the Plaintiff/Respondent, for that the Defendant/Appellant had disclosed that it has a good defence to the action on its merits and/or had adduced sufficient facts in evidence that entitled it to defend the action generally;

2) The learned Judge misdirected herself on the law as to Set-off as a defence."

During the course of argument, counsel for the appellant Mr. Enos Grant, abandoned the second ground of appeal and so nothing will be said hereafter of that ground.

Before dealing with the sole ground of appeal remaining, it is necessary to set out briefly the contractural relationship that existed between the parties.

The plaintiff is a well-known manufacturer and supplier of soft drinks and beer throughout the island. The appellant is a company formed by Mr. Hugo Duval to act as his agent/partner as a distributor and haulage contractor for the respondent's products in the parishes of Portland, St. Mary and St.Thomas. For this purpose, the appellant per Mr. Duval entered into a Franchise Agreement with the plaintiff, and leased premises at Annotto Bay in the parish of St. Mary from the appellant.

The relevant clauses of the Franchise Agreement which were stated in the form of a letter to Mr. Duval from the plaintiff are as follows:

> "As agreed, you will commence operations on 1st September, 1985, in the name of North Eastern Distributors Limited, under the following conditions:
>
> 1. Desnoes & Geddes will deliver product to you on consignment with charges made on a weekly basis for product sold.
>
> 2. North Eastern Distributors Limited will provide Desnoes & Geddes Ltd with one year's supply of signed blank cheques i.e. 52 cheques for the purpose of debiting your account for goods sold.
>
> **3.** North Eastern Distributors Limited will be paid a commission rate of:

	Fulls	Empties
	(Per 100 cases)	
First 13,500 c/s per week	$88.64	$86.68
Above 13,500 c/s per week	$77.44	75.58

It is in pursuance of Clause 2 of the agreement, that the respondent, filled in, and deposited the three cheques, which were dishonoured, and now form the subject matter of the dispute between the parties.

Mr. Grant for the appellant, maintained that the respondent filled in, and deposited the cheques without first settling the accounts with the appellant. It was a "running account" he submitted, and the normal course of business required the respondent to settle the accounts before depositing the cheques and to the extent that it did so, it acted it bad faith. He referred to another action in which the appellant has sued the respondent for damages arising out of the unlawful repossession of the leased premises from the appellant; and the unlawful detention of its equipment existing thereon. In summary, Mr. Grant relied on the following submissions:

> 1. The appellant adduced sufficient evidence to show -
>
> a) that there is a triable issue as to whether there was a total or partial failure of consideration for the cheques, having regard to the failure of the respondent to submit a statement of the running account between the parties in accordance with the course of dealings between them and/or
>
> b) that there is a triable issue as to whether the Respondent failed to act on good faith in breaching the fiduciary duties owed by the Respondents and the appellant in accordance with the history of dealings between them.

In my view, there is really no necessity to deal in any detail with the contentions of Mr. Grant. The system has agreed to by both parties entailed the delivery of goods to the appellant who would take them on consignment, sell them to the customers, retaining the money collected therefor, and the

respondent would in accordance with the agreement, write up the cheques to pay to itself what was due to it having regard to the goods delivered to the appellant.

In my view there cannot be, in those circumstances, any valid contention that there was no consideration for the value of the cheques, or that the respondent acted in bad-faith.

Section 79(1) of the Civil Procedure Code speaks to the issues involved in this appeal as follows:

> "**79.** (1) Where the defendant appears to a writ of summons specially indorsed with or accompanied by a statement of claim under section 14 of this Law, the plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any liquidated sum is claimed), and stating that in his belief there is no defence to the action except as to the amount of damages claimed if any, apply to a Judge for liberty to enter judgment for such remedy or relief as upon the statement of claim the plaintiff may be entitled to. The Judge thereupon, unless the defendant satisfies him that he has a good defence to the action on the merits or discloses such facts as may be deemed sufficient to entitle him to defend the action generally, may make an order empowering the plaintiff to enter such judgment as may be just, having regard to the nature of the remedy or relief claimed."

In my view, nothing exists in the available evidence or the submissions made by Mr. Grant to disclose that there is a good defence to the action. Counsel's attempt to rely on the action filed by the appellant against the respondent as creating a defence to the respondent's action must fail having regard to the settled principles of law on the subject.

