Federal Court of Appeal

Citation: Atlantic Lines & Navigation Co. Inc. v. Didymi (The)
Date: 1987-05-20

Mahoney, Stone and Lacombe JJ.

Counsel:
*S. Harry Lipetz*and *John W. Bromley*, for appellant.
J.W. Perrett, for respondents.

The judgment of the court was delivered by

[1] STONE J.:—This appeal is from a decision of Collier J. in the Trial Division rejecting an application of November, 1985, brought pursuant to Rule 341(*a*)[1] of the *Federal Court Rules* whereby the appellant sought to secure judgment in the action, and the dismissal or, alternatively, the staying of the respondents' counterclaim. Leave to file a conditional appearance to the counterclaim was granted. The respondents seek to set off their claims against those of the appellant. It was argued by the appellant that the Trial Division is without jurisdiction to hear and determine those claims and that, in any event, as a matter of law none of them may be set off against the claims made in the amended statement of claim.

Background

[2] In 1979, the respondent corporation, as owner of the vessel, agreed to charter her to the appellant for a period of approximately five years ending on February 29, 1984, upon terms contained in a time charter dated March 26, 1979, on a New York Produce Exchange form. Among the terms of the contract is cl. 53, providing for reference of disputes to arbitration. It reads in part:

> *Arbitration*:
>
> Any dispute arising out of this Contract shall, unless the parties agree forthwith on a single Arbitrator, be referred to the final arbitrament of two Arbitrators carrying on business in London who shall be members of the Baltic Exchange, one to be appointed by each of the parties, with power to such Arbitrators to appoint an Umpire, who shall be a member of the Baltic Exchange.

[3] In April, 1980, the appellant subchartered the vessel on voyage terms to carry a full and complete cargo of steel from Foss Sur Mer to the United States/Canada with an expected

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[1] *Rule 341.* A party may, at any stage of a proceeding, apply for judgment in respect of any matter
(a) upon any admission in the pleadings or other documents filed in the Court, or in the examination of another party, or
(b) in respect of which the only evidence consists of documents and such affidavits as are necessary to prove the execution or identity of such documents,
without waiting for the determination of any other question between the parties.

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ready-to-load date of "June 1980". On June 9, 1980, it notified the subcharterer that the vessel would arrive at the port of loading on June 17-18. Later that day, the respondent corporation informed the appellant that it intended to dry-dock the vessel for a week to 10 days in southern Italy. Dry-docking could not be deferred. As the vessel had been involved in four separate groundings and in a collision, her classification society insisted she be dry-docked before carrying her next cargo. She entered dry-dock on June 16th and was unavailable to load cargo until early July. The subcharterer asked the appellant to nominate a substitute vessel and that was done. After the dry-docking, the vessel was able to re-enter service under the charter-party. The appellant submitted a claim to the respondents in respect of its losses. Additional disputes ensued, resulting in the appellant submitting further claims. All of these claims were referred to arbitration in London in accordance with cl. 53.

[4] In March of 1984, the vessel arrived at the Port of Vancouver to receive a cargo for delivery in Finland. On March 15th, the appellant instituted this action *in rem*, causing the vessel to be arrested and joining her owner as a defendant. In para. 4 of its amended statement of claim, the appellant makes the following allegations:

> 4. Contrary to the requirements of the charter party, which is annexed hereto and marked as Schedule "1", the Defendant their servants or agents breached the terms of the contract, or, in the alternative negligently:
>
> (*a*) prematurely dry-docked the vessel "Didymi" without Notice to the Plaintiff whereby the Plaintiff lost a sub-fixture and had to charter another vessel for a total additional cost of U.S. $81,760.72;
>
> (*b*) Failure of the Defendant, its servants or agents to load the vessel "Didymi" to the draft as instructed by sub-charterers whereby there was a loss of freight revenue on the shut-out cargo and a claim for loss of market value of the goods by the consignees of the cargo which could not be loaded on board the "Didymi" whereby the Plaintiff claims the amount of U.S. $301,123.59;
>
> (*c*) The Defendant, its servants or agents contrary to instructions overloaded the vessel "Didymi", her arrival draft in Port Said being 32′ 7″ against notified draft of 31′ 10″ making it necessary to lighten the vessel by discharging cargo to lighters rather than to dock wherein additional expenses including discharge to lighter and off-hire expenses being incurred in the amount of U.S. $60,000.00;
>
> (*d*) In addition the Plaintiff claims the amount of U.S. $55,000.00 for legal fees and incidental expenses arising out of the Defendant's breach of contract or in the alternative negligence as set forth herein.

