Neutral Citation Number: [2015] EWCA Civ 1908

Case No: A3/2014/1253

**IN THE COURT OF APPEAL (CIVIL DIVISION)**
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**
**QUEEN'S BENCH DIVISION MANCHESTER MERCANTILE COURT**
**His Honour Judge BIRD (sitting as a Judge of the High Court)**
**3MA40141**

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17/12/2015

**Before :**

**LORD JUSTICE LAWS**
**LORD JUSTICE KITCHIN**
and
**LORD JUSTICE CHRISTOPHER CLARKE**

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**Between :**

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| **Bibby Factors Northwest Limited** | **Appellant** |
| **- and -** | |
| **HFD Limited and Anr** | **Respondent** |

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**Simon Mills** (instructed by **Bermans**) for the **Appellant**
**Edward Brown** (instructed by **Pinsent Masons LLP**) for the **Respondent**

Hearing dates: 7th October 2015

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# Approved Judgment

## LORD JUSTICE CHRISTOPHER CLARKE:

1. Morleys Limited ("the Supplier") supplied goods to HFD Limited and MCD Group Ltd ("the Customers"). Bibby Factors Northwest Limited ("Bibby) is a factor.

2. By clause 2 of a Factoring Agreement dated 6 March 2000 Morleys agreed to sell and Bibby agreed to buy "*all the Debts, referred to in the Particulars, which are in existence at the Commencement Date or which afterwards arise during the currency of this Agreement*". Under the Agreement "*Debts coming into existence after the Commencement Date*" were to vest in Bibby "*automatically upon their coming into existence*".

3. On 4 July 2013 Morleys went into administration.

4. On 11 October 2013 Bibby began proceedings against the Customers for failing to pay them £ 281,919.35 due in respect of supplies made by the Supplier. On 29 October 2013 the Customers served a defence and counterclaim in which they raised three matters. They claimed:

   i) that they were entitled to a rebate from the Supplier of 10% of the price payable by the Customers for every supply made in a given calendar year which was payable by the Supplier in January of the following year;

   ii) that if payment was made in accordance with the Supplier's terms they were entitled to a discount of 2.5%; and

   iii) that they had raised certain Debit Notes for faulty goods for which they were entitled to credit.

5. The amounts which the Customers sought to set off under these heads were (i) £ 242,175; (ii) £ 6,967.37; and (iii) £ 32,555.

6. Bibby relied on what was described as a "take-on letter" said to have been written at or about the time of the Factoring Agreement. There is a dispute between the parties as to whether the Customers ever received a copy of this letter. The Customers produced 17 emails from financial controllers at various branches which denied receipt of the letter. Bibby could no longer find a copy of the letters said to have been sent in March 2000; but said that such letters were automatically generated by computer when the Customers' details were entered onto the system. For the purpose of the application for summary judgment the judge proceeded on the assumption that the take-on letters had been received.

7. The letter (a 2013 copy of which was available) included the following terms:

> "*We write to introduce ourselves as factors to your supplier Morleys Limited. Please see the attached letter of confirmation and statement of your account. Under the terms of the Factoring Agreement and security of a Debenture all present and future debts are legally assigned to us.*
>
> *Please note from today onwards payment and queries relating to your account should be addressed to this office and right of set-off in respect of any sale you make to our client is not permitted. We respectfully put you on notice that a*

> *valid discharge of your liability can only be obtained by making payment to us. Payment sent to our client will not discharge your liability.*"

8. Bibby also relied on (i) a letter or letters said to have been sent in March 2000 informing the Customers of the Factoring Agreement and that all debt of Morleys vested in Bibby on creation, as a result of which all monies had to be forwarded to Bibby to obtain a valid discharge; and (ii) a sticker which was said to have been affixed to all invoices raised by the Supplier on the Customer.

9. As to the latter, the invoices were sent by Morleys to Bibby so that Bibby could affix the stickers, and they were then sent by Bibby to the Customer. The sticker recorded that the amount payable under the invoice had been purchased by Bibby to whom the Customer was authorised and requested to make payment. It also warned the Customer that the Factor "*alone can give a valid discharge and should be advised immediately of any dispute likely to defer payment beyond terms of sale*". It was said by Mr Jones, a financial controller of Headlam Group Plc, