187.

87/71

IN THE ROYAL COURT OF JERSEY

(Samedi Division)

3rd November, 1987.

Before P.R. Le Cras Esq., Commissioner
(sitting as a single Judge)

Between	THOMAS JOSEPH BURKE	Plaintiff
and	SOGEX INTERNATIONAL LTD.	Defendant

Advocate A.P. Begg for the Plaintiff
Advocate R.J. Michel for the Defendant

This is an interlocutory application arising from a summons by the Plaintiff under Rule 6/13 of the Royal Court Rules to strike out the Defendants answer and counterclaim, or, in the alternative, to give directions for a hearing on a preliminary point of law as to whether the Defendant is entitled as a matter of law to raise a defence and counterclaim in an action brought on bills of exchange.

There is a further summons in being issued by the Plaintiff requesting that the Defendant be ordered to provide further and better particulars, but this has, by agreement, been stood over to await the outcome of the first summons.

The allegations on which each party rely may be briefly state having been set out not only in the pleadings but also in Affidavits relating to previous proceedings in the Royal Court betwee the parties.

The Plaintiff claims that he was employed by the Defendant

in varicus capacities for nearly seven years between 23rd October 1978 and 15th September 1985; and that there remained owing to him by the Defendant, in respect of the terminatien of his employment $ U.S. 169,548. He further claims that by an agreement dated May 1985 the Defendant employed a ccmpany, established under the laws cf Panama, cf which the Plaintiff is the beneficial owner and cf whcm he is the principal employee. This Company which was emplcyed in arbitratien proceedings between Scgex and a ccmpany knowx as AEG had a claim of $ 36553 against the Defendant in January 1986 These twc claims, amounting to $ 206102 were settled between the Plaintiff and a Mr. Hamzah in or about May 1986 when the latter, on behalf of the Defendant, gave him four cheques each for $US 50,0 payable as to the first cn the 15th June 1986 and thereafter at twc mcnthly intervals. The first cheque was met, but the subsequent ones were not.

After scme ccrrespondence, the Plaintiff whc had not transferred the cheques to a 3rd party fcr value, but had retained them himself attempted tc cause the Defendant tc be declæed "en desastre The Royal Court refused the applicatien. During the ccurse of the hearing the Defendant deposited $ US 150,000 with the Court, where it remains.

After these proceedings, the Plaintiff issued an Order of Justice claiming on the three cheques which had not been hcnoured.

The reasons for which it is claimed they were not honoured are set cut by Mr. Hamzah in an affidavit which he swore in the desastre proceedings in which, inter alia, he claimed that the Plaintiff had been reported, in late 1985 as cclluding with AEG. On the threat however by the Plaintiff that he would not sign a necessary statement in the arbitratien proceedings, Mr. Hamzah, nctwithstanding his misgivings (which were denied) issued the four cheques.

Shortly afterwards a letter dated 3rd February 1986 came to Mr. Hamzah's hands. This letter was written, it is claimed, by the Plaintiff to the President of Korea Heavy Industries, and a copy sent to the President of an American subsidiary of the Defendant.

Mr. Hamzah contended that it demonstrated a sinister design and that he had to terminate the employment of the President of the subsidiary. It is put in the proposed answer and counterclaim in this way, that the letter shows: that the Plaintiff was attempting to enrich himself by taking advantage of knowledge gained as an employee of the Defendant; that the Plaintiff had been attempting to cause the Defendant great financial loss; and that the letter proved an improper and fraudulent agreement between the Plaintiff and the President of the Defendants wholly owned American subsidiary.

Counsel for the Plaintiff admitted that the letter was indiscreet (-), whilst Counsel for the Defendant claimed that it was a good deal more than that, contending that the Plaintiff was acting in total breach of his duties both as an employee in his own name and as the nominated named consultant, albeit employed by another firm.

Counsel for the Plaintiff equated his case to one brought in the High Court under O.14/3 - 4/14 of the Rules of the Supreme Court claiming that as the action was one brought on a dishonoured cheque the usual rule as to striking out (as under RSC 018/19) ought not to apply, but rather that that which was contained under O.14 was applicable.

