[2014] JMSC CIV.152

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2013 HCV 000368

BETWEEN	**UNITED PETROLEUM (JA.) LIMITED**	**CLAIMANT**
A N D	**LUTHER WILLIAMS**	**DEFENDANTS**
A N D	**PANSY WILLIAMS**	

Mr. Huntley Watson instructed Watson and Watson for Claimant/Applicant

Ms. Zara Lewis for Defendants/Respondents

Summary judgment application – Claim – Counterclaim – Defence to Counterclaim – Claim for Goodwill – Set-off – Dealership Agreement between parties – Arbitration Act

Heard on 4th March 2014 and 10th October, 2014

Coram: Morrison, J.

[1] "…Where there is no real defence, a defendant may go through the motions of defending in order to delay the time when judgment may be entered. It is possible for defendants to put up the pretence of having a real defence to such an extent that some cases run all the way through to trial before judgment can be entered. The CPR provide several ways of preventing this happening. The court can use its power … to knock out hopeless defence such as those that simply do not amount to a legal defence on a claim. Entering summary judgment… is used where a purported defence can be shown to have no real prospect of success and there is no other compelling reason why the case should be disposed of at trial: "per Blackstone's Civil Practice, 2011, Chapter 34.

[2] In the case at bar the claim, simply put, is for arrears of rent in the sum of $349,600.00 and for goods sold and delivered in the sum of $26,881,973.29.

[3] The Particulars of Claim is set out in *extenso:*

A. The Claimant company is and was at all material times a company incorporated with limited liability under the Companies Act carrying on in business from its corporate headquarters at 50 Lyndhurst Road, Kingston 5 in the parish of Saint Andrew and divers locations within the Island as marketers, distributors and suppliers of petroleum and other related products.

B. Amongst its business undertakings the Claimant Comp[any carries on the business of acquiring property rights in locations owned by its parent company Hagley Park Holdings Limited and other entitles for the purpose of operating petroleum filling stations operators under the **Unipet** brand.

C. The Defendants t/a Wilfam Enterprise were at all material times operators of the **Unipet** petroleum filling and service station at 17 Main Street, Mandeville in the parish of Manchester ("**Unipet** Mandeville) with their residential address at 214 Getz Avenue, Bridgeport P.O. in the parish of Saint Catherine at which address they still reside.

D. The Defendants were at all material times the tenants of the Claimant in respect of the said filling station situated at 17 Main Street, Mandeville in the parish of Manchester and they were also customers of the Claimant in that they purchased petroleum and other products for the operation the said petroleum filling and service station from the Claimant.

E. The relationship of tenant and customer/supplier carried on between the parties were formalized by a Dealership Agreement

committed to writing and signed by the parties or their authorized officers on the 10th day of October 2011 which contains the terms under which the parties committed to carry on the mutual obligations of Landlord/tenant and supplier/customer.

F. The Claimant now claims as against the Defendants for losses suffered in the breach by the Defendants in their performance of certain of their financial obligations arising from the said Dealership Agreement and in particular the Claimant claims that

i. The Defendants are in arrears of rental in respect of the monthly rent of $174,750.00 payable for the premises situate at 17 Main Street, Mandeville in the parish of Manchester for the months of June 2012 and July 2012 in the amount of $349,950.00.

ii. The Defendants have failed to pay the Claimant for goods sold and delivered in the amount of $20,881,973.29.

G. The Claimant has made several efforts to collect the aforesaid outstanding amounts and the Defendants have attempted to engage them in several failed proposals for settlement of their obligations including the delivery to the Claimant by the Defendants of several cheques which they relied on to obtain credit for additional supplies.

H. The cheques include seven instruments bearing the following cheque numbers which the Claimant's former accountant was asked by the Defendant or either of them to hold and not present to their bankers on the basis that the relevant bank account of the Defendants was inadequately funded and thus these cheques were never presented to the Defendants bankers. The requests to hold

presentation of these cheques were made in each instance after they had been tendered and the Claimant's goods received for them.

