CARPENTERS FIJI LTD v JOES FARM PRODUCE LTD (ABU0019 of 2006S)

COURT OF APPEAL — CIVIL JURISDICTION

EICHELBAUM, PENLINGTON and SCOTT JJA

31 October, 10 November 2006

Practice and procedure — judgments and orders — summary judgment — whether findings of fact and law proper — High Court Rules O 14 r 3 — Sale of Goods Act (Cap 230) ss 29, 53.

The Respondent was a distributor of fruits and vegetables and the Appellant was a vendor of those products. They had a written agreement for the exclusive supply of fruits and vegetables by the Respondent to the Appellant. During the currency of the agreement, the Respondent supplied fruits and vegetables, until the Appellant failed to pay some of the goods supplied by the Respondent. The Respondent sought payment but the Appellant did not comply asserting that it had claims in excess of the sum claimed by the Respondent. The Respondent commenced three actions (CA455/2005, CA533/2005 and CA437/2005) to recover the unpaid amounts allegedly not paid by the Appellant. The Appellant filed a defence and counterclaim alleging breaches of contract in not supplying goods, supplying goods that were substandard or inferior in quality and charging prices that were unreasonable and not compatible with the market price. Damages were later claimed.

The Respondent unsuccessfully applied to consolidate all three actions but only the first two were consolidated, leaving the third action (CA437/2005) on its own course. Subsequently, the Respondent sought summary judgment under O 14 of the High Court Rules in respect of the consolidated claims.

The judge ruled in favour of the Respondent and entered summary judgment for the consolidated claim and ordered a stay of execution with respect to the remaining $65,000 claim until the hearing and determination of the counterclaim. The judge also granted leave to the defendant to defend its counterclaim. The judge's reasons were: (1) that the Respondent failed to put up a bona fide defence to the Respondent's claim; (2) there were no triable issues or questions to proceed to a hearing; and (3) part of the counterclaim went beyond what was generally accepted in law, on the measure of damages in contract, namely, losses which arose directly and naturally in the ordinary course of events from the alleged breaches of contract.

The Appellant appealed and challenged the order of the judge on the ground that the judge was wrong in fact and in law in not finding that the Appellant had a defence to the Respondent's claim and that there were issues or questions ought to be tried.

Held — (1) The court reached the conclusion that the summary judgment should have been refused by the judge and that the action and counterclaim should have been set for trial unconditionally for the following reasons:

(i) Evidence showed that the Appellant was due to be paid rebates. While the agreement on rebates did not stipulate the mechanics of how and when the rebates are to be paid, it did set out a formula for the calculation of the rebate. The Appellant held back payments on invoices because a number of claims which it had against the Respondent included rebates. The Appellant's claim for rebates was a set-off against the Respondent's claim.

(ii) The judge was in error in not finding that the Appellant's claim for credit notes was a defense to the Respondent's claim to which the Appellant was entitled to unconditional leave to defend at least up to the amount claimed. Evidence showed that there was no dispute that from time to time the Respondent passed

credit notes in favour of the Appellant. During the oral argument, the Respondent's counsel conceded in answer to a question from the court that a credit note would be a set-off.

(iii) The court held that s 53 of the Sale of Goods Act (Cap 230) was in point. It held that under common law rule enunciated in *Mondel v Steel* that s 53 of the Sale of Goods Act allowed the buyer of goods as a defence to set-up against the seller a breach of warranty in diminution or extinction of the price. In this case, the Appellant properly raised the allegation of breach of warranty.

Appeal allowed.

Cases referred to

Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd [1974] AC 689; [1973] 3 All ER 195; *Hanak v Green* (1958) 2 QB 9; [1958] 2 All ER 141; *Mondel v Steel* (1841) 8 M & W 858; *Morgan and Son Ltd v S Martin Johnson and Co* (1949) 1 KB 107; [1948] 2 All ER 196, cited.

H. Lateef and *S. Bale* for the Appellant

G. O'Driscoll and *A. Seruvatu* for the Respondent

[1] Eichelbaum, Penlington and Scott JJA. This is an appeal from Jitoko J wherein he entered summary judgment against the Appellant under O 14 r 3 of the High Court Rules.