His case was simple. His client relied on the cheques and not the underlying agreements (-): and the only way in which the Defendant ought to be permitted to enter a defence

against a demand for payment of the bills is by reason of a total failure of consideration, or, possibly if there is some special case. Any onus falls, he says, on the Defendant. Furthermore, the Defendant is seeking a claim for unliquidated damages which cannot afford a defence or a counterclaim to an action on bills of exchange. As to whether the point of law should be taken, the contention was that it should be taken if it would be decisive of the ~~pleadings~~ Litigation. The general rule, which was "pay first and claim later" should apply. He did, however, concede that the Court had a discretion as to whether it would authorise a stay.

So far as the letter of the 3rd February 1986 is concerned, Counsel for the Plaintiff claimed that there was no confidential information in the letter and that all the allegations were a matter of record; there was nothing to shew that the ~~Defendant~~ Plaintiff was using inside information and in any event he was no longer employed by Sogex (except through a company for the arbitration with AEG) and there was no specific clause in his agreement with the Defendant which dictated a duty of confidentiality. The Plaintiff, he said, wants his money, wants it now and wants to take it away; he is in a senior position in the construction field and the Defendant can pursue him if it wishes. The agreement was a separate agreement and there is no allegation of abuse of fiduciary duty or of confidentiality. Bills of exchange should be honoured when issued and he asked for judgement without a stay of execution.

The Defendant's answer was divided into two parts: the first being procedural.

This submission was to the effect that Rule 6/13 of the Royal Court rules was clearly modelled on O 18/19 of the Rules

of the Supreme Court; that unlike the English Rule, which specifically permits judgement to be entered, the words "and may make such consequential order as the Justice of the case may require" do not, in the absence of any rule equivalent to O.14, give the Court power to enter judgement, so that all the Court can do (if it so thinks fit) is to strike out the pleading. Not only does the Court have no power to order summary judgement, so that the remedy of the Plaintiff would be to seek an order under rule 6/7 (i) (when the Defendant, if so minded, might again call for the case to be put on the pending list) but, by analogy, the Court ought to permit a defence to be entered if it would have qualified under O 18/19, in respect of which numerous examples are given under O 18/19/3.

I should say at once that I see no merit in these submissions. The Royal Court Rules, not unnaturally, are nowhere near as extensive as the Rules of the Supreme Court in England. Although, clearly, where the wording is similar, regard may be had to the English rules, it is my view that the Court is not bound to follow them. The mere absence of a rule equivalent to order 14 is not enough to exclude the Royal Court from continuing to do what it has done for a long time, that is to give summary judgement where it is satisfied that there is no defence In my view Rule 6/13 is drawn sufficiently widely for the Court to make whatever order it thinks the Justice of the case to require. I see no reason for such a ponderous and unnecessary sequence of steps as is suggested by the Defendant should the Court make an order to strike out the answer and counterclaim, not least in a case where, as here, there is admitted to be no

other defence. Second, I am of the opinion that the submission that all that the Defendant need shew is a defence which falls within the ambit of O 18/19 is also misconceived. Where a bill of exchange is concerned special rules apply.

Although in Chestertons v, Leisure Enterprises (JJ) unreported 20th December 1984, this particular point was not raised, it is clear that the Court took the view that it could have proper regard to O.14, and that with regard to bills of exchange a wholly different practice prevails over that which may be described as "the usual practice". Having heard Mr. Michel's submission, I am satisfied that the Court was correct in the Chesterton's case and I propose to follow the same procedure. As I say, I therefore rule against Mr. Michel's preliminary submission .

The point therefore is what special rules apply.

Mr. Michel's submission for the Defendants on the facts which the Defendant alleged was succinct. First, he pointed out that the vast majority of the monies claimed were owed to the Plaintiff under his contract of employment and that there had been no breakdown in the settlement of $ 200,000 of the respective amounts. As to the letter, he claimed that the Plaintiff was acting in total breach of his duties when he signed it, and that had the Defendant known about it when the cheques were issued, it would never have issued the cheques at all, so that there was a total failure of consideration. In addition, when dealing with an adversary who gives an address in the United States of America and is employed more recently by a Panamanian Company, the Defendant foresees some difficulty in pursuing any

claim: in the circumstances failing to fund the last three cheques was the only practical way of bringing the Plaintiff to a Court where the Defendant might hope to recover damages. As to the Plaintiffs fear that the Defendant might be declared "en desastre", Counsel pointed out that it had deposited $ 150,000 with the Court.

