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IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
BEFORE THE HON. THE CHIEF JUSTICE

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ON THE 7TH NOVEMBER 1991

CAUSE #382/91

BETWEEN METALLGESELLSCHAFT HONG KONG LIMITED PLAINTIFF
AND OMNI METALS TRADING DEFENDANT

Mr. Jones for the plaintiff
Mr. Turner for the defendant

MALONE C.J. RULING

The plaintiff's summons is for summary judgment in an action on dishonoured promissory notes. The defendant concedes that it cannot have leave to defend the action as it has not averred a total lack of consideration. (See rule 23 (5) of the Grand Court (Civil Procedure) Rules. The defendant, however, opposes the plaintiff's application on two grounds. The first concerns the amount in dispute. The plaintiff claims that the principal sum due is U.S.\$5,353,559.55. The defendant pleads that U.S.\$3,498,147.20 is the balance of the principal due. The second ground concerns the payment of a promissory note in the sum of U.S.\$4,279,759.55 which matured, the plaintiff claims, on the 30th August 1991. The defendant says it was agreed orally that the payment of that note was to be deferred by the issue of further promissory notes in the sum of approximately U.S.\$300,000.00 and U.S.\$350,000.00 payable over a number of months. On the basis of that agreement the defendant counterclaims for a declaration that the plaintiff is in breach of that agreement and seeks to set-off

any damages due to it by the plaintiff for breach of the alleged agreement. The defendant also claims interest at the statutory rate from the date of the alleged breach until the date of payment. The plaintiff denies there was an agreement. Alternatively it says that if even there was a legally binding contract it does not give rise to an allowable set-off.

In *Brown Shipley & Co Ltd v Alicia Hosiery Ltd.*

(1966) 1 Lloyd's Rep 668 Lord Denning M.R. said at p 669:

"For many years the Courts of this country have treated bills of exchange as cash. In *James Lamont & Co Ltd. v Hylands Ltd* (1950) 1 A.E.R. 341 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. Here the counterclaim is in relation to a different contract altogether from that which initiated the bills of exchange."

Six years later in *Saga of Bond Street Ltd v Avalon Promotions* (1972) 2 A.E.R. 545 Salmon L.J. at p 547 commented on the passage cited from Brown's case (ibid) as follows:

"..... I do not read that case, nor any other to which we had been referred, as laying down the proposition that the court has no discretion in the matter and is bound in every case where the claim rests on a dishonoured bill of exchange to give judgment for the plaintiff unconditionally."

The effect of that comment has however since been negated by the House of Lords in *Nova (Jersey) Knit Ltd. v Kammgarn Spinneri GmbH*

(1977) 2 A.E.R 463. The view of the majority is, I think, most clearly expressed by Lord Wilberforce at p 469 of his judgment where he said:

"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; James Lamont & Co. Ltd. v Hyland Ltd). As between the immediate parties a practical 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, Agra and Masterman's Bank v Leighton (1866) L.R 2 Exch 56; James Lamont & Co. Ltd. v Hyland Ltd; (1950) 1 A.E.R. 341 Brown Shipley & Co Ltd. v Alicia Hosiery Ltd.(ibid).".

The amount claimed here by the counterclaim is not ascertained and liquidated. Further if there is a basis for the counterclaim it is another contract. Admittedly that other contract relates to the specific subject matter of the initial contract but from that fact it does not follow that the counterclaim can hold up the promissory note. Brown's case (ibid) is authority against that proposition. So too, the learned author of the White Book who in dealing with the practice of not allowing a defendant to set up a set-off or counterclaim for damages writes at note 14/3-4/14 of the 1988 Annual Practice Vol 1 as follows:

This practice will obtain whether the counterclaim is connected with or arises out of or is independent of the contract in respect of which the bill, cheque or note was given, and whether or not the action is between the immediate parties to the bill.".

At Law the position then is that if the defendant wishes to pursue its counterclaim it must do so separately. Accordingly I have not to express an opinion on the merits. Indeed I think it preferable that I should not.

As regards the dispute over the difference between the sum claimed and the amount which the defendant admits to be due, the defendant cannot have an order as in *Lloyd's Bank v Ellis Fewster and Others* (1983) 2 A.E.R. 424 to pay the plaintiff U.S.\$3,498,147.20 with unconditional leave to defend as to the balance, if any. For unlike that case where there was a triable issue, here, there is no triable issue since the defendant does not aver a total lack of consideration. To my mind the plaintiff is entitled to be paid U.S.\$5,353,559.95. In addition I think the circumstances justify my exercising the discretion conferred on me by section 62 (2) of the Judicature Law to award the plaintiff interest.

Judgment is entered for the plaintiff in the sum of U.S.\$5,353,559.55 with compound interest of 10% at half yearly rests from the 1st September 1991, until the date of payment, both dates inclusive. I have selected the 1st September 1991 as the date when interest commences in preference to the maturity date of each month as it seems to me that it was then that the indebtedness arose.

Denis S. G. Malone

Sir Denis Malone

30th January, 1992.