In para. 5 of the same pleading, it is alleged that "arbitration proceedings have been commenced in London pursuant to the charterparty seeking damages as stated herein" for breach of contract "and/or" negligence. There then appears the following prayer for relief:

> (a) Damages for breach of the March 26, 1979 charter party;

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(b) A declaration that the Plaintiff, Atlantic Lines & Navigation Company Inc. be indemnified by the Defendants in an amount equal to any award that may be made against it in any Court or arbitration proceedings;

(c) Interest; and

(d) Costs.

[5] On March 16, 1984, the respondents moved to strike out the amended statement of claim or to stay the action and, in either event, to have the vessel released from arrest. The application was heard by Reed J. in the Trial Division: *Atlantic Lines & Navigation Co. Inc. v. The Ship "Didymi" et al.*, [1985] 1 F.C. 240. She refused to strike out the amended statement of claim or to stay the action and ordered, instead, that the vessel be released from arrest upon the respondents giving appropriate security. It was her view, as expressed at p. 245, that the jurisdiction of the Trial Division "has been invoked primarily to obtain security for the claims being made" by the appellant. That was accomplished by delivery of a letter of undertaking given by the vessel's Protection and Indemnity Club. No appeal has been taken from the judgment of Reed J.

[6] The respondents filed a statement of defence and counterclaim on October 30, 1985. It contains the following as para. 2:

2. *The Defendants deny the allegations of fact contained in paragraph 4 of the Plaintiff's Statement of Claim except that the Defendants breached a term of the agreement referred to in paragraph 3 of the Statement of Claim by prematurely dry-docking the defendant ship as alleged in paragraph 4(a). The Defendants say with respect to the allegations of fact contained in paragraph 4(a) of the Plaintiff's Statement of Claim that arbitrators appointed by the Plaintiff and Defendants have rendered an interim award with respect to the said claim in the amount of $54,793.06 (U.S.) together with interest and costs. Except for the foreoing admission*, the Defendants deny each and every other allegation of fact contained in paragraph 4 of the Plaintiff's Statement of Claim with, without limiting the generality of the foregoing, specifically deny that they breached the terms of the contract (hereinafter referred to the "Charterparty" by failing to load the defendant ship to a draft as instructed by sub-charterers as alleged in paragraph 4(b) of the Plaintiff's Statement of Claim; that they breached the Charterparty by overloading the defendant ship such that her arrival draft in Port Said made it necessary to lighten the defendant ship as alleged in paragraph 4(c); or that the Plaintiff is entitled to legal fees or any other incidental expenses as alleged in paragraph 4(d) or otherwise.

(Emphasis added.)

[7] Additionally, in the same pleading, the respondents put forward three different claims alleged to have arisen under the charter-party. They are that the appellant is liable under the contract for damage done to the vessel during its currency; that, in breach of the contract, the appellant has failed to pay an increase of charter hire flowing from the vessel performing in excess of her warranted speed capabilities; and, finally, that, in further breach of the contract, the appellant has failed to pay an increase in charter hire flowing from the vessel consuming

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less than her warranted rates of fuel and diesel oil. These claims were also referred to arbitration in London pursuant to cl. 53. Nevertheless, the respondents assert they are entitled in the action to set off the sum of these claims against any amount adjudged to be owing to the appellant. The prayer for relief in the counterclaim reads as follows:

> (a) damages for breach of Charterparty;
>
> (b) a declaration that the Defendant Didymi Corporation be indemnified by the Plaintiff Atlantic Lines & Navigation Company Inc. in an amount equal, in Canadian currency, to any awards that may be made against the said Plaintiff in any Court or arbitration proceedings;
>
> (c) interest;
>
> (d) costs;
>
> (e) such further and other relief as to this Honourable Court may seem meet.

[8] In its application pursuant to Rule 341(*a*), the appellant asks for judgment "in the amount of $94,216.29 in U.S. funds plus costs in the amount of £6,144.78 pursuant to an Arbitration award" of July 27, 1985, "those amounts being admitted by the Defendants in the Statement of Defence and Counterclaim". At the date the application was heard by Collier J., only the claim in subpara. 4(a) of the amended statement of claim had been determined at arbitration. On July 27, 1985, the arbitrators issued a "Final Interim Award" in favour of the appellant in respect of that claim. Paragraphs 6 to 10 of that award read in part:

> 6. NOW WE, the said Arbitrators ... having accepted the burden of this arbitration and having carefully and conscientiously read the documents and listened to the contentions of the parties, weighed the evidence, conferred and agreed with each other, (so having no need of the Umpire)
>
> DO HEREBY MAKE, ISSUE AND PUBLISH this our joint and agreed INTERIM AWARD, which is FINAL of the matter determined, as follows:—
>
> 7. WE FIND AND HOLD that for the reasons set out in Annexure "A" which is attached to and forms part of this Award, the Owners were in breach of the charterparty and Atlantic are entitled to recovery of damages in the sum of US$54,793.06.
>
> 8. WE AWARD AND ADJUDGE that the Owners do forthwith pay to Atlantic the sum of US$54,793.06 (fifty-four thousand, seven hundred and ninety-three United States dollars and six cents) PLUS interest on the said sum at the rate of 13 per cent per annum from 1st August 1980 until the date of this our Award.
>
> 9. WE ALSO AWARD AND ADJUDGE that the Owners do bear and pay their own and Atlantic's costs in the reference to date (the latter to be taxed if not agreed) and

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> WE FURTHER AWARD AND ADJUDGE that the Owners do bear and pay the cost of this our Award which we hereby tax and settle at £2,394.78 inclusive of our fees and charges (and the fee of the Umpire).
>
> 10. ALWAYS PROVIDED that if Atlantic shall in the first instance have paid for the cost of this Award they shall be entitled to immediate reimbursement from the Owners of the sum so paid.

These paragraphs are preceded by a number of recitals, one of which, being para. 4, was referred to and relied upon in argument. It reads:

> 4. The matter referred to us concerned a claim for damages arising from the unexpected dry-docking of the vessel and which Atlantic contended was in breach of the terms of the charterparty by the Owners. The sum claimed was US$54,793.06. The Owners denied liability.
>
> We were given notice of a counterclaim by the Owners but it was agreed by the parties that this issue should be left over for adjudication at some future date.

[9] At the hearing, the court was informed of the current status of the London arbitrations touching the claims made in the amended statement of claim and in the counterclaim. The costs allowed to the appellant under the July 27, 1985 award are yet to be quantified and paid. The claims asserted in subparas. 4(b) and (c) of the amended statement of claim also remain to be decided. On the other side, the respondents' claim for damage done to the vessel has been settled with costs to be agreed upon, but the settlement remains unpaid. Although agreement has been achieved on some aspects of the claim for increase of charter hire flowing from a saving of fuel, that claim remains outstanding. Indeed, a question upon the interpretation of the charter-party concerning that claim has found its way into the English Commercial Court and is pending a hearing on appeal. Apparently, the respondents' claim for increase of charter hire flowing from the vessel exceeding its warranted speed capabilities also remains outstanding. It now appears that the respondents are asserting an additional claim under the charter-party. It is referred to in the material as "a claim for balance of charterparty accounts". It, too, was referred to arbitration in London and was heard in February of this year. In any event, that claim is not included among the claims asserted in the counterclaim. It seems the parties have agreed that payment of the damage settlement may await the outcome of that arbitration proceeding.

[10] In the meantime, as a means of gaining security for the claims asserted in the counterclaim, the respondents arrested a vessel in the appellant's ownership or management. That security was given in the form of a bank letter of guarantee in the sum of $900,000 in United States currency. With the settlement of the damage claim and an agreed reduction in the fuel claim, the amount of that guarantee has been reduced to little more than $600,000 in United States currency.

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The issues

[11] The appellant contends that the learned judge erred in refusing the judgment it requested and also in refusing to dismiss or stay the counterclaim. There are two principal prongs to its attack. First, it says that given the nature of the claims asserted by the respondents, no basis in law exists whereby they may be set off against the appellant's claim now represented by the arbitration award of July 27, 1985. Secondly, it urges that the Trial Division lacks jurisdiction to hear and determine those claims which cl. 53 requires be disposed of by arbitration in London. The respondents contend that we ought not to interfere because the decision below derives from the proper exercise of a discretion conferred by Rule 341(*a*). They also assert that the award of July 27, 1985, does not entitle the appellant to judgment under that rule because it is merely an 'interim'' award. In any event, they say that judgment was rightly refused because, by virtue of the doctrine of equitable set-off, they would be entitled to set off their claims against those of the appellant upon final adjudication.

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Equitable set-off

[12] I turn first to the issue of equitable set-off. The learned judge did not give reasons for refusing judgment under Rule 341(*a*) or for refusing to dismiss or to stay the counterclaim. On the other hand, we are told that the respondents relied upon the doctrine of equitable set-off as a ground for denying the application. As entitlement to a set-off if specifically pleaded in the statement of defence and counterclaim, it may be fairly assumed that the argument was a factor in the decision below. On that basis, the discretion of the learned judge would not have been properly exercised if it can be demonstrated that the doctrine of equitable set-off cannot be invoked: see, *e.g., IBM Canada Ltd. — IBM Canada Ltée v. Xerox of Canada Ltd. et al.*, [1977] 1 F.C. 181, 12 N.R. 440 (F.C.A.).