I have not of course heard evidence and make no findings of fact. I should say at once though that the letter of the 3rd February 1986 causes me some disquiet. It appears possibl indeed probable, that in ordinary circumstances the Defendant is quite entitled to request the Court to hear the parties and to decide on the allegations in the defence and counterclaim. The question before the Court though is whether they are so entitled in this case, or whether they must pay now and seek to pursue the Plaintiff elsewhere.

There is, once again, a curious absence of authority and Counsel was only able to cite one recent case, that of Chesterton (supra) which dealt with a similar application. As the Court then found, the present practice of the law in Jersey dates from the law of 1813 "concernant le paiement de lettres de change &ca" Article 1 of which permitted those persons having the right to demand payment to proceed summarily and thus to avoid the delays which would otherwise ensue in the recovery of debts.

C.S. Le Gros, in his Droit Coutumier de Jersey, remarks @ p. 317

> "Enfin, pour terminer, il convient de remarquer que nous suivons en général les dispositions de l'Acte de Parlement"The Bills of Exchange Act 1882" en tant qu'elles ne sont point contraires au droit statuaire et à la jurisprudence de cette Île".

Counsel were able to cite only a few cases. The first, in point of time was Rencuf c. Willcccks Ex 1855 Juillet 14. As the case shews the practice of the time, it is perhaps worth mentioning the facts as claimed by the parties. The Defendant was sued to meet two notes of hand amounting in total to £67.10.6d consented in favour of Mr. John May and endorsed by him. The Defendant in reply first presented a "traité" in the sum of £75 drawn by the Defendant on Mr. John May, which having fallen out of date was accompanied by a note (or "soussigné") signed by Mr. Willcocks by which the latter undertook to guarantee the Defendant against all responsibility. The Defendant, not unnaturally perhaps, as Mr. Willcocks had effected a "remise de bien", requested a set off against the notes and asked that Mr. Willcocks be liable to him for the balance. The Court had no difficulty in dealing with this defence, finding as follows:-

> "Considérant que le Defendeur ne nie pas d'avoir consenti lesdits deux billets à ordre.
>
> Que le paiement de tout billet à ordre peut être recouvré sommairement.
>
> Que l'on ne peut opposer ou mettre en compensation avec un billet à ordre ni un compte ni un autre billet de la même nature ni aucune autre demande.
>
> Que le soussigné dudit Sieur Willcocks dont le défendeur réclame le bénéfice n'a aucun rapport aux deux billets qui forment l'objet de la demande.
>
> La Cour a écarté la prétention du Defendeur."

The Defendant then turned to his second line of defence, which was first that he had received no consideration for the note of £27.10.6d and, second, that Mr. Wilcocks had paid no consideration for the two notes which had been passed to

him with a view to defrauding the Defendant and to hinder him so that he could not oppose to the notes the claims which he had against Mr. May.

The Court had equally little difficulty in dealing with this defence either, finding:-

> "Attendu qu'aucun commencement de preuve n'a été fourni à la Cour de nature à lui faire douter que le défendeur ait reçu aucune considération pour ledit billet de vingt-sept livres, dix chelins, six pennys ou que ledit Sieur Wilcocks ait payé aucune considération pour les deux billets dont le paiement est réclamé dans l'action.
>
> Attendu que l'allégation du défendeur qu'il n'a reçu aucune considération pour le billet precité et le soussigné dudit Sieur Wilcocks qu'il a produit et qui n'a aucun rapport avec les deux billets qui forment l'objet de la demande, ne suffisent pas pour autoriser la Cour à s'écarter de la règle générale quant au recouvrement des billets à ordre en admettant la preuve;
>
> Attendu d'ailleurs que la Cour a déjà jugé qu'elle ne peut admettre aucune autre demande en compensation avec un billet à ordre.
>
> La Cour a écarté la pretention du defendeur."

The practice then is quite clear, but there are points which distinguish that case from the present one. These are first, that the notes had been endorsed, and, second, that the claim "en compensation" arose separately. It does however shew very clearly what was the general rule, and that the Court was prepared, without hesitation, to strike out a defence of this nature.

That apart, three other cases, all old, were cited by Counsel, who went no further than the note in the table.

The first, Harben v. Baudains (1887) 211 Ex 506 contains, it would seem, an allegation of fraud, upon which the endorsee was summoned. In the second, Le Rossignol v. Le Gresley (1887) 212 Ex 138, the Defendant denied having consented the note and was, not unnaturally, permitted to enter his defence and have it sent to proof. In the third Niccile v. Le Feuvre, Gicquel intervenant (1891) 214 Ex 492, there was a claim that there was a "manque de considération" and the table merely notes "aucun commencement de preuve n'étant fourni, Defendeur condamné."