Unpresented cheques for goods sold and delivered

Chq# 1369391 for $1,643,332.63 dated 23/7/12 in purported payment for goods delivered under invoice number 012189 due 5/7/12;
Chq# 1369382 for $1,637,898.09 undated in purported payment for goods delivered under invoice number 012134 due on 28/6/12
Chq#1368914 for $942,811.08 dated 23/7/12 in purported payment for goods delivered under invoice number 012212 due 9/7/12
Chq# 136392 for $2,345,650.05 undated in purported payment for goods delivered under invoice number 012167 due 3/7/12
Chq# 1368915 for $3,376,955.75 undated in purported payment for goods delivered under invoice number 012228 due 12/7/12
Chq# 1368925 for $1,187,752.20 undated in purported payment for goods delivered under invoice number 012221 due 10/7/12
Chq# 1368927 for $1,696,105.33 undated in purported payment for goods delivered under invoice number 012262 due 17/7/12

Sub-total unpresented payments for goods sold and delivered $12,830,505.12

I. In addition to these instruments which were not presented the Defendants paid in to the Claimant on account of goods sold and delivered (with reference to Invoice number 012156 (IV-47600) due 30/6/12) their cheque numbered 1369383 in amount of $2,795,947.37 which was not honored upon presentment to their bankers and incurred bank charges of an additional $800.00.

Sub-total dishonouredcheques presented for goods sold and delivered $2,796,740.56.

J. The Defendants have additionally received four deliveries of goods from the Claimant pursuant to aforesaid Dealership Agreement in respect of which the Defendants have failed declined or refused to tender any cheque or other medium of payment at all. These deliveries are represented by the invoice numbers set out below;

Invoice number 012251 (IV-47642) due 16/7/12 in amount of $2,142,427.49

Invoice number 012279 (IV-47656) due 20/7/12 in amount of $2,149,532.49

Invoice number 012287 (IV-47659) due 21/7/12 in amount of $ 965,675.42

Sub-total other outstanding invoices for which no payment tendered $5,257,635.39

K. Accordingly the total payable on account of goods sold and delivered is $20,884,881.07. The gross outstanding balance has been adjusted to reflect a credit note dated 15 May 2012 of $2,940.98 for an overpayment and a debit note dated 23 June 2012 for $33.20 for underpayment.

Total adjusted balance owing for goods sold and delivered $20,881,973.29

L. In addition to the monies owing on account of goods sold and delivered there is an outstanding balance in respect of rental for eh service station premises owned by the Claimant and rented to the defendants in connection with their aforesaid business.

M. The Defendants had given the Claimant two cheques for rental and asked them to hold them in good faith until they advised them that the relevant account was funded. To date the account has not been funded and/or the Claimant has not been advised by the Defendants that the cheques can be tendered. In the meanwhile however the Claimant's bankers have billed them for the cost of other dishonored cheques on the said account.

Unpresentedcheques for rental

1368928 for $174,750.00 undated in purported payment of one months rental for June 2012 reference number MVREN 08.

1368929 FOR $174,750.00 undated in purported payment of one months rental for July 2012 reference invoice number MVREN 09.

Total unpresented rent cheques $349,500.00

N. The Claimant has repeatedly themselves and finally formally through their Attorneys at Law made demand upon the Defendants for settlement of the outstanding amounts of $20,881,973.29 remains due and payable and outstanding.

And the Claimant claims as against the Defendants jointly and severally for -

i. Arrears of rental in amount of $349,500.00

ii. The sum of $20,881,973.29 on account of goods sold and delivered

iii. Interest on both amounts at commercial rates commencing the 1st day of August 2012 until payment or judgment whichever shall be the sooner.

iv. Costs and Attorneys at Law's costs.

[4] The array of the Defence and Counterclaim as against the Claim serves to highlight the points in controversy and is also set out in its full extent.

DEFENCE AND COUNTERCLAIM

Defence

[5] The Defendants do not dispute the claim.