[13] The appellant contends that this case is not of a kind to which the doctrine applies. It says that while it is true the claims asserted in the counterclaim, like those in the amended statement of claim, all arise out of the same time charter, that is not a sufficient basis for invoking the doctrine. The equity claimed, it is argued, must be shown to impeach the legal title to the appellant's claim in subpara. 4(a)of the amended statement of claim. The respondents reply in this way. It is sufficient, they say, that their claims be so closely related to the appellant's claims as to raise an equity in favour of the respondents, making it unfair that a judgment be rendered against them on one of the issues raised in the amended statement of claim without also determining the claims in the counterclaim.

[14] A number of recent English cases have traced the evolution of equitable set-off. Perhaps the most thorough treatment of the subject is that of the Court of Appeal in *Hanak v. Green*, [1958] 2 All E.R. 141, where Morris L.J. describes the development of the three categories of set-off: set-off under statute, abatement in certain cases at common law, and equitable set-off. I shall describe them briefly in that order.

[15] The right of set-off was unknown to the common law courts until its introduction by statute. The Statute of Set-Off, 2 Geo. II, c. 22 of 1729, and 8 Geo. II, c. 24 of 1735, provided for the set-off of cross-claims arising out of separate transactions where they consisted of

liquidated debts or money demands which could be ascertained with certainty at the time of the pleading. However, it was only in 1873 that the *Supreme Court of Judicature Act*, 1873 (U.K.), c. 66, enabled the courts to hear a counterclaim; until then a cross-claim had to be advanced by a separate action. The Statutes of Set-Off were repealed by the *Civil Procedure Acts Repeal Act*, 1879 (U.K.), c. 59, and the *Statute Law Revision and Civil Law Procedure Act*, 1883 (U.K.), c. 49, but the former Act saved established or confirmed legal principles, thus preserving the right of legal set-off: see *Hanak v. Green, supra*, at pp. 145, 149.

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[16] The second category is known as abatement. Enunciated in *Mondel v. Steel* (1841), 8 M. & W. 858, 151 E.R. 1288, it is sometimes referred to as the rule in that case. It is not a true set-off. Prior to the Act of 1873, it allowed a defendant to answer a claim for the price of goods sold or agreed to be supplied or for work and labour done with an assertion that the goods or work were of poor quality, without bringing a separate action. Abatement operates as a pure defence, rather than as a set-off, to diminish or extinguish the price. Being in the nature of a defence, it is not subject to a time bar: see *Henriksens Rederi A/S v. PHZ Rolimpex; The "Brede"*, [1973] 3 All E.R. 589 at pp. 593-4, [1973] 2 Lloyd's Rep. 333 (C.A.) at pp. 336-7.

[17] The third category originated with equity's practice of intervening by interim injunction to prevent a claim at law being carried to judgment, or judgment being enforced, before any cross-claim had been adjudicated upon. Like abatement, equitable set-off functions as a defence. It is recognized in Rule 418[2] of the *Federal Court Rules.* In the case of equitable set-off, however, the plaintiff's wrongful act does not reduce the value of goods sold or of work done but causes other damages. In *The "Brede"*, at pp. 595-6 All E.R., pp. 337-8 Lloyd's Rep., Lord Denning M.R. offers the following illustration of its effect:

> When the contractor sues for the contract price, the employer can say to him: "You are not entitled to that sum because you have yourself broken the very contract on which you sue, and you cannot fairly claim that sum unless you take into account the loss you have occasioned to me." ... So also with any breach by the plaintiff of the selfsame contract, the defendant can in equity set up his loss in diminution or extinction of the contract price. It is in the nature of a defence. As such it is not subject to a time-bar.

[18] This form of set-off was available long before legal set-off was established by statute in the 18th century. In *Ex parte Stephens* (1805), 11 Ves. 24 at p. 27, 32 E.R. 996 at p. 997 (Ch.), Lord Eldon L.C. intimated that the doctrine is of ancient origin. He said:

> As to the doctrine of set-off, it is not necessary to say much. This Court was in possession of it, as grounded upon principles of equity, long before the law interfered. (19 *Ves.* 467.) It is true, where the Court does not find a natural equity, going beyond the statute the construction of the law is the same in equity as at law. (Stat. 2 *Geo.* II. c. 22; 8 *Geo.* II. c. 24 ...) But that does not affect the general doctrine upon natural equity.