[2] Order 14 r 3 provides:

> 3. — (1) Unless on the hearing of an application under rule 1., either the Court dismisses the application or the defendant satisfies the Court with respect to the claim, or the part of a claim, to which the application relates that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part, the Court may give such judgment for the plaintiff against that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.
>
> (2) The Court may by order, and subject to such conditions, if any, as may be just, stay execution of any judgment given against a defendant under this rule until after the trial of any counterclaim made or raised by the defendant in the action.

Background

[3] The Respondent, the plaintiff in the High Court, is a distributor of fruit and vegetables. The Appellant, the defendant in the High Court, is a vendor of those products through its supermarkets in Suva and elsewhere in Fiji. It trades under the name of "Morris Hedstrom — MH".

[4] On 19 August 2002 the parties entered into a written agreement for the exclusive supply of fruit and vegetables by the Respondent to the Appellant for the period from 30 November 2002 (wrongly referred to as "31 November 2002") to 31 December 2005. The agreement was in the following terms:

> *Morris Hedstrom — Produce*
>
> An agreement is hereby reached between Morris Hedstrom Fiji Limited and Joes Farm Fiji Limited.
>
> —
>
> Joes Farm has been nominated to be the sole supplier of all Local and Imported Fruit and Vegetables as of 31st November 2002 or before.
>
> *Contractual Agreements*
>
> [1] *Contract* — Three years. This contract shall end on 31st of December 2005 unless if another term of contract is signed between the two parties. 1st option to be given to Joes Farm for further 3 years.

[2] *Start Date* — 31st November 2002.

[3] *Product Packaging* — New concept of packed produce will only be sold through Morris Hedstrom in retail business.

[4] *Distribution* — It is understood that all deliveries throughout Fiji will be made through refrigerated trucks and Local Produce in crates.

[5] *Delivery Schedule* — Central Division — Daily (Monday to Sundays)
Western Division — Mondays, Wednesdays and Fridays
Northern Division — once a week

[6] *Delivery Charges* — Joes Farm to deliver at there (sic) own cost to Western & Central Stores.
Except — For Northern delivery whereby Morris Hedstrom will Pay for shipping charges only from Viti Levu to Vanua Levu or Taveuni.

[7] *Orders* — All orders for the next days delivery shall be with Joes Farm at least by midday on the previous day of delivery.

[8] *Product Pricing* — Joes Farm is to source quality product and at reasonable price in order to keep us competitive in the market.
— Local Fruit & Vegetable — Joes Farm to put up a maximum mark up of ten per cent on there (sic) cost before supplying to MH's.
— Imported Fruit & Vegetables — Joes Farm to put up a maximum mark up of 12.5% on landed cost.
— Potato/Onion & Garlic — Joes Farm to charge maximum of $1.50 per bag On landed cost inclusive of deliveries to MH's.

[9] *Price Checking* — Joes Farm will have to show there (sic) purchase invoices and other relevant documents to confirm cost price if required by MH's.

[10] *Pre packed Pot/Onion & Garlic* — Joes Farm packed with identifying tags will have different mark up. However in line with PIE regulation.

[11] *Trading Term* — 30 days nett.

[12] *Rebate* — Morris Hedstrom purchase exceeds $4,000,000 in one year, then Joes Farm will pay a rebate of 3%. If purchase exceeds 2,800,000 then Joes Farm will pay a rebate of 2% exclusive of VAT. [The rebate calculation exclude pot/onion & garlic].

[13] *Promotion* — Joes Farm to do weekly/monthly promotion on selected products. However approval from MH advertising manager is to be obtained.

[14] *Fleet Vehicles* — If Joes Farm has to purchase new delivery vehicles then it has to be bought from Carpenters Motors.

[15] *Shipping* — Joes Farm to use Carpenters Shipping (ANZDL) vessels for all importation of produce from overseas.

[16] *Quality of Produce* — Joes Farm has to ensure that Morris Hedstrom is supplied with the best quality of produce always. Morris Hedstrom stores receiving point will have full right to reject product if quality is not accepted.

[17] *Termination of Contract* — Morris Hedstrom's will have full right to terminate the Contract if the sale of Morris Hedstrom Produce declines due to the negligence of Joes Farm Limited.