From this, as well as from Rencuf v. Willcocks Counsel for the Defendant sought to argue that where there is a failure of consideration a defence may be entered with a view to it being argued.

In the Chestertons' case (supra) the Court had no hesitation in looking at the law in England for guidance. As Counsel for the Plaintiff relied greatly on it, as a good many cases were cited, and because of the paucity of authority which exists in the records of the Royal Court, it may be helpful if I refer to them, and so I propose to do so, notwithstanding Advocate Michel's submission that the Court should not be overly persuaded by English law.

The series cited to the Court began with the old case of Warwick v. Nairn (1855) CLVI ER 648, where Defendants who had issued a bill of exchange in respect of the price of certain goods attempted to set up a defence that the goods, save in part, were not of the quality specified. The defence was struck out, Pollock, C.B. remarking "the payment by a

bill of exchange is to be treated as so much cash; the Defendant ought to satisfy the bill and prceed upon the remedy for the breach of warranty".

The Second, in date order, was Harris v. Vallarman (1940) 1 AER 185 when the Court of Appeal overruled an order of Hallet J. and permitted a defence to be entered by way of set off where it was claimed that machinery which had been bought was defective in breach of a condition of sale so that the consideration had wholly failed. In the Judgement of the Court, Slesser L.J. @ p.187 stated that he thought that "in the present state of the law, since the Supreme Court of Judicature (Consolidation) Act. 1925, it is at any rate arguable that the Defendants may claim as a reduction of the liability under the bills the loss and damage by way of set off, as mentioned in the defence". It is interesting to note that Warwick v. Nairn was considered by the Court.

In Lamont v. Hyland (1950) 1 AER 929, the Defendants, who claimed that the bill was given in pursuance of a contract which the Plaintiffs had broken in respect of which the Defendants were entitled to unliquidated damages in excess of the bill, and that they were entitled to set off against the Plaintiffs' claim a sufficient amount of the damages to extinguish it, were not so fortunate. The master, gave leave to sign Judgement against a stay of execution pending trial of the counter claim. From this, both parties appealed to the Judge, when the Defendants' appeal was dismissed and the Plaintiffs' appeal against the stay was allowed. The

Defendants' appealed again, when after reviewing certain of the authorities (including Warwick v. Nairn but not Harris v. Vallarman) the judgement of the Court of appeal ended with the following passage at p.932:-

> "Lastly, among the bill of exchange cases is that of Anglo-Italian Bank v. Wells (8). The Plaintiffs, by specially endorsed writ, sued the defendants on certain promissory notes and took out a summons under Ord.14. The defendants resisted on the ground that they had a good defence and a good counterclaim. THESIGER L.J. said (38 L.T. 201):
>
> > "If the appellants had disclosed by their affidavits facts sufficient to establish a good ground of counterclaim, I think the counterclaim would have been sufficiently connected with the cause of action in the present case to justify its being set up as a defence even to a liquidated claim on a bill of exchange,"
>
> In the result, however, leave to defend on the bills was refused. And SIR GEORGE JESSEL, M.R. anticipating the possibility envisaged by THESIGER,L.J. strikes rather a different note. He said (ibid., 199):
>
> > "... I must say, speaking for myself, that I should hesitate long before I allowed a defendant in an action on a bill of exchange to set up a case for damages by reason of the breach by the plaintiff of some other contract or the commission of some tort."
>
> Pausing there, it would seem that the learned Master of the Rolls means by "some other contract" some contract other than that constituted by the bill of exchange itself. He goes on:
>
> > "I do not say that there cannot be a case where the two transactions may not be so connected, but at present I cannot even imagine the existence of such a special case,"
>
> Having regard to the tenor of the authorities summarised above in cases where the action is on a bill of exchange, it is impossible to say that in giving liberty to sign immediate judgment without a stay the learned judge in chambers was guilty of an improper exercise of the discretion vested in him. In our view, the appeal fails."

The case is not precisely in point here being rather one which deals with the exercise of the Judge's discretion; and it is clear that the Court of Appeal did recognise that the Judge had a discretion which, if it did not extend so far as was suggestedby Thesiger L.J., at least extended to granting a stay of execution pending trial.