~~The following dicta supports this.~~ In **Brown, Shipley & Co., Ltd. v. Alicia Hosiery Ltd** [1966] 1 Lloyd's List Law Reports 668, Lord Denning MR in delivering the judgment of the Court of Appeal in England said thus:

> "For many years the Courts of this country have treated bills of exchange as cash. In **James Lamont & Co., Ltd. v. Hyland, Ltd.,** [1950] 1 K.B. 585, this Court declared that where there is an action between the immediate parties to a bill of exchange, then in the ordinary way judgment should be given upon that bill of exchange as for cash and it is not to be held up by virtue of some counterclaim which the defendant may assert, even, as in that case, a counterclaim relating to the specific subject-matter of the contract."

Then in **Montecchi v. Shimco** (1980) 1 Lloyd's Law Report 50 at page 51 Bridge, L.J. had the following to say:

> "Now of course it is elementary that as between the immediate parties to a bill of exchange, which is treated in international commerce as the equivalent of cash, the fact that the defendant may have a counterclaim for unliquidated damages arising out of the same transaction forms no sort of defence to an action on a bill of exchange and no ground on which he should be granted a stay of execution of the judgment in the action for the proceeds of the bill of exchange."

Also Viscount Dilhorne speaking in the House of Lords in **Nova (Jersey) Knit Ltd v Kammgarn Spinnerei GmbH** (1977) 2 All E.R. 463 at page 470 stated:

> "Bearing in mind the intrinsic nature of a bill of exchange, 'an unconditional order', which the appellants were entitled to regard as a deferred instalment of cash, and the fact that cross-claims, unless based on fraud, invalidity or failure of consideration are not allowed, it appears to me that seldom, if ever, can it be right while denying the right to bring a cross-claim, to allow a cross-claim to operate as a bar to execution and to prevent the holder of a bill of exchange receiving the deferred instalment of cash which the parties agreed he should get."

The claim which the appellant has against the respondent for unliquidated as well as liquidated damages arising out of the re-possession of the leased premised by the respondent, cannot therefore in my view aid the appellant in his quest to set aside the summary judgment entered against him.

In any event, the factual situation, discloses that there is really no defence to the action. Mr. Arthur Ziadie, a Vice-President of the respondent company in his affidavit in reply to that of Mr. Hugo Duval of the 28th February, 1994, attached a letter dated 25th June, 1993 written by Mr. Duval to Mr. Ziadie in his official capacity, which by necessity is set out in full hereafter:

> "I am writing to apologise to you personally and to the company, for the embarrassment caused by the action taken by my bankers in dishonouring my cheques.
>
> As I indicated to you when we met subsequently, my company was in the process of completing arrangements for a credit line with the bank. All the information and collateral security, requested by the bank, had been provided by me. I was led to believe, by the Branch Manager of the Bank, that all was well, although no written commitment had been given. I was not advised by the bank that the facility, which I had been utilising for some time, had been withdrawn and was not given the opportunity to make alternative arrangements. I was only made aware of the returned cheques by a call from your company.
>
> In discussions held with the bank subsequently, I learnt that their decision to dishonour the cheques was based on a perception that the company could not clear the debt, that would have been created by the payment of the cheques, by the expiry of the notice period. This notwithstanding that we had advised them of your intention to review the position at the end of the month and indicated that, based on the company's performance, we had expected this review to be a favourable one.

> The banks decision came as a big surprise to me, especially their returning my cheque for $376,000.00 when there was adequate funds in the account to cover it.
>
> I am quite sure that you are aware of the efforts that I have made within the past eight weeks to restructure and streamline the distribution and the positive effect that this has had on our performance up to the 16th of the month, when Desnoes & Geddes took over the operations of the distribution. Had I been allowed to continue to operate, I am positive that the company would have achieved sales that you would be proud of and that you would have not had any difficulty in recommending the extension of the franchise agreement.
>
> I am therefore respectfully asking that you reconsider your decision to rescind the franchise agreement. You can be assured that, if allowed to continue operations and complete the restructuring exercise, North Eastern Distributors will become a model of which Desnoes and Geddes Ltd will be justly proud."