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[2] *Rule 418.* Where a claim by a defendant to a sum of money (whether of any ascertained amount or not) is relied on as a defence to the whole or part of a claim made by the plaintiff, it may be included in the defence by way of compensation or as a set-off against the plaintiff's claim, whether or not it is also added as a counterclaim or cross-demand.

The Act of 1873 enabled any equitable defence to be raised in all circumstances in which, before 1873, it might have been raised either in equity or to restrain an action at common law: see *Bankes v. Jarvis*, [1903] 1 K.B. 549 at p. 552. However, in *Federal Commerce & Navigation Ltd. v. Molena Alpha Inc.; The "Nanfri" et al.*, [1978] 3 All E.R. 1066 at p. 1078, Lord Denning M.R. points out that the grounds of equitable set-off:

> ... were never precisely formulated before the Supreme Court of Judicature Act 1873. It is now far too late to search through the old books and dig them out. Over 100 years have passed since the Supreme Court of Judicature Act 1873. During that time the streams of common law and equity have flown together and combined so as to be indistinguishable the one from the other. We have no longer to ask ourselves: what would the courts of common law or the courts of equity have done before the Supreme Court of Judicature Act 1873? We have to ask ourselves: what should we do now so as to ensure fair dealing between the parties? (see *United Scientific Holdings Ltd. v. Burnley Borough Council* ([1977] 2 All E.R. 62 at p. 68, [1977] 2 W.L.R. 806 at pp. 811-2) per Lord Diplock). This question must be asked in each case as it arises for decision; and then, from case to case, we shall build up a series of precedents to guide those who come after us. *But one thing is quite clear: it is not every cross-claim which can be deducted. It is only cross-claims that arise out of the same transaction or are closely connected with it. And it is only cross-claims which go directly to impeach the plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim.* Such was the case with the lost vehicle in *Morgan & Son Ltd. v. Martin Johnson & Co. Ltd.* ([1948] 2 All E.R. 196, [1949] 1 K.B. 107) and the widow's misconduct in *Hanak v. Green* ([1958] 2 All E.R. 141, [1958] 2 Q.B. 9).

(Emphasis added.) I shall deal with the criteria for equitable set-off in more detail later.

[19] The treatment of freight is a significant and well-established exception to the common law rule of abatement. It is rooted in business convenience and amounts to this. A claim for freight under a bill of lading or a voyage charter, where the shipper or the charterer has a cross-claim concerning deficiencies in the services peformed, cannot be reduced or extinguished by way of abatement: see *e.g., Meyer v. Dresser* (1864), 16 C.B. (N.S.) 646, 143 E.R. 1280; *The "Brede"* and *Aries Tanker Corp. v. Total Transport Ltd.*, [1977] 1 All E.R. 398 (H.L.). This court applied the principle in *SIS Steamship Co. Ltd. v. Eastern Caribbean Container Line S.A.* (1986), 26 D.L.R. (4th) 472, [1986] 2 F.C. 27, 66 N.R. 74. This treatment of freight reflects the original state of the common law and, in the words of Lord Simon of Glaisdale at p. 406 of *Aries Tanker*, "stands uneroded, like an outcrop of pre-Cambrian amid the detritus of sedimentary deposits". It cannot even be displaced by equitable set-off. In *Aries Tanker*, Lord Wilberforce disposed of an argument that the doctrine of equitable set-off entitled a charterer to set-off a claim for short delivery of cargo against a shipowner's claim for freight. He said at pp. 404-5:

> My Lords, a yet further argument was developed, that the charterers' claim for short delivery might operate by way of equitable set-off — this, on the assumption as I understood it, that the right of deduction at law was not upheld. This contention was given more prominence in this House than perhaps it received in the Court of Appeal's

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judgments in *The Brede* ([1973] 3 All E.R. 589, [1974] Q.B. 233) though in fact it seems to have been given adequate consideration in that case. It does not appear to me to advance the charterers' case. *One thing is certainly clear about the doctrine of equitable set-off — complicated though it may have become from its involvement with procedural matters — namely that for it to apply, there must be some equity, some ground for equitable intervention, other than the mere existence of a cross-claim*: see *Rawson v. Samuel* ((1841) Cr. & Ph. 161 at p. 178), per Lord Cottenham L.C., *Best v. Hill* ((1872) L.R. 8 C.P. 10 at p. 15), and the modern case of *Hanak v. Green* ([1958] 2 All E.R. 141 at p. 147, [1958] 2 Q.B. 9 at p. 19), per Morris L.J. But in this case counsel could not suggest, and I cannot detect, any such equity sufficient to operate the mechanism, so as, in effect, to override a clear rule of the common law on the basis of which the parties contracted. It is significant that in no case since the Supreme Court of Judicature Act 1873 or at a time before that Act when equitable jurisdiction was available to a court dealing with the claim, was any such equitable set-off or equitable defence upheld or, until *The Brede* ([1973] 3 All E.R. 589, [1974] Q.B. 233), suggested. Indeed, if there is any equity in the present situation, it would seem to be in favour of the owners, so as to hold the charterers to their bargain in adopting art. III, r. 6 of the Hague Rules.