The next case was Brown Shipley & Co. v. Alicia Hosiery Ltd.(1966) 1 Lloyds Rep. 668. This again was an appeal to the Court of Appeal from a refusal by the Judge to order a stay of execution. Lord Denning M.R., having stated @ p.669 that the counterclaim is in relation to a different contract altogether from that which initiated the bills of exchange, went on to say "I do not say that there may not be some cases in which the Court may in its discretion grant a stay of execution. I think it is possible ...."; and in the next paragraph states:-

> "The Judge having exercised his discretion in this case, I do not think this Court should interfere with his discretion. I think his judgement follows out the ordinary practice in these Courts for many years and I would not interfere with it."

Lord Justice Winn agreed implicitly with this judgement but Lord Justice Harman sounded a more cautionary note, and having commenced by stating that he felt constrained against his inclination to agree ended a very short speech with the words:- "The learned Judge in Chambers exercised his discretion and I do not think we are in a position to say that he exercised it on such wrong principles as would entitle us to interfere. Therefore, I feel constrained to agree."

It is clear though that there were two essential factors which have to be taken into account in assessing the weight of this Judgment in the present instance. First, the counterclaim was in respect of a different contract to that which initiated the bill of exchange; and, second, the appeal was essentially concerned, as in Lamont with the exercise of the discretion of the Judge in Chambers.

Barclays Bank Ltd. v. Aschaffenberger Zellstoffwerke A.G. (1967) 1 Lloyds Reports 387 turned on its own rather special facts. It was there stated by Lord Denning, M.R., @ p.388 that "The holder (of a Bill of Exchange) is entitled in the ordinary way to Judgement ... But that is 'in the ordinary way'. There may be exceptions to the rule...". Not only Lord Denning, but Harman, L.J. and Salmon, L.J. overruled the discretion exercised by Waller J., and permitted a stay in part, Salmon, L.J., stating (@ p.391) that although "in the ordinary course where a buyer who has given bills has some cross claim against the seller for breach of contract, the holder of the bills, even when he is the seller, normally is given judgement for the whole amount of the bills and the cross claim is left to be litigated separately. That may be the normal rule but it is not the invariable rule."

In Fielding & Platt Ltd. v. Selim Najjar (1969) 1 WLR 357, Lord Denning, M.R., again stated that a bill of exchange is to be treated as cash and is to be honoured unless there is some good reason to the contrary. In this case, on the second note which was issued, there was an available defence,

work having been suspended when the English company had been advised by Mr. Najjar that he could not pay.

In Banco di Roma Spa v. Orru (1973) 2 Lloyds Reports 505, the defendant dishonoured the bills because the goods delivered had to be destroyed and was sued by the Plaintiffs as holders in due course of the bills. Thesiger J. gave unconditional leave in part, and judgement in part. The defendant appealed. The Court of Appeal upheld the Judges decision, Cairnis L.J. remarking at p.507, that it "is not a question of owing money for goods; it is a question of owing money upon bills of exchange which he admittedly accepted."

I pause here to remark that here, we are not, of course, dealing with defective goods; and that this, once again was an appeal from the exercise of a discretion by the Judge.

The next case was that of Cebora SNC v. S.I.P. (Industrial Products) Ltd. (1976) 1 Lloyds Reports 271. The Plaintiffs claimed that the agreement had been breached, but it is clear from the Judgement of Buckley L.J. (@ p.274) that May J had stated that the Court had a discretion to grant a stay, but that in the circumstances of this particular case he must give effect to the ordinary rule and that he should not grant a stay. The appeal was in consequence as to whether the special circumstances, as alleged by the Appellant were sufficient to overturn the exercise of his discretion by the Judge at first instance. As Stephenson, L.J., stated @ p.278 the Court of Appeal was concerned to see whether the Judge

was plainly wrong. Although Counsel for the Plaintiff company conceded (see p. 275) that there may be exceptions to the ordinary rule, by implication "the discretion is available whenever there is any counterclaim by the Defendant, whether that counterclaim arises directly out of the contract in respect of which the bills were given or not": he added that he had found no case where a stay had been granted where the counterclaim has arisen otherwise than under the contract directly relating to the bills sued on. Although Buckley, L.J., used the term the "ordinary rule", Advocate Begg for the Plaintiff pointed out that in his judgement (@ p.278) Sir Eric Sachs stated that :-

> "For some generations one of these certainties has been that the bona fide holder for value of a bill of exchange is entitled, save in truly exceptional circumstances, on its maturity to have it treated as cash....."