[5] Clauses 8 (Product Pricing) 12 (Rebate) and 16 (Quality of Produce) are to be noted as they are relevant to some of the issues involved in this appeal. We shall return to them later.

[6] During the currency of the agreement the Respondent supplied fruit and vegetables to the Appellant. According to the Respondent the Appellant failed to pay for some of the goods supplied and accepted by it, namely:

For the period ending 31 July 2005,	$209,371.02
For the period 1 August 2005 to 15 October 2005	$214,051.77
Total	$423,422.79

[7] The Respondent sought payment, but the Appellant did not comply asserting that it had claims in excess of this sum.

Proceedings

5 **[8]** Litigation followed. First, on 5 September 2005 the Respondent commenced an action (CA 455/2005) in the High Court to recover the above sum of $209,371.02. Then in the following month on 24 October 2005 the Respondent commenced another action (CA 533/2005) against the Appellant claiming $214,051.77, the other sum mentioned above. In each action the Appellant filed 10 a defence and counterclaim alleging breaches of contract in not supplying goods when demanded by the Appellant, supplying goods that were substandard or inferior in quality and charging prices that were unreasonable and not compatible with the market price. General and special damages, to be quantified later, were claimed.

15 **[9]** It is proper to note that prior to the commencement of these two actions the Respondent had commenced yet another action (CA437/2005) against the Appellant alleging that it had not exclusively dealt with the Respondent. The latter sought damages from the Appellant.

20 **[10]** The Respondent unsuccessfully applied to consolidate all three actions. In the event only the first two were consolidated. The third action (CA437/2005) was left to follow its own course. We do not regard it as a relevant consideration in this appeal and we therefore put it to one side.

[11] The Respondent's next procedural step was to seek summary judgment 25 under 0.14 in respect of the consolidated claims amounting to $423,422.79 as set out above. Voluminous affidavits in support of and in opposition to the summons were filed. All the invoices were exhibited. The summons came on for hearing before Jitoko J. In a judgment delivered on 3 March 2006 the judge found in favour of the Respondent and entered summary judgment for the consolidated 30 claim. The judge further ordered that payment of $358,422.79 be made within 7 days and that there be a stay of execution in respect of the remaining $65,000 of the judgment debt until the hearing and determination of the counterclaim. The judge granted leave "to the defendant to defend its counterclaim". Clearly the judge meant that the defendant now the Appellant had leave to prosecute its 35 counterclaim. After the appeal was filed a stay of proceedings was ordered.

[12] The affidavit in support of the application for summary judgment asserted that goods had been delivered to and accepted by the Appellant under the contract and that the monies (being the price of the goods) claimed remained unpaid by the Appellant. In the affidavit in support of the Appellant's opposition to the 40 summary judgment application a number of matters of dispute were raised: (1) unpaid rebates under clause 12 of the agreement, (2) credit notes not being issued and met, (3) allegations of delivery of defective goods, late deliveries and non-deliveries, (4) the charging of unreasonable prices in breach of clause 8, (5) "lost opportunities to make money" resulting from customers 45 going elsewhere to buy their fruit and vegetables because of the substandard products delivered by the Respondent, late deliveries and non-deliveries. The Appellant set-up claims against the Respondent well in excess of the amount claimed by it against the Appellant.

50 **The judgment of Jitoko J**

[13] We now refer shortly to the judgment of Jitoko J.

[14] First the judge reviewed the relevant principles relating to the granting of summary judgment as set out in the 1985 Annual Practice Vol 1 p 136.

[15] The judge then made some comments about the agreement. He considered that was a very simple contract which had been drafted by a lay person and that it lacked "some of the trappings that normally, are found in commercial agreements, especially involving the supply of perishable goods". He considered that there could be "interpretation difficulties" in respect of some of the provisions in the agreement, for example "the clause relating to rebate", should a dispute arise in relation to any of them.

Notwithstanding these shortcomings the judge did not doubt that the agreement constituted a binding contract between the parties which they had acted on.