This letter clearly indicates that Mr. Duval was very apologetic to the respondent for the fact that the cheques were dishonoured by the Bank, thus by necessary implication admitting that the respondent was entitled to the proceeds of the cheques. One line from the letter speaks loudly to this:

> "The banks decision came as a big surprise to me, especially their returning my cheque for $376,000.00 when there was adequate funds in the account to cover it."

Even, as late as the 27th April, 1994, Mr. Duval swore the following, in his affidavit:

> "That as the Bank had <u>wrongfully returned</u> the cheques contrary to arrangements that were being put in place, the Defendant has instructed its attorney-at-law to take legal action against the Bank. That I have been informed by the Defendant's said attorney and do verily believe that he has written a strong letter to the Bank and

> is in the process of preparing or filing legal action against the Bank." [Emphasis added]

Mr. Duval was therefore so annoyed with the Bank for dishonouring the cheques, that he was in the process of filing an action against the Bank for so doing.

In my view this is strong evidence of admission by Mr. Duval who represents the appellant company, that the proceeds of the cheques were duly owing to the respondent company. In those circumstances, the learned judge, would have had no option but to enter judgment, a decision with which I see no reason to interfere.

I would dismiss the appeal and order that the appellant pay the costs, to be taxed, if not agreed.

DOWNER, J.A.

There is a dispute between the appellant and the respondent which is scheduled to be litigated in the Supreme Court. That litigation could well result in a decision in favour of the appellant. Notwithstanding that possibility, it is necessary in this case to focus on the issue of whether Hazel Harris, J. was correct in finding for the respondent, Desnoes & Geddes Ltd. in summary proceedings in respect of three dishonoured cheques which totalled $3,407,827.71.

It is important to recognise from the outset that the appellant admitted that the cheques were dishonoured. Here is an extract from a letter dated 25th June,1993 which the appellant's company wrote to Desnoes & Geddes the respondent company.

> "Mr. Arthur Zaidie
> Vice President - Marketing
> Desnoes & Geddes Ltd.
> 214 Spanish Town Road
> Kingston 11
> 25th June 1993
>
> Dear Mr. Zaidie
>
> I am writing to apologisie to you personally and to the company, for the embarrassment caused by the action taken by my bankers in dishonouring my cheques.
>
> As I indicated to you when we met subsequently, my company was in the process of completing arrangements for a credit line with the bank. All the information and collateral security, requested by the bank, had been provided by me. I was led to believe, by the Branch Manager of the Bank, that all was well, although no written committment had been given. I was not advised by the bank that the facility, which I had been utilising for some time, had been

withdrawn and was not given the opportunity to make alternative arrangements. I was only made aware of the returned cheques by a call from your company.

Yours Sincerely

Hugo Duval."

To appreciate the scope of these proceedings it is helpful to set out in full the Order made in the court below. It is as follows:

" Upon the Summons for Summary Judgment dated December 10, 1993 coming on for hearing on March 3, 1994, April 7, 1994 and June 5, 1996 and after hearing Mr. Dennis Goffe, Q.C. Attorney-at-Law instructed by Myers, Fletcher & Gordon for and on behalf of the Plaintiff and Mr.Enos Grant, Attorney-at-Law for and on behalf of the Defendant **IT IS HEREBY ORDERED** that:

1. The Defendant pay to the Plaintiff the sum of $3,407,827.71 with interest at a rate of 6% per annum from October 14, 1993.

2. Costs to the Plaintiff

3. Certificate for Counsel granted

4. Stay of execution for six (6) weeks granted

5. Leave to appeal granted"

The averments of the respondent company were set out with admirable clarity in the Statement of Claim thus:

STATEMENT OF CLAIM

"1. The Plaintiff's claim is against the Defendant for the sum of $3,407,827.71 being the balance due to the Plaintiff by the Defendant as the drawer of the following cheques:

a) National Commercial Bank cheque No. 576059 dated the 4thJune, 1993 in the sum of Two Million Two Hundred and Eighty-Six Thousand One Hundred and Eighty-eight Dollars and Eighty Cents ($2,286,188.80);

b) National Commercial Bank Cheque No. 576060 dated 11th June, 1993 in the sum of Three Hundred and Seventy-Six Thousand Dollars ($376,000.00);

c) National Commercial Bank Cheque No. 576061 dated 11th June, 1993 in the sum of One Million Two Hundred and Fourteen Thousand Six Hundred and Eighteen Dollars and Forty Cents ($1,214,618.40)

2. All Cheques were drawn on the National Commercial Bank Ja. Limited, Annotto Bay, Saint Mary, made payable to the Plaintiff and delivered by the Defendant to the Plaintiff.