I would dismiss this appeal.

(Emphasis added.)

[20] In *The "Nanfri"*, a majority of the English Court of Appeal decided that the freight exception applies only to "freight" payable under a bill of lading or a voyage charter and that it does not include a charge for the use or hire of a vessel under a time charter, which is termed "hire". This distinction enabled the court to furnish partial relief from the freight exception by making equitable set-off available. According to Lord Denning M.R. at p. 1079 of *The "Nanfri"*, the doctrine may be pleaded in such cases when:

> ... the shipowner has wrongly deprived the charterer of the use of the vessel or has prejudiced him in the use of it. I would not extend it to other breaches or default of the shipowner, such as damage to cargo arising from the negligence of the crew.

It is, however, to be limited to these circumstances: see also *The "Teno"*, [1977] 2 Lloyd's Rep. 289 (Q.B., Com. Ct.), at pp. 296-7.

[21] On the authorities already referred to, a right of equitable setoff relies on much more than the mere existence of a cross-claim. As Lord Denning put it in the *The "Nanfri"* in a passage already recited, it is only "cross-claims that arise out of the same transaction or are closely connected with it" and which "go directly to impeach the plaintiff's demands" such as to render it "manifestly unjust to allow him to enforce payment without taking into account the cross-claim" that may be the subject of an equitable set-off. That case furnishes a practical illustration of circumstances in which the doctrine may be invoked. A shipowner sought to recover charter hire under a time charter. The charterer sought to set off damages which flowed from the shipowner having wrongly deprived the charterer of the use of the vessel during the currency of the charter-party. The Court of Appeal permitted the cross-claim for damages to be set off against the claim for charter hire. The cross-claim not only arose out of

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the same agreement but was directly connected to the claim for charter hire and thus, could be set up so as to reduce or extinguish the shipowner's claim. It would be manifestly unjust to compel the charterer to pay charter hire without first permitting him to set up his cross-claim for damages caused by the shipowner's wrongful act of depriving the charterer of use of the vessel during the period for which the charter hire was claimed.

[22] This need for a cross-claimant to show that his claim goes directly to impeach a plaintiff's demand was explained by Lord Cottenham L.C. in *Rawson et al. v. Samuel* (1841), Cr. & Ph. 161, 41 E.R. 451. At that time equity interfered on behalf of a person asserting a right of equitable set-off by way of injunctive relief against the prosecution of the plaintiff's action. I refer to the following passage in the judgment of the Lord Chancellor at pp. 179-80 Cr. & Ph., pp. 458-9 E.R.:

> Several cases were cited in support of the injunction; but in every one of them, except *Williams v. Davies*, 2 Sim. 461, it will be found that the equity of the bill impeached the title to the legal demand. In *Beasley v. D'Arcy* (2 Sch. & Lef. 403, n.) the tenant was entitled to redeem his lease upon payment of the rent due; and in ascertaining the amount of such rent, a sum was deducted which was due to the tenant from the landlord for damage done in cutting timber. Both were ascertained sums, and the equity against the landlord was that he ought not to recover possession of the farm for non-payment of rent, whilst he owed to the tenant a sum for damage to that same farm. In *O'Connor v. Spaight* (1 Sch. & Lef. 305) the rent paid formed part of a complicated account; and it was impossible, without taking the account, to ascertain what sum the tenant was to pay to redeem his lease. In *Ex parte Stephens* (11 Ves. 24) the term equitable set-off is used; but the note having been given under a misrepresentation, and a concealment of the fact that the party to whom it was given was at the time largely indebted to the party who gave it, the note was ordered to be delivered up as paid. In *Piggott v. Williams* (6 Mad. 95) the complaint against the solicitor negligence went directly to impeach the demand he was attempting to enforce. In *Lord Cawdor v. Lewis* (1 Y. & Coll. 427) the proposition is too largely stated in the marginal note; for, in the case, the action for mesne profits was brought against the Plaintiff, who was held, as against the Defendant, to be, in equity, entitled to the land.