[16] The judge referred to the Appellant's counterclaim. He recorded that the Appellant claimed $559,520.24 for substandard goods supplied and $462,101.84 for non-deliveries and late deliveries, a total of $1,020,622.08. The judge noted that the Appellant claimed not only losses directly and naturally resulting from the alleged breaches but also "lost opportunities to make money" resulting from customers shopping elsewhere. The judge expressed the opinion that part of the counterclaim went beyond what is generally accepted in law, on the measure of damages in contract, namely, losses which arise directly and naturally in the ordinary course of events from the alleged breaches of contract.

[17] It was common ground in the High Court that the goods had been supplied by the Respondent to the Appellant, that the Appellant had received invoices for those supplies and that it had not fully paid those invoices. The Appellant, for its part, contended that it was entitled to do so because of the losses arising from the Respondent's breaches of contract. The judge rejected this contention. He said:

> While this Court is willing to accept the Defendant's contentions of alleged breaches by the Plaintiff of the agreement, I do not believe it is proper that the withholding of payment for goods supplied and received should be withheld merely on the grounds advanced by the Defendants. This is especially so given that the provisions of the agreement upon which the withholding of payments are being pegged, are in themselves very much subject to differing interpretations. Goods have been supplied by the Plaintiff and received and accepted by the Defendants. The Defendants were at liberty to reject sub-standard and unsatisfactory products which they did. Invoices were subsequently raised by the Plaintiff, in respect of those goods accepted by the Defendant. The Defendant has an obligation to pay for the goods received and sold in its outlets.

[18] The judge then referred to s 29 of the Sale of Goods Act (Cap 230) which stipulates that the delivery of goods and the payment of the price are concurrent conditions. The judge considered, having regard to the terms of s 29 that the Appellant was obliged in law to pay for the goods supplied. He then went on to say:

> It cannot withhold payments for goods delivered purely as a device to set off against its claim for the plaintiffs alleged breaches of the agreement the terms of which are subject to interpretation.

The judge concluded that the Appellant was unable to put up a bona fide defence to the Respondent's claim and that there were no triable issues or questions which ought to go to a hearing. He rejected the Appellant's contention that its claims were closely connected to the Respondent's claim although later the judge accepted that the counterclaim was "based on an agreement the provisions of which are not readily subject to unequivocal interpretation". Ultimately he

concluded that the Appellants counterclaim "in so far as they relate to losses due to breaches" had merit and that the Appellant was entitled to proceed with them.

[19] Against the background of these findings the judge entered summary judgment and made the other orders to which we have earlier referred.

The appeal

[20] The Appellant's notice of appeal challenged the ordering of summary judgment. It raised a number of grounds of appeal. Collectively they amounted to a complaint that the judge was wrong in fact and in law in not finding, on the totality of the affidavit evidence, that the Appellant had a defence to the Respondent's claim and that, in any event, there were issues or questions in dispute which ought to be tried.

Summary judgment principles

[21] Here it is timely to state some of the well-established principles relating to the entry of summary judgment:

(a) The purpose of 0.14 is to enable a plaintiff to obtain summary judgment without trial if he can prove his claim clearly and if the defendant is unable to set-up, a *bona fide* defence or raise an issue against the claim which ought to be tried.

(b) The defendant may show cause against a plaintiff's claim on the merits eg that he has a good defence to the claim on the merits or there is a dispute as to the facts which ought to be tried or there is a difficult point of law involved.

(c) It is generally incumbent on a defendant resisting summary judgment, to file an affidavit which deals specifically with the plaintiff's claim and affidavit and states clearly and precisely what the defence is and what facts are relied on to support it.

(d) Set-off, which is a monetary cross-claim for a debt due from the plaintiff, is a defence. A defendant is entitled to unconditional leave to defend up to the amount of the set off claimed. If there is a set-off at all, each claim goes against the other and either extinguishes or reduces it *Hanak v Green* (1958) 2 QB 9 at 29; [1958] 2 All ER 141 at 153 per Sellers LJ.

(e) Likewise where a 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 whole or part of the claim. *Morgan and Son Ltd v S Martin Johnson and Co* (1949) 1 KB 107; [1948] 2 All ER 196.

See *The Supreme Practice*, 1991, vol 1 especially at pp 146,147,152 and 322.