3. The said cheques were duly presented for payment on the 9th June, 1993, 11th June, 1993 and 16th June 1993 respectively, and were dishonoured.

4. Although the Defendant had due notice thereof, which it acknowledged in its letter of June 25, 1993 to the Plaintiff, it did not pay the amounts of the said cheques to the Plaintiff."

Perhaps it is pertinent to state that the appellant company held a franchise to sell the products of the respondent company. The course of business was that goods were delivered to the appellant company and the respondent would collect its payment for goods delivered by completing blank cheques which were previously signed by the appellant company. The relevant issue as the statement of claim demonstrates is confined to the appropriate remedy for these dishonoured cheques. For completeness it is useful to cite section 79 of the Civil Procedure Code which

lays down the conditions which enabled the respondent company to institute those proceedings."

> "79.(1) Where the defendant appears to a writ of summons specially indorsed with or accompanied by a statement of claim under section 14 of this Law, the plaintiff may on affidavit made by himself or by any other person who can swear positively to the facts, verifying the cause of action and the amount claimed (if any liquidated sum is claimed), and stating that in his belief there is no defence to the action except as to the amount of damages claimed if any apply to a Judge for liberty to enter judgment for such remedy or relief as upon the statement of claim the plaintiff may be entitled to. The Judge thereupon, unless the defendant satisfies him that he has a good defence to the action on the merits or discloses such facts as may be deemed sufficient to entitle him to defend the action generally, may make an order empowering the plaintiff to enter such judgment as may be just, having regard to the nature of the remedy or relief claimed."

The authorities

In Brown, Shipley & Co., Ltd. v. Alicia Hosiery Ltd., (1966) 1 Lloyds Rep. 668 at p. 669 Lord Denning put the matter thus:

> "For many years the Courts of this country have treated bills of exchange as cash. **In James Lamont & Co., Ltd. v Hyland, Ltd.,** [1950] 1 K.B. 585, this Court declared that where there is an action between the immediate parties to a bill of exchange, then in the ordinary way judgment should be given upon that bill as for cash and it is not to be held up by virtue of some counterclaim which the defendant may assert, even, as in that case, a counterclaim relating to the specific subject-matter of the contract."

Mr. Grant for the appellant company made a strong plea that the order below should be set aside and that this case be stayed pending the action in the Supreme Court. In that regard he exhibited a defence and set off which purports to put the dishonoured cheques in proper context. The proper context he submitted would show that he had a good defence.

In Montecchi v. Shimco (U.K) Ltd. (1981) 1 Lloyd Rep. 50 at p. 51 Bridge L.J. said:

> " Now of course it is elementary that as between the immediate parties to a bill of exchange, which is treated in international commerce as the equivalent of cash, the fact that the defendant may have a counterclaim for unliquidated damages arising out of the same transaction forms no sort of defence to an action on a bill of exchange and no ground on which he should be granted a stay of execution of the judgment in the action for the proceeds of the bill of exchange."

This passage ought to be an effective answer to the contention of the appellant. **The House of Lords** has approved the principle expressed in this passage. In **Nova (Jersey) v Kammgarn Sinnerei GmbH** (1977) 2 All E.R. 463, at 469 Lord Wilberforce in the following passage enunciates the settled law as follows:

> " I shall deal however with the second point. I take it to be clear law that unliquidated cross-claims cannot be relied on by way of extinguishing set-off against a claim on a bill of exchange (**Warwick v Nairn** (1855) 10 Exch 762; **James Lamont & Co. Ltd. v Hyland Ltd** (1950) 1 All ER 341,[1950] 1 KB 585). As between the immediate parties, a partial failure of consideration may be relied on as a pro tanto defence, but only when the amount involved is ascertained and liquidated (**Warwick v Nairn** (supra); **Agra and Masterman's Bank v Leighton** (1866) LR 2 Exch 56; **James Lamont & Co Ltd v**

> **Hyland Ltd** (supra); **Brown, Shipley & Co Ltd v Alicia Hosiery Ltd** [1966] 1 Lloyd's Rep 668.) The amount claimed here in respect of the machines is certainly neither ascertained nor liquidated, and the claim in respect of mismanagement is one for a wholly unrelated tort, so that there would seem to be no basis for denying the appellant's claim that, as regards the bills there is no dispute."