After this series of appeals to the Court of Appeal, all of which were appeals against the exercise of his discretion by the Judge at first instance, the question came before the House of Lords in Nova (Jersey) Knit Ltd. v. Kammgarn Spinnerei GMBH (1977) 2 AER 463. In this case the Appellant Plaintiff appealed from an order of the Court of Appeal, granting a stay in an action for recovery of bills of exchange pending arbitration proceedings. In this case, the Court of Appeal, in making the order overruled the Order of the Judge at first instance. Lord Wilberforce set out his view, notably in the two following passages:-

@ p.469:-

> "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 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; Agra and Masterman's Bank v. Leighton; James Lamont & Co.Ltd v. Hyland Ltd. Brown, Shipley & Co.Ltd v. Alicia Hosiery Ltd). 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 appellants' claim that, as regards the bills there is no dispute."

and again @ p. 470:-

> "My Lords, I must emphasise, since it seems to be suggested that all the merits require the whole dispute to go to arbitration in Germany, that it is not mere technicality that supports the appellants' claim. When one person buys goods from another, it is often, one would think generally, important for the seller to be sure of his price: he may (as indeed the appellants here have) bought the goods from someone else whom he has to pay. He may demand payment in cash; but if the buyer cannot provide this at once, he may agree to take bills of exchange payable at future dates. These are taken as equivalent to deferred instalments of cash. Unless they are to be treated as unconditionally payable instruments (as the Bills of Exchange Act 1882, s 3, says, "an unconditional order in writing), which the seller can negotiate for cash, the seller might just as well give credit. And it is for this reason that English law (and German law appears to be no different) does not allow cross-claims, or defences, except such limited defences as those based on fraud, invalidity, or failure of consideration, to be made. I fear that the Court of Appeals' 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 straightforward 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 the appeal.

Their Lordships, with the exception of Lord Salmon agreed with him. In his dissenting Judgement, Lord Salmon stated (@ p.474):-

> My Lords, it has been argued on behalf of the appellants that (a) there is no dispute in relation to the bills because the respondents have no defence arising from or occasioned by the claim made in respect of them and (b) that even if there is a dispute, it did not arise from nor was it occasioned by the partnership relationship.
>
> I agree that there is no defence to the bills, since the only possible defence (which is not relied on by the respondents) could be that their acceptance had been procured by fraud, duress or for a consideration which had failed and because the damages claimed in the arbitration are unliquidated damages and such damages cannot be set off against a claim on the bills of exchange (James Lamont & Co.Ltd v. Hyland Ltd).
>
> The courts however certainly have a discretion to stay the execution of a judgment (see RSC Ord 14,4 3 (2)). This discretion is rarely exercised in the case of a claim on a bill of exchange save in exceptional cases. The appellants dispute that there is any power to stay execution of a judgment on a bill of exchange although they took no steps to apply for summary judgment which they could have done at any time from the service of the writ on early 1975 until the judgment of the Court of Appeal given on 8th April 1976.
>
> Although, in my view, there is no defence to the bills, there is in my view a very real dispute in relation to them. The appellants were saying that they should obtain payment of the bills at once. The respondents' contention was that it would be a great injustice if they were forced

> to pay up when they had a strong prima facie case that the appellants, by the grossest breach of good faith, have cheated them out of a considerably larger sum than the total amount of the bills; moreover this issue is about to be decided by the final award of the arbitration tribunal in Germany which has already made its interim award.
>
> The respondents were saying in effect that if the circumstances of this case were not exceptional, it is difficult to imagine any that could be and that accordingly if the appellants obtained judgment in this country, that judgment would be stayed (possibly on terms as to payment into court) until after their cross-claim against the appellants had been decided; and that it is inconceivable that our courts would allow the judgment to be executed against foreign respondents who it might well turn out had been cheated out of vast sums of money by their partners, the English appellants. The appellants dispute this.
>
> It seems clear to me that whichever party is right or wrong, this is a dispute within the meaning of that word in the arbitration agreement subject to it arising out of or being occasioned by the partnership relationship between the respondents and the appellants.
>
> I would add that I naturally recognise that bills are generally regarded as the equivalent of money and the courts do not, save in special circumstances, stay a judgment on a bill even if the direct parties to it are the sole parties to the action; and certainly there could be no question of a stay if the bills had been discounted and the holders in due course were the plaintiff in the action. In the special circumstances alleged in this case, however, I hardly think that if this action was allowed to proceed, there would be any alarm or surprise in the city of London if the judgment which the appellants might obtain on the bills were stayed pending the trial of the counterclaim which would have to be delivered were the order of the master and the trial judge to be restored.