COUNTERCLAIM

[6] The Defendants operated the filling and service station at 17 Main Street, Mandeville, Manchester, from around October 2005 several years before the Defendants entered into Dealership Agreement with the Claimant in or around August, 2011 which said Agreement ended in or around November, 2012.

ii. The Defendants, operated the business in a manner, which built a solid reputation, good name and strong customer base which was achieved through the honesty, hard work, investment, innovation, quality customer service offered by the Defendants over the years that they operated the filling and service station.

iii. The Defendants developed a strong network of dedicated customers and dominated the market place in the Mandeville region and its environs especially amongst the many taxi operators who were dominant in transport services in around Mandeville. This dominance was directly related to the manner in which the Defendants operated the service station with the result that sales volume increased from around 14,500 per month in 2005 to around 80,000 gallons by the time the Dealership Agreement ended with the Claimant.

iv. Goodwill created by the way the Defendant operated the business to be valued at $17,500,000.00.

v. The Defendants also claim against the Claimant sums for services rendered to the benefit of the Claimants and for payments made on the Claimant's behalf. These services and payments are set out in the attached marked "LPW-1" and amount to $2,837,804.17.

EQUIPMENT

Unipet agrees-

A. To provide the Dealer with dispensing and other equipment, including display equipment at eh Location (hereinafter called "Unipets Equipment", which referred to the equipment listed in the Second Schedule hereto) for the purpose of the operation of the Location, which equipment remains the property of Unipet and

B. To maintain and keep Unipets Equipment in proper a state of repair at the expense of Unipet provided that the replacement hoses, couplings and fixtures and air meters shall be at the expense of the dealer except where the replacement is necessary due to fair wear and tear in which case it shall be done at Unipet's expense."

Particulars of Loss

And the Defendants claim against the Claimant

1) The sum of $2,837,804.7 for services to and payments made on behalf of the Claimant.
2) The sum of $17.5 million dollars being the value of the goodwill as at the time when the Dealership Agreement ended.

THE SUBMISSIONS

[7] First it is urged by the Claimant that from the Dealership Agreement it "expressly excepts claims by **Unipet** for monies due in respect of products supplied".

[8] Second, the Arbitration Act does not permit the ouster of the Court. Rather, it facilitates an application for stay of proceedings before it. The Defendant has not applied for a stay of proceedings and in that respect the Court will not stay its hand in those circumstances".

[9] Third, by virtue of Section 5 of the Arbitration Act, the power of enabling the application to the Court for a stay of proceedings does not apply after the party who would seek a stay has filed pleadings in the matter before the Court". The Defendants have filed an amended Defence and Counterclaim and in that regard they have submitted to the jurisdiction of the Court

[10] Fourth that from the Dealership Agreement it "expressly excepts claims by **Unipet** for monies due in respect of products supplied."

[11] Fifth, that the Arbitration Act does not permit the ouster of the Court. Rather, it facilitates an application for stay of proceedings before it. The defendant has not applied for a stay of proceedings and in that respect "the Court will not stay its hand in those circumstances."

[12] Sixth, that by virtue of Section 5 of the Arbitration Act, the power enabling the application to the Court for a stay of proceedings "does not apply after the party who would seek a stay has file proceedings in the matter before the Court." The defendants have filed an amended Defence and Counterclaim and in that regard they have submitted to the jurisdiction of the Court.

[13] The Claimant recruited the following authorities in support of its submissions-

1) The Civil Procedure Rule (CPR)
2) The Arbitration Act
3) **Parker, Gaines & Co., Ltd v Turpin** [1918] 1KB 359
4) **Esso Petroleum v Milton** [1992] 2 ALLER 593
5) The Judicature (Supreme Court) Act
6) **Tregs v Hunt** [1896] ALLER 7

[14] In summary the Defendants response engaged the concept of the value of the goodwill of the Defendants business prior to and leading up to the current Dealership Agreement. The Defence and Counter Claim nucleates around Set-Off .

[15] The Defendants do not deny owing the Claimant the sums as claimed. However, the argument is, "The Defendants…counterclaim for the goodwill which incurred to them during the subsistence of their tenancy of the service station and their operation of the service station at that location": See Written Submissions of the Defendants filed March 3, 2014.