This is exactly the position with the instant case where the set-off relates to a claim for unliquidated damages. There was no valid claim for a partial failure of consideration which was ascertained and liquidated. Then His Lordship concludes thus at 470:

> " I fear that the Court of Appeal's decision, if it had been allowed to stand, would have made a very substantial inroad on the commercial principle on which bills of exchange have always rested. In my opinion, this is a straightforwarded case of an action on bills, to which no admissible defence has been put forward. I would hold that the judge was right, in the result, in refusing a stay and I would restore his order and allow an appeal. As I have said, we are not concerned in this appeal with the future course of this action, but I must demur to the view that a result similar to granting a stay under the Arbitration Act 1975 can be obtained by any procedural stay of another character. So to hold would seem quite counter to long accepted principles regarding claims on bills of exchange and would represent an undesirable change in the law."

Then Viscount Dilhorne states the reason why the order below in this case had to be affirmed. At p. 470 he states:

> " Bearing in mind the intrinsic nature of a bill of exchange, 'an unconditional order', which the appellants were entitled to regard as a deferred instalment of cash, and the fact that cross-claims, unless based on fraud, invalidity or failure of consideration are not allowed, it appears to me that

> seldom, if ever, can it be right while denying the right to bring a cross-claim, to allow a cross-claim to operate as a bar to execution and to prevent the holder of a bill of exchange receiving the deferred instalment of cash which the parties agreed he should get."

Lord Russell was also of the same mind. His contribution was as follows at 479-480:

> " This, my Lord, bring(s) me to a consideration of English law in relation to such bills of exchange. It is in my opinion well established that a claim for unliquidated damages under a contract for sale is no defence to a claim under a bill of exchange accepted by the purchaser; nor is it available as set-off or counterclaim. This is a deep rooted concept of English commeercial law. A vendor and purchaser who agree on payment by acceptance of bills of exchange do so not simply on thc basis that credit is given to the purchaser so that the vendor must in due course sue for the price under the contract of sale. The bill is itself a contract separate from the contract of sale. Its purpose is not merely to serve as a negotiable instrument; it is also to avoid postponement of the purchaser's liability to the vendor himself, a postponement grounded on some allegation of failure in some respect by the vendor under the underlying contract unless it be total or quantified partial failure of consideration."

These authorities which were effectively deployed by Mr. Goffe, Q.C. refuted the thesis propounded by Mr. Grant for the appellant that these proceedings ought to have been stayed pending the outcome of the comprehensive proceedings before the Supreme Court.

Accordingly, therefore, the appeal is dismissed and the order of Hazel Harris, J. must be affirmed. The appellant must pay the taxed or agreed cost of the respondent.

HARRISON, J.A.

This is an appeal against the order of Mrs. Hazel Harris, J. made on the 5th of June, 1996, granting to the plaintiff/respondent leave to enter final judgment against the defendant/appellant for $3,407,827.71 with interest and cost to be agreed or taxed, in Suit C.L. 1993 D.165.

The claim for the balance due on dishonoured cheques, arose as a result of three cheques pre-signed by the appellant as consignee of goods sent to it by the respondent. In accepting payment for the goods, the respondent filled in the amounts due and deposited the cheques to its account. The cheques were dishonoured by the appellant's bank.

The material facts are as hereunder:

The respondent is the manufacturer and supplier of certain products which it supplied to the appellant who was appointed distributor of the said products. The appellant operated from premises at Annotto Bay leased by the respondent to one Hugo Duval the managing director of the appellant. The lease agreement was entered into on 1st June, 1989, on which date a franchise agreement was also entered into between the said Hugo Duval and the respondent.

By the terms of a contract contained in a letter dated 8th August, 1985 to Hugo Duval and signed by one Mrs. Beverley Lopez, General Sales Manager on behalf of the respondent, the appellant commenced operations on 1st. September, 1985.