He added subsequently (@ p.475) that he found it "impossible to hold that the dispute arose out of and was occasioned by anything other than the partnership relationship between the respondents and the appellants."

He made the further statement @ p. 476 "a case which in

essence turns on whether a judgment should be stayed pending the trial of a crossclaim turns on discretion and rarely gets beyond a Judge in Chambers and, if it does, is quite properly seldom if ever reported."

Counsel cited several further cases. That of Jade International Steel Stahl und Eisen GMBH & Co. KG v. Robert Nicholas (Steels) Ltd. (1978) 3 AER 104 deals with problems relating to a holder in due course and I find it of no particular assistance in this case. The next case was Thoni GMBH & Co. KG v. R.T.P. Equipment Ltd. (1979) 2 Lloyds Reports 282 where the decision of Mocatta J., that summary judgment for the whole amount of the bill would be granted, was overturned in the Court of Appeal because there had been a partial failure of consideration, and that there was thus an arguable defence as to part of the claim. The Court refused to grant a stay for part of the claim, but in respect of that part of the claim in respect of which leave to defend was given it was so given on condition that the equivalent of liquidated sum in respect of which the order was made was brought into Court.

Last of all in Montebianco Industrie Tessili S.P.A. v. Carlyle Mills (London) Ltd. (1981) 1 Lloyds Reports 509, Stephenson L.J., in a case which he described as being a partial failure of consideration, so that the Court had a discretion referred, with approval, @ 511 to some words of Bridge L.J. in Montecchi v. Shimco Ltd. (1980) 1 Lloyds Report 50, (1979) 1 WLR 1180 @ pp 51 & 1183:-

> "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."

He went on to say that in view of the Cebora & Nova Knit cases, that he was led "to conclude, not without some reluctance in the circumstances of this case, that this is a case in which in our discretion the rule should be applied and the exception not applied."

Consideration of this line of cases, taken in conjunction with the few authorities which exist in Jersey leads me to the view that the opinion expressed by the late Mr. C.S. Le Gros was correct, namely that unless contrary to the jurisprudence or statutory law of the Island, the Courts here do in general follow the provisions of the Bills of Exchange Act 1882, notwithstanding the limited nature of the law of 1813. In consequence, although not binding, very considerable regard must be paid to the decisions of the Superior Courts in England, not least because it is desirable, insofar as is possible, to continue the concordance which exists with regard to commercial practice. In saying this, of course, I am aware that there are, of necessity, distinctions as "consideration" does not so far as I am aware form part of the law of Jersey. Whilst on this point, I should add that the cases of Renouf v. Willcocks and Herbert v. Baudains fall within these parameters and add force to this conclusion.

In the ordinary way therefore and unless there is good reason to the contrary, or put another way, unless there are exceptional circumstances, bills of exchange are to be treated as cash.

The Court however has a discretion to decide whether these circumstances or reasons exist, and if it finds that they do it may either grant judgement with a stay of execution in order to permit the defence and/or counterclaim to be entered or, as in Thoni against a payment into Court; or as in Chesterton without, it would appear, any conditions

The question therefore is whether, on the present allegations, as disclosed in the affidavits, and the pleadings, I should permit the defence and counterclaim to be entered. On the arguments which I have heard, I have no doubt but that I should, and this whether I follow the test used by the Learned Deputy Bailiff, as he then was in Chesterton's or the narrower rule now pronounced by the House of Lords.

In the Chesterton's case, it would seem that the Court looked at O.14, took note of serious matters alleged in the proposed answer, including an allegation of fraud, and having found that a reasonable ground of defence was disclosed, found that the Justice of the case required that the Defence should be allowed to stand. If that is the test, then clearly I would be able to exercise my discretion in favour of the Defendant in the instant case.