Subsequent cases on the point have consistently followed that principle. I refer, for example, to the decision of the Privy Council in *Government of Newfoundland v. Newfoundland R. Co. et al.*(1888), 13 App. Cas. 199. In that case, as was pointed out by Lord Hobhouse at p. 212, the "two claims under consideration have their origin in the same portion of the same contract, where the obligations which gave rise to them are intertwined in the closest manner". In the present century we have the cases of *Bankes v. Jarvis, Morgan & Son, Ltd. v. S. Martin Johnson & Co., Ltd.*, [1948] 2 All E.R. 196 (C.A.), *Hanak v. Green, Aries Tanker* and *The "Nanfri"* as modern illustrations of the need on the part of a cross-claimant invoking the equitable doctrine to show his claim goes directly to impeach the plaintiff's demand: see also *The "Leon"*, [1985] 2 Lloyd's Rep. 470 (Q.B. Com. Ct.) at pp. 474-5. Here in Canada, as well, the authorities appear to be fully in harmony with the English decisions on the point: see, *e.g., Kaps Transport Ltd. v. McGregor Telephone & Power Construction Co. Ltd.* (1970), 13 D.L.R. (3d) 732, 73 W.W.R. 549 (Alta. C.A.); *Abacus Cities Ltd. v. Aboussafy* (1981), 124 D.L.R. (3d) 150, [1981] 4 W.W.R. 660, 29 A.R. 607 (C.A.); *United Chemicals Ltd. v. Prince Albert Pulp Co.*

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Ltd. (1981), 11 Sask. R. 320 (Q.B.); *Norbury Sudbury Ltd. v. Noront Steel (1981) Ltd.* (1984), 11 D.L.R. (4th) 686, 47 O.R. (2d) 548 (H.C.J.); *Coba Industries Ltd. v. Millie's Holdings (Canada) Ltd. et al.*(1985), 20 D.L.R. (4th) 689, [1985] 6 W.W.R. 14, 65 B.C.L.R. 31 (C.A.)).

[23] It is true that the claims on both sides arose out of the same charter-party agreement. In that sense they are closely connected. On the other hand, I fail to see how it can be said that any of the respondents' claims asserted by the counterclaim go directly to impeach the appellant's claim asserted in subpara. 4(a) of the amended statement of claim. As charterer, the appellant was put to additional costs by reason of being wrongly deprived of the vessel's use. The cross-claims for damage done to the vessel, and for increases in charter hire due to a saving of fuel and the vessel performing beyond her warranted speed capabilities, do not, in my view, go to impeach that claim. They are each separate and distinct claims having no bearing whatsoever upon it. I do not see how we can interfere with the right asserted by the appellant to have judgment on that claim pursuant to Rule 341(*a*) provided, of course, the appellant is otherwise entitled.

[24] In so concluding I have not overlooked certain views expressed by Lord Denning M.R. in *The "Angelic Grace"*, [1980] 1 Lloyd's Rep. 288 (C.A.). There, the charterer claimed for the value of bunkers remaining on board at the time the charter-parties terminated. The shipowner cross-claimed for damage done to the ship during the currency of the agreements. The claim and cross-claims were referred to arbitration. The only issue before the Court of Appeal was whether the arbitrators had acted beyond their jurisdiction in imposing a condition that the charterer recover an interim award provided it put up security for return of this amount in case the owner's cross-claims were successful. In deciding that the arbitrators had gone wrong, Lord Denning made certain remarks that at first sight might possibly be construed as supporting the respondents' position. At p. 293 he said:

> It seems to me that, in making an interim award, the arbitrators can and should look at all the circumstances of the case. They can look at the other two arbitrations as well as this one. They can apply the principle of equitable set-off such as was considered in *The Nanfri (Federal Commerce v. Molena)*, [1978] 2 Lloyd's Rep. 132; [1978] Q.B. 927.
>
> In this case there were three charter-parties involving the self-same vessel being chartered by the self-same charterers over a continuous period. The claims and cross-claims under each charter-party are so closely connected that it would be a case for equitable set-off to be allowed if it was a claim in a Court of Law.

In making these observations Lord Denning spoke only for himself, his views not being necessary to the decision. I doubt very much he intended to reject the basic principle upon which the doctrine of equitable set-off is founded, namely, that a cross-claim must go to impeach the plaintiff's claim. He recognized this principle and the limitations it imposed as recently as 1978 in *The "Nanfri".*

[25] I conclude that the respondents, as a matter of law, cannot invoke the doctrine of equitable set-off against the appellant's claim in subpara. 4(a) of the amended statement of claim.