[22] And one other point of principle should be referred to at this stage as it is of particular relevance to this appeal. That is the common law rule in *Mondel v Steel* (1841) 8 M & W 858 at 871 (*Mondel*) per Parke B which is now codified in s 53 of the Sales of Goods Act (Cap 230). This rule permits a buyer of goods to set-up against the seller a breach of warranty in diminution or extinction of the price. We shall return to this provision later in the judgment.

Our consideration of the appeal

[23] So much for the relevant principles. This appeal can be dealt with quite shortly. Having considered the written submissions of counsel as supplemented by their oral submissions at the hearing of the appeal we have reached the clear conclusion that, with respect to the judge in the High Court, summary judgment should have been refused and that the action and counterclaim should have been sent for trial unconditionally. We now set out our reasons for this conclusion under the following headings:

(a) Rebates.
(b) Credit Notes.
(c) Breach of Warranty for Defective Goods.
(d) Claims for non-delivery and late delivery and loss of business.

(a) Rebates

[24] We have earlier set out the provision in the exclusive supply agreement as to rebates: clause 12. While the agreement does not stipulate the mechanics of how and when a rebate is to be paid it does set out a formula for the calculation of a rebate. The Appellant held back payments on invoices because a number of claims which it had against the Respondent including rebates. Indeed there was an ongoing dispute between the parties for some time during the period of the agreement. Correspondence, which was exhibited to the Appellant's affidavit was exchanged. As well there were discussions. The economy of language in the clause 12 no doubt contributed to the dispute. Later the Respondent took the stance that the rebates were not payable in any event because the Appellant was in breach of contract for sourcing fruit and vegetables from other suppliers (which in turn the Appellant said it had to do because of breaches by the Respondent).

[25] The evidence in opposition to the summary judgment application was that the Appellant was due to be paid rebates amounting to:

For the year 2003	$52,365.00
For the year 2004	$81,529.83
Total	$133,894.83

[26] In the Respondent's affidavit in reply it was stated:

> The figure for rebate is disputed and based on the (appellant's) own figures and not yet agreed between the parties.

[27] Counsel for the Respondent conceded in his oral argument that, within the context of this agreement, a rebate was a sum which could be calculated and was therefore a set-off available to the Appellant against the claim of the Respondent if the same could be properly established.

[28] The judge had before him the disputed evidence concerning rebates. Significantly in our view the Respondent, in the evidence quoted above, admitted that rebates are payable but that the amount is in dispute.

[29] In our view the Appellant's claim for rebates was a set-off against the Respondent's claim, and, with respect, the judge fell into an error in not reaching this view on the evidence before him. Rebates were a defence to the Respondent's claim and it was entitled to unconditional leave to defend, at least, on the amount it claimed for rebates.

(b) Credit notes

[30] There was no dispute that from time to time the Respondent passed credit notes in favour of the Appellant. The evidence for the Appellant was that the Respondent was required to give credit notes for the sum of $9,638.54 but had not done so. The Respondent's evidence in reply to this allegation was that "the figure for credit note has been credited". Clearly a credit note is for a calculable sum. If it can be properly established it would be a debt due by the Respondent to the Appellant, or put another way would diminish the amount due to the Respondent for the price of the goods supplied. During the oral argument the Respondent's counsel conceded, in answer to a question from the court, that a credit note would be a set-off. This concession was properly made.

[31] In our view the judge was in error in not finding that the Appellant's claim for credit notes was a defence to the Respondent's claim for which the Appellant was entitled to unconditional leave to defend at least up to the amount claimed.

(c) Breach of warranty for defective goods

[32] Under this heading we first refer to the agreement. Clause 16 provided that the Respondent "has to ensure that the (Appellant) is supplied with best quality of produce always". It further provided that the Appellant's stores had the "full right to reject product if quality is not accepted".

[33] The Appellant's affidavit in opposition contained the following evidence.

> Furthermore, the Plaintiff has breached clause 16 of the contract when it delivered substandard supplies that had to be returned. In fact, some of the goods had to be returned because they were either of poor quality, damaged and/or not fit for display amongst other things.