The said contract provided, inter alia:

> 1. Desnoes & Geddes will deliver product to you on consignment with charges made on a weekly basis for product sold
>
> 2. North Eastern Distributors Ltd. will provide D.& G Ltd. with one year's supply of signed blank cheques i.e. 52 cheques for the purpose of debiting your account for goods sold
>
> .....
>
> 5. North Eastern Distributors will be paid a commission at the rate of.....Fulls Empties (Per 100 cases)"
> (Emphasis added)

The parties operated a system of accounting under the contract by which, generally, on a weekly basis having ascertained the amount of products sold by the appellant, the respondent would fill in on one of the said pre-signed cheques a net amount, having made allowance for the payment to the appellant of its commission and other charges on its sales of the products. This cheque would be deposited for payment at the bank from the account to which the appellant would have lodged the proceeds of such sales. The details of how much of the products were sold would be peculiarly within the knowledge of the appellant and such information could only be known by the respondent if it was supplied by the appellant.

By letter dated 27th April, 1993, the respondent gave Hugo Duval three month's notice of termination of the lease and franchise agreement to take effect on 31st. July, 1993

In accordance with the system of accounting and the terms of the contract, the respondent filled out three (3) of the pre-signed cheques:

(1) $2,286,188.80 dated 4.6.93

(2) $1,214,618.40 dated 11.6.93

(3) $376,000.00 dated 11.6.93

These cheques were presented at the appellant's bank between the 9th day of June and the 16th day of June, 1993 and were all dishonoured.

On 17th June, 1993, the respondent took over the management of the appellant company.

By letter dated 25th June, 1993 signed by Hugo Duval the appellant expressed to the respondent his regret that the cheques were dishonoured and blamed it on the reneging of its banker's promise. It read, inter alia,

> "Dear Mr. Zaidie,
>
> I am writing to apologise to you personally and to the company, for the embarrassment caused by the action taken by my bankers in dishonouring my cheques.
>
> As I indicated to you when we met subsequently, my company was in the process of completing arrangements for a credit line with the bank. All the information and collateral security, requested by the Bank, had been provided by me. I was led to believe, by the Branch Manager of the Bank, that all was well, although no written commitment had been given. I was not advised by the bank that the facility, which I had been utilising for some time, had been withdrawn and was not given the opportunity to make alternative arrangements. I was only made aware of the returned cheques by a call from your company.
>
> In discussions held with the bank subsequently, I learnt that their decision to dishonour the cheques was based on a perception that the company could not clear the debt, that would have been created by the payment of the cheques, by the expiry of the notice period. This notwithstanding that we had advised them of your intention to review the position at the end of the month and indicted that, based on the company's performance, we had expected this review to be a favourable one.
>
> The banks decision came as a big surprise to me especially their returning my cheque for $376,000.00

> when there was adequate funds in the account to cover it."

The appellant, through its managing director, was at this stage apologetic, did not deny the respondent's right to the payment on the cheques and made no claim for money due to it from the respondent.

The clear inference is that there was no contention that there was any failure of consideration; the products had been supplied by the respondent and sold by the appellant.

On the 14th day of October, 1993, the suit in the instant appeal was filed claiming the sum of $3,407,827.71 as a liquidated debt being the balance due on the said dishonoured cheque.

The appellant filed a defence and set off dated the 19th day of October, 1993, denying that it owed the amount on the said cheques, and claiming a sum representing the total value of the assets of the appellant taken over by the respondent on 17th June, 1993

The defence and set off reads, inter alia;

> " The defendant denies that the plaintiff is entitled to the relief as claimed or at all. The defendant will say that at all material times there was a running account between them which was never settled and that the plaintiff owes the defendant a sum in excess of $3,627,500.00 on the said account."

Consequently, the respondent filed its summons for summary judgment; leave to enter final judgment was granted.

The appellant contends that the learned judge in so doing wrongly exercised her discretion, in that the appellant had a good defence on its merits and had

adduced sufficient evidence to entitle it to defend generally and misdirected herself on the law concerning set off as a defence.

By section 79 of the Judicature (Civil Procedure Code) Act, a plaintiff who claims a liquidated sum on a writ endorsed with a statement of claim and contends that the defendant has no defence, may apply for leave to file final judgment, where the defendant appears; the judge may make the order,

> " ...unless the defendant satisfies him that he has a good defence to the action on the merits or discloses such facts as may be deemed sufficient to entitle him to defend the action generally..."