[16] Further, according to the written submissions, "The Goodwill as claimed is the sum of $17,500,000.00. The Defendants also claim the $2,836,804.17 as being a [sum] [and] further to the amount to be set off from the Claim of the Claimants (sic). The basis on which the Defendants make the latter claim is specifically outlined in an attachment to the Counterclaim. Thus, the aggregate sum counterclaimed is of the magnitude of $20,336,804.17 leaving an unopposed amount of $894,669.12".

THE AFFIDAVIT EVIDENCE

[17] In the instance case the Notice of Application for Court Orders for Summary Judgment was filed on July 1, 2013, along with the affidavit in support of the same date while the affidavit evidence in opposition was filed on January 23, 2014.

[18] It is to be noted that a further affidavit from Mr. Luther Williams one of the Respondents, was filed on the 3rd March 2014 in which he ostensibly is attempting to rely on Clause 35 of the Dealership Agreement in order to thwart the Application. The affidavit, in my view, flounders as it is not only filed and served too late to be relied on but raises issues as to the Arbitration clause contained in the Dealership Agreement which ought to have been made a part of the Defendant's pleadings.

[19] Nevertheless, from the affidavit evidence of Mr. Evert Palmer, Managing Director of the Applicant/Claimant, the claim arises from arrears for rental owed by the Defendants for the Claimant's premises at Main Street, Mandeville, Manchester, for the months of June and July 2012 in the amount of $349,500.00. Also, asserts this affiant, the claim further arises for recovery of monies owing to the Claimant by the Defendants in respect of goods sold and delivered in the course of business in the amount of $20,881,973.29. The above sums as claimed are not in dispute and the aggregate claimed is $21,231,473.29.

[20] According to this deponent, "the Claimant and the Defendants entered into a written agreement on October 10, 2011, shortly after the Claimant had acquired the business premises located at Main Street, Mandeville in the parish of Manchester from the personal representative of Estate Eric Sanderman, deceased. With respect to the said premises it was being used as a petroleum filling and service station under the brand name **Petcom** prior to and at the date of its acquisition by the Claimant whose was to continue its use as such under the changed brand name of **Unipet.** The use of the brand name **Petcom** by the

Defendants under the dispensation of Eric Sanderman was pursuant to an agreement between them and to which the Claimant was not a party.

[21 In a significant paragraph, the affiant states that, “In the course of the negotiations for the acquisition of the service station the Claimant negotiated for a new basis to continue operating a service station on the subject premises and this resulted in a written contract dated October 10th, 2011 signed by the Claimant and the Defendants without reservation or reference to any rights or obligations extrinsic to the written document”.

[22] The contract which the Claimant has with the Defendants, says the affiant, speaks specifically to the matter of goodwill at Clause 17(ii) as is reinforced by Clause 27(i)(E) of the said Dealership Agreement.

[23] The evidence on affidavit from Mr. Luther Williams speaks to his wife and himself as managing the said Gas Service Station under a Management Agreement and later through a lease of the gas station property extracted from Mr. Eric Sanderman (now deceased). He depones that after Mr. Sanderman’s death the said property was offered to for sale to he and his wife by the attorney’s-law who were handling the Sanderman’s estate but they were unable to accept the offer.

[24] However, continues this affiant, “During the execution of the sale agreement between **Unipet** and the executor of the estate, we met twice with the parties. At these meetings **Unipet** indicated that they would like us to continue our lease of the premises with a dealership from them … we did not discuss compensation for goodwill in the business as goodwill remained vested in my wife and me.”

[25] The counterclaim for goodwill has only arisen, says he, due to the termination of his tenancy at the location and the transferring of “my business to

new owners at the location." Further, he bemoans, "The new business owners now benefit from the connections we established and the reputation we have built up at that location. Given that out ownership of the business was continuing at the time of the negotiations of the Dealership Agreement, we were under no obligations to mention our claim for goodwill at that time. If anyone had an obligation at the location, it would have been the Estate of the former landlord who passed his obligation to compensate my wife and me for goodwill in the business at that location to the new landlords."