The deponent, the general manager of the Appellant, then went on to exhibit a summary of the goods (55 pages in all) which had to be returned totalling $458,623.15 cost price and $559,520.24 retail price. The evidence was that the latter figure would have been recovered by the Appellant had the goods not been returned to the Respondent. As well the deponent exhibited some written memoranda which had been sent to the Respondent concerning the supply of inferior quality goods. The Respondent's reply to this evidence was to the effect that all the returned goods had been the subject of credit notes. These credit notes were not however either produced in evidence or made the subject of a summary.

[34] The judge noted the Appellant's counterclaim of $559,520.24 under this head and described this claim along with the claims for non-delivery and late delivery as claims not closely connected to the Respondent's claim. With respect to the judge this was not a correct conclusion on the evidence. The cross-claim for the delivery of inferior quality goods was closely connected to the Respondent's claim for price. It arose directly out of the contract, and, further, was an allegation of a breach of a specific warranty in the contract (cl 16) which was a term as to the quality of the produce to be delivered.

[35] In our view s 53 of the Sale of Goods Act was in point. It was not referred to by the judge, but in fairness to him it was not raised by either counsel in the High Court. It was mentioned for the first time in this court when the point was referred to counsel during the oral argument. They both accepted that it was in point.

[36] The common law rule enunciated in (*Mondel*) by Parke B and now codified in s 53 of the Sale of Goods Act allows the buyer of goods, as a defence, to set-up against the seller a breach of warranty in diminution or extinction of the

price. See discussion on the corresponding English provision, s 53 of the English Sale of Goods Act, in Benjamin on *Sale* 6th ed at [17-046] and [17-048] and Meagher Gummow and Lehane's *Equity Doctrines and Remedies* 4th ed, at [37-015]. The plea is only available as between a buyer and a seller. See also *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1974] AC 689 at 717; [1973] 3 All ER 195 at 215 per Lord Diplock.

[37] In this case the Appellant, having properly raised the allegation of breach of warranty and fully particularised this cross-claim ought to have been given unconditional leave to defend the Respondent's claim for price under this head.

(d) Claims for non-delivery and late delivery and loss of business

[38] The Appellant raised a claim for non-delivery of goods ordered but not supplied to one of its outlets Superfresh at Tamavua for the period 30 April 2003–20 October 2005. It calculated its loss at $378,772.00 cost price and $462,101.84 retail price. It itemised this claim with a detailed supporting schedule consisting of 16 pages. The general manager of the Appellant deposed that some of its other stores throughout Fiji had also experienced the same problem but that due to a lack of resources and personnel it was not possible to keep similar records for those outlets.

[39] The Respondent's reply was to the effect that the Appellant had sourced stock elsewhere contrary to the exclusive supply agreement and that because of this the Respondent was unable to "sustain the level of stock sometimes required".

[40] The Appellant also raised other claims against the Respondent. It alleged that on many occasions there had been late deliveries which resulted in customers of the Appellant having to go elsewhere to obtain their produce. The Appellant alleged that it had thereby suffered a loss of business.

[41] Additionally the Appellant alleged that the Respondent had supplied goods at prices which were not "reasonable" in breach of clause 8 of the agreement. Comparative schedules were exhibited.

[42] We are unable to accept the judge's finding that these claims, like the claim for the delivery of inferior quality goods, were not closely connected to the Respondent's claim for price. Each of them arose out of the exclusive supply contract. In our view they support a counterclaim which should be tried at the same time as the Respondent's claim for price.

Result

[43] For the reasons given we conclude that the judge erred in ordering the summary judgment subject to a stay of execution for the sum of $65,000.00 pending the trial of the Appellant's counterclaim. The Appellant did establish that it has a bona fide defence and with respect to the Respondent's claim, there are issues or questions in dispute which ought to be tried. Summary judgment ought to have been refused. The Appellant ought to have been given unconditional leave to defend the Appellant's claim and both the claim and the counterclaim ought to have been allowed to proceed to trial.

Accordingly we order:

(1) The appeal is allowed.
(2) The judgment of Jitoko J of 3 March 2006 is set aside.
(3) In lieu thereof the Appellant is granted unconditional leave to defend the Respondent's claim and pursue the counterclaim.

(4) The Respondent is ordered to pay $1000 costs (including disbursements) to the Appellant.

Appeal allowed.