However, in relation to actions on bills of exchange, this general rule follows a particular practice. If the defendant has a defence of set off or a counter claim to the said action it will not preclude the plaintiff entering judgment in the said action. This is so because bills of exchange and cheques are treated as cash, in commercial transactions.

Of course, if the defendant shows that he has a valid defence on the said cheques for example, under the Bills of Exchange Act, leave to enter judgment would be denied. Failure of consideration is also a good defence.

In order to succeed before us, the appellant must show that the learned trial judge wrongly exercised her discretion in granting leave to the respondent on the facts of this case.

In relation to the practice of the courts concerning actions on a bill of exchange, in **Fielding and Platt Ltd vs. Selvin Najjar** [1969] 1 WLR 357, Lord Denning, M.R. said, at page 361;

> "We have repeatedly said in this court that a bill of exchange or a promissory note is to be treated as cash. It is to be honoured unless there is some good reason to the contrary."

In **Newman v Lever** (1887) 4 T.L.R. 91, the plaintiff applied for summary judgment in respect of an action on a dishonoured promissory note, to which action the defendant had no defence. On appeal to the Queen's Bench Division from the order of the judge in Chambers, reversing the Order of the Master who had granted leave to file summary judgment, Stephen J. said, at page 92.

> "...without... strong grounds a counter claim ought not to be allowed in an action on a bill, cheque or note which was not disputed."

In **Brown, Shipley & Co. Ltd. vs Alicia Hosiery Ltd.** [1966] Lloyd's List Law Reports, 668, (C.A.), the appellants were refused a stay of execution pending the trial of their counterclaim, in an action to recover the amounts due on their dishonoured bills of exchange. Lord Denning, M.R. said, at page 669:

> "For many years the Courts of this country have treated bills of exchange as cash.... where there is an action between the immediate parties to a bill of exchange, then in the ordinary way judgment should be given upon that bill of exchange as for cash and it is not to be held up by virtue of some counter claim which the defendant may assert, even.... a counter claim relating to the specific subject matter of the contract."

He referred to **Lamont & Co. Ltd. vs. Hyland Ltd.** [1950] 1 All E.R. 341, a case relied on by counsel for the appellant in the instant case.

This principle has been consistently followed; see **Montebianco vs. Carlyle Mills** [1981] 1 Lloyds Law Reports 509, (C.A.) Stephenson, L.J. at page 511 quoting Bridge, L.J. in **Montecchi vs Shimco Ltd.** [1980] 1 Lloyd's Rep. 50.

Accordingly, in the circumstances, the defence and set off filed in the instant case cannot postpone the right of the plaintiff to be granted leave to file final judgment, unless a valid defence is shown on the said cheques.

The original payee on a cheque is not regarded as a holder in due course. Sections 29 & 30 of the Bills of Exchange Act, do not therefore enable the respondent to rely on its provisions - **Jones v Waring and Gillow** [1926] AC 670 (H.L.) However the respondent gave value. No defence was raised or arises under the Bills of the Exchange Act in favour of the appellant.

In the instant case there was no failure of consideration as the appellant contends. The appellant has not complained that the goods were not supplied by the respondent thereby negating any right in the respondent to fill in and present the said cheques for payment. On the contrary, the appellant's early conduct reveals that it accepted that the goods were consigned, received and sold.

Looked at another way, the filling in and presentation of the three cheques to the bank for payment, without protest from the drawer, is an acknowledgment by the drawer, the appellant that consideration had been given; the contract on which the payment of the cheques was based is deemed to have been performed and completed. No cause of action remains on the contract. The cause of action can only arise on the cheques themselves, no failure of consideration can arise. In this regard also the appellant has not shown a good defence to the action on its merits.

I fail to see how the "running account" between the appellant and the respondent, which the appellant relies on to base its set off of $3,627,500.00, fails to give details of products consigned under the contract. It relates instead to items, such as motor vehicles and furniture allegedly taken subsequently by the respondent. The single item referable to the said "running account" on the contract is "empties", albeit valued at $903,000.00.

The plaintiff's action being on the three dishonoured cheques, the fact of dishonour is not in dispute. There is no defence disclosed to that claim. The respondent was entitled to leave to file final judgment.

The learned trial judge properly exercised her discretion and in accordance with the proper legal principles.

I would dismiss the appeal with costs.

FORTE, J.A.

The appeal is dismissed. Costs to the respondent to be taxed if not agreed.