[26] He ends by stating that he is informed by his Attorney-at-law that where the basis of his claim lies in industry practice, which is an implied term of the Dealership Agreement, the matter must be resolved at trial so that the Honourable Court may have an opportunity to hear evidence from industry players on the circumstances on which goodwill is plaid at the termination of the lease of the gas station, whether the relationship created by the leasehold has passed under priority of estate to the Claimant for the estate of the Eric Sanderman; and the basis and methodology used in quantifying goodwill that ought to be awarded.

[27] As I did not find favour with the Defendants submissions, I will now advance my reasons therefor. I accepted, without reserve, the Claimant's submissions. I find that they are in consort with the law

[28] To begin with, I am to say that the filing of a further affidavit on 3rd March 2014, which plainly runs afoul of Rule 15.5(2), stymies any reliance being attached to it. However, having so noted, the defendants though Mr. Luther Williams, have sought to avail themselves of Clause 35 of the Dealership Agreement which contains an arbitration clause.

[29] Let the first observation be that the Dealership Agreement expressly excepts claims by **Unipe**t for monies due in respect of goods supplied. Then,

also observe that, the Arbitration Act does not permit the ouster of the Court. Rather, it facilitates an application for a stay of proceedings before the Court.

[30] Further, the Defendants have not filed an application for a stay of proceedings before the Court.

[31] Furthermore, under Section 5 of the Arbitration Act, an application for a stay of proceedings does not apply where such an applicant has filed pleadings: "If any party to a submission, or any person claiming through or under him, commences any legal proceedings in the court against any other party to the submissions, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking any other steps in the proceedings, and the Court or a Judge thereof, is satisfied that there is no sufficient reason why the matter sho8uld not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying that proceedings."

[32] Again, it has to be observed that in respect of the Defence and Counterclaim that the Defendants have also filed amendments thereto. Accordingly, the Defendants have thereby submitted to the jurisdiction of the Court. In **Parker, Gaines & Company Limited v Turpin** [1918] 1 KB 359, the point is made that, in a context where "a party to a written contract containing an agreement to refer disputes to arbitration was sued for breach of contract", he being unaware that the contract contained an agreement to refer, but who, on becoming aware, pursuant to a Court Order for mutual discovery, applied for a stay of proceedings in the action, "that he had taken a step in the proceedings within the meaning of S.4 of the Arbitration Act 1889, and therefore was not entitled to a stay."

THE LAW

THE TEST FOR ENTERING SUMMARY JUDGMENT

[33] A summary judgment application is governed by Part 15 of the CPR. In particular, reads Rule 15.2, "The court may give summary judgment on the claim or on a particular issue if it considers that –

a. The Claimant has no real prospect of succeeding on the claim or the issue or,

b. The Defendant has no real prospect of successfully defending the claim or the issue."

[34] The necessary evidence for the purpose of summary judgment hearing, as per Rule 15.5, is that the Applicant must file affidavit evidence in support with the application and such an applicant must also serve copies on a party against whom summary judgment is sought not less than 14 days before the date fixed for hearing of the application. A respondent who wishes to rely on evidence must file affidavit evidence and serve copies on the Applicant not less than 7 days before the summary judgment hearing.

REAL PROSPECT OF SUCCESS

[35] As has already been adverted to, the test for entering summary judgment is whether the respondent has a case with real prospect of success.

In **Swain v Hillman** [2001] 1 All.E.R. 91 Lord Woolf said that the words "no real prospect of succeeding' did not need any simplification. The word "real" directed the Court to the need to see whether there was a realistic prospect of success –

not a fanciful prospect of success. Nor does it mean that summary judgment will be granted if the clam or defence is 'bound to be dismissed at trial'. Nor does it require compelling evidence. All that is required is enough evidence to raise a real prospect of a contrary case.

[36] In the instant case the Defendants have raised the equitable defence of set-off based on 'goodwill created by the way the Defendant operated the business …", it being an implied term, as per paragraph 3 of the Amended Counterclaim that, "where the contract was terminated by the landlord, the landlord of the Service Station would be liable under the contract, by virtue of industry practice, to pay the tenants of the service station who built a strong business at the location, a sum of money, that is goodwill, for the loss of the business by the tenant at the service station at that location."