However even if I adopt the stricter test disclosed by the line of English authorities, it is my view that this

is a case where I would be able to exercise a discretion. The Defendant has argued that this is not a sale of goods which are alleged to be defective, as are so many cases, or a case of a possible referral to arbitration as in Nova Knit but a continuing and evolving relationship between the parties where it is impossible to apportion the payments between salary and fees and where the cheques would never have been issued had the Defendants known of the letter to Korean Heavy Industries. The points raised include not only an allegation of failure of consideration but also that the letter is evidence of an improper and fraudulent agreement. So far as the first point is concerned, the English authorities do not andcannot take into account the law of Jersey. It is my view that it would be wrong to attempt to deal with this point without hearing evidence. So far as the second point is concerned, this clearly falls within every exception I have no hesitation in saying that the defence should enter and evidence should be heard.

Whichever test is used therefore, I have, as I say, no hesitation in finding, first, that I have a discretion to permit the defence and counterclaim to enter and, second, that I exercise this discretion in favour of the Defendant.

In my view, this finding also disposes of the second part of the Plaintiff's summons, that is that part which requests a preliminary hearing on a point of law as to whether as a matter of law the Defendant is entitled to raise a defence and counterclaim to an action brought by the Plaintiff on bills of exchange.

The only question which remains is the order which I should make.

The Defendant has already brought in $ 150,000 and, in the circumstances, I do not propose to grant judgment with a stay of execution. I order that the summons of the Plaintiff be struck out, so that the Defendant may enter its answer and counterclaim, on the condition that the $ 150,000 which has been paid into Court remain in Court pending further order of the Court.

Texts cited in the Judgment.

Le Gros: "Droit Coutumier de Jersey" p.317

Laws and Regulations cited in the Judgment.

R.S.C. 014/3 - 4/14

018/19

Royal Court Rules, 1982: 6/13

6/7(1).

Other cases cited.

Everett -v- Ribbands: (1952) 2QB 198.

Carl Zeiss Stiftung -v- Herbert Smith and Company: (1969) 1 Ch. 93.

Waters -v- Sunday Pictorial Newspapers: (1961) 1WLR 967.

Robinson -v- Fenner: (1913) 3K.B. 835

Glasscock -v- Balls: (1966) 1 Lloyds Reports 668.

Churchill -v- Goddard: (1937) 1 K.B. 92.

Elliott -v- Crutchley: (1906) A.C.7.

Anon: (1867) 92 E.R. 950.

McKay -v- Essex Area Health Authority: (1982) 2 A.E.R.771.

Other Texts Cited.

Halsbury's Laws of England (4th Edn) Vol.4, paras 409 -504

paras 379 - 387

Vol 16, paras 545 - 548

Byles on Bills of Exchange (23 Edn) 1972 pp. 206 - 213; pp. 317 - 325

Other Laws & Regulations cited.

R.S.C. O. 33 r.3.

Cases cited in the Judgment.

Chesterton's -v- Leisure Enterprises: 20th December, 1984, unreported Jersey Judgment.

Renouf -v- Willcocks: Ex. 1855. Juillet 14.

Harben -v- Baudains: (1887) 211 Ex 506.

Le Rossignol -v- Le Gresley: (1887) 212 Ex 138.

Nicolle -v- Le Feuvre, Gicquel intervenant: (1891) Ex 492.

Warwick -v- Nairn: (1855) CLV ER. 648.

Harris -v- Vallarman: (1940) 1 AER 185.

Lamont -v- Hyland: (1950) 1 AER 929.

Brown Shipley & Company -v- Alicia Hosiery, Ltd: (1966) 1 Lloyds Reports, 668.

Barclays Bank -v- Aschaffenberger Zellstoffwerke A.G: (1967) 1 Lloyds Reports, 387.

Fielding and Platt, Ltd -v- Selim Najjar: (1969) 1WLR, 357.

Bancodi Roma S.p.A. -v- Orru: (1973) 2 Lloyds Reports, 505.

Cebora S.N.C. -v- S.I.P. (Industrial Products), Ltd: (1976) 1 Lloyds Reports, 271

Nova (Jersey) Knit, Ltd -v- Kammgarn Spinnerei GMBH: (1977) 2AER 463.

Jade International Steel, Stahlund Eisen GMBH & Co. K.G. -v-
Robert Nicholas (Steels) Ltd: (1978) 3 AER, 104.

Thoni GmBH & Co. K.G. -v- R.T.P. Equipment Ltd: (1979) 2 Lloyds Reports, 282.

Montebianco Industrie Tessili, S.p.A -v- Carlyle Mills (London) Ltd: (1981) 1 Lloyds Reports, 509.

Montecchi -v- Shimco, Ltd: (1980) 1 Lloyds Reports, 50

(1979) 1 WLR. 1180