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[26] The respondents contend that the appellant is not entitled to judgment under Rule 341(*a*) in any event. They say that the award of July 27, 1985 is but an interim award and was admitted to be such in the pleading. If that be the case, then I would not regard para. 2 of the statement of defence and counterclaim as containing the "admission" required to found a judgment pursuant to the rule. However, I cannot view the award as an interim one. It appears that nothing further need by done by the arbitrators for it to be made final. By its own terms, the award "is FINAL of the matter determined" (para. 6) and is to be paid "forthwith" (para. 8). The remaining claims, including the counterclaim of the respondents alluded to in para. 4 of the award, were not before the arbitrators. They involve additional disputes and different arbitration proceedings.

Jurisdiction

[27] I must deal with two remaining points. The first is that the trial division lacks jurisdiction to hear and determine the claims asserted in the counterclaim. I cannot accept this submission. The appellant invoked the jurisdiction of the trial division by using the vessel and her owner to enforce arbitration awards settling disputes referred pursuant to cl. 53. The letter of undertaking by which security was given required the respondents to accept service of the amended statement of claim and to file a defence. That was done.

[28] It seems to me that the subject-matter of the claims made in the counterclaim fall within a head of jurisdiction enumerated in para. 22(2)(*i*) of the *Federal Court Act*, R.S.C. 1970, c. 10 (2d Supp.):

> 22(2) Without limiting the generality of subsection (1), it is hereby declared for greater certainty that the Trial Division has jurisdiction with respect to any claim or question arising out of one or more of the following:
>
> • • • • •
>
> (*i*) any claim arising out of any agreement relating to the carriage of goods in or on a ship or to the use or hire of a ship whether by charter party or otherwise;

In *Cormorant Bulk-Carriers Inc. v. Canficorp (Overseas Projects) Ltd.* (1984), 54 N.R. 66 at p. 78, this court gave the words "arising out of any agreement" a broad construction. In my view, they are broad enough to embrace the subject-matter of the claims asserted in the counterclaim. The substance of those claims is damages for alleged breaches of the contract. Arbitration is merely the agreed upon mechanism for their determination: see *Eurobulk Ltd. v. Wood Preservation Industries* (1979), 106 D.L.R. (3d) 571, [1980] 2 F.C. 245 (T.D.).

[29] It is true, of course, that the appellant is a foreign corporation having no residence in Canada or other business connection with this country. However, by bringing this action in the trial division and submitting to the jurisdiction, the appellant must be taken to have submitted to the jurisdiction not only for that purpose but also for the purpose of enabling the respondents to adequately defend themselves. This, it seems to me, includes asserting cross-claims by way of counterclaim when those claims arise out of the self-same charter-party upon which the

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appellant bases its claims for breach of contract. The governing principle was enunciated in England and has been applied there in admiralty proceedings: see, *e.g., The "Cheapside"*, [1904] P. 339 (C.A.). I think the principle is applicable in this case, seeing that the appellant has come within the jurisdiction to prosecute its claims against the respondents and that the cross-claims arise out of the same contract.

[30] Finally, it was argued that the counterclaim should have been stayed as required by s. 1 of the *Arbitration Act*, 1975 (U.K.), c. 3:

> 1(1) If any party to an arbitration agreement to which this section applies, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the agreement, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to the proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, apply to the court to stay the proceedings; and the court, unless satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.

That statute, as its long title states, gave "effect to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards". With respect, I do not see how the Federal Court of Canada could be regarded as "the court" invested with authority to act pursuant to that provision.

Disposition

[31] For the foregoing reasons, I would allow this appeal with costs. In my opinion, the appellant is entitled to judgment for damages for breach of the charter-party found to be recoverable under the arbitration award of July 27, 1985. However, having regard to the provisions of s. 11 of the *Currency and Exchange Act*, R.S.C. 1970, c. C-39,

> 11. All public accounts throughout Canada shall be kept in the currency of Canada; and any statement as to money or money value in any indictment or legal proceeding shall be stated in the currency of Canada.

we are prevented from pronouncing judgment in the foreign currencies in which the award is expressed: see, *e.g., Baumgartner v. Carsley Silk Co. Ltd.* (1971), 23 D.L.R. (3d) 255 (Que. C.A.); *Batavia Times Publishing Co. v. Davis* (1978), 88 D.L.R. (3d) 144, 20 O.R. (2d) 437, 7 C.P.C. 106, affirmed without reasons, Ont. C.A. January, 1979; *Am-pac Forest Products Inc. v. Phoenix Doors Ltd. et al.*(1979), 14 B.C.L.R. 63, 12 C.P.C. 97 (S.C.). The foreign currency figures will have to be converted to their Canadian currency equivalents. Perhaps the parties can agree to the same. In the circumstances I think that pursuant to Rule 337(2)(*b*), the appellant should prepare a draft of an appropriate judgment to implement the above conclusion and move for judgment accordingly.

[32] Appeal allowed.

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