[37] I deem it apposite that I now look at the defence of Set-off and then at the concept of goodwill

[38] What is a Set-Off?: A legal set-off is where there are mutual debts between the claimant and the defendant where one debt may be set against the other.

[39] Thus, a set-off and counter claim confer definite and independent remedies upon a defendant against the plaintiff: **Pellas v Neptune Marine Insurance** 5 C.P.D. 39, per Brett, J. The following are the recognized set-off scenarios: mutual funds; sale of goods; on a claim for the price of services; arrears of rent and equitable set-off.

I shall here say without impudence that an equitable set-off is an-all-or nothing defence to the extent it is in any way sustainable in law. It arises where there is a close commercial relationship between the parties: **Benford Ltd v Lopecan SL** [2004] EWHC 1897 (Comm.) [2004] 2 Lloyds Report 618.

[40] Now what is this legal commercial cncept called ‘goodwill’ of which the Defendants speak?

[41] The goodwill of a business may be taken, in the words of Lord Eldon in **Cruttwell v Lye** 17 Ves. 335, as the probability that the old customers will resort to the old place. It is the very sap of life of the business without which the business would yield little or no fruit, it is the attractive force which brings in custom: per Lord MacNaughton in **Inland Revenue v Muller** [1901] A.C. 224. The goodwill of a business means every affirmative advantage that has been acquired in carrying on the business, whether connected with the premises of the business, or its name or style, and everything connected with or carrying with it the benefit of the business: per Wood V.C. in **Churton v Douglas** 28 L.J Ch. 845.

[42] It has to be borne in mind that the asset class – goodwill – is a chose in action which involves the value of a business.

In the current case the Defendants are asserting, while they owe a debt for goods supplied that they have developed goodwill in the business which they operated at the premises wherem according to the first Defendant, he had been operating at the premises under an arrangement with a third party prior to doing business with the Claimant. Further, that it arose independently of the supply of goods.

[43] In engaging summary judgment applications it is made abundantly clear that where a cross claim is presented which is unconnected with the claim, judgment should be entered in favour of the claim. Thus, in **Esso Petroleum Co. Ltd v Milton** [1997] 2 All.E.R. 593 the Court of Appeal held that in order for a defendant to be able to rely on equitable set-off, his counter-claim had to be closely connected with the transactions as that giving rise to the plaintiffs claims,

and the relationship between the respective claims had to be such that it would be manifestly unjust to allow one to be enforced without regard to the other.

The facts from which the stated principles are mined are that the plaintiff owned a chain of garages. The defendant occupied and managed two of the garages under licence agreements. Under the agreements the defendant was to pay for the motor fuel supplied by the plaintiff on or before delivery. He would do so by bankers direct debit. The plaintiff made the deliveries to the defendant who in spite of his non-payment for the deliveries cancelled his direct debt mandates.

[44] The plaintiff sued to recover the outstanding amount and also sought summary judgment against the defendant. The defendant admitted the claim but alleged that the plaintiff had imposed upon him stringent financial terms which forbade his being able to operate the two garages profitably. He thereby asserted a repudiatory breach of contract and counterclaimed for damages for future loss which he sought to set-off. The first instance judge dismissed the plaintiff's application for summary judgment and granted leave to the defendant to defend on the basis that there was a properly arguable counterclaim.

[45] The Court in coming to its decision had earlier said that, since modern commercial practice was to treat a direct debit in the same way as a payment by cheque and, as such, the equivalent or cash, the effect of cancelling a direct debt was the same as countermanding payments by cheque. Accordingly, since a mere right to set-off could never constitute a defence to a claim on a dishonoured cheque, it could not do so either to a claim following a cancelled direct debit.

[46] From the case at bar I am to say that the facts thereof cannot overwhelm the principle enunciated in the **Esso** case, *supra.* This is so as in the instant case the Claimant sued the defendants for liquidated amounts which the defendants admit owing. However, by the defendants insinuating into the traverse of the defence and counter-claim the defence of set-off based on

goodwill is, in my estimation, nothing more than a transparent effort to avoid what is prescribed by cited authority.

[47] It seems to me to be the case that the Defendants defence is based on a contract between the Claimant and a third party through which the property housing the service station was purchased by the Claimant. On closer scrutiny, the Defendants take the view that as they had rented the service station which was subsequently acquired by the Claimant from the estate of the previous owner, that fact somehow entitled them to advance a counterclaim on the basis of goodwill. But observe that the generic business had been operated by another on the said premises and building who the Defendants succeeded under the specific brand name of **Petcom**. This latter contract specifically excluded from its terms any right of goodwill from its operators. Thus, when the service station ws sold the Defendants did not claim goodwill.

[48] In any event in order for he Defendant to maintain that their rights accruing from the **Petcom** Agreement continued into the newly established relationship with the Claimant t5hey would need to establish first, whether there were privity of contract by the Claimant to the contract between the Defendants and the third party and, second, whether the right of the Defendants against such a third party for compensation for any asset so transferred, including goodwill, were assigned.

[49] As to the question of whether there was privity of contract by the Claimant to the contract between the Defendant and the third party it is evident from the pleadings that there is no such contractual relationship

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[50] As to the question of the assignment of any compensation for goodwill, if any, I need only say it is trite law that the common law does not countenance the transfer of choses in action. The point elaborated upon by Mr. Watson that the rights of action at common law could only have passed delivery of the instrument

where the instrument was negotiable or the instrument is given statutory protection, is not only well made but comports with my understanding of the law.

[51] Further, the right of assignment of a chose in action will only be enforced by a Court of Enquiry where express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or thing in action: See S.49(f) of the Judicature (Supreme Court) Act.

[52] It is significant to keep in mind that here, no notice of any assignment of any claim to goodwill was given by either the third party who sold to the Claimant or by the Defendants.

[53] Allied to the above observations I shall here point out from the pleadings and affidavit evidence some salient and irrefutable facts, facts which I again stress, that cannot be overwhelmed by the equitable demand of set-off.

[54] First, the subject service station was purchased by the Claimant from a third party.
Second, the Defendants were well aware of the said purchase of the service station.
Third, the Defendants, though seized of that patent fact, failed to assert any clam to goodwill.
Fourth, the contract does not provide for the payment of goodwill to the Defendants.

Fifth, the Defendants have by their pleadings, latterly and belatedly, raised the equitable claim of goodwill. Bearing in mind all the above, the equitable principle is not only that to delay is fatal but that notice of assignment is a strict procedural requirement for enforcing such a claim under the jurisdiction of the Supreme Court.

[55]] Significantly, the Defendants were not a party to the contract between the Claimant and the third party and accordingly cannot enforce any benefit or right emanating therefrom

[56] In fact in the agreement entered into by the Claimant and the Defendants, the Defendants agreed to pay rent to the Claimant and to pay for goods sold to them by the said Claimant. To this the Defendants have admitted their indebtedness to the Claimant and are in arrears. Such an admission, I should think, is peremptory and ought to inform that judgment be entered on admission in favour of the Claimant.

[57] Observe, however, that neither the contract for rent nor that for operating the dealership contained any provision or notice that the Defendants were claiming goodwill from anyone including the Claimant or indeed the Claimant's predecessor in title. This, to my mind, is a singular, if not eccentric omission.

[58[According to the **Esso** case, *supra*, what is required when a defendant relies on an equitable set-off is that his counterclaim had to be so closely connected with the same transaction giving rise to the plaintiff's claim.

[59] In the instant case, the facts simply fail to resonate with the required closeness between the Defendants being supplied with the goods by the Claimant and that of goodwill arising out of the Defendants operating the station.

[60] In the upshot then, the Defence and Counter-claim for goodwill have failed to lodge and are unsustainable. In consequence the claim for summary judgment succeeds. The Claimant/Applicant is to have its costs agreed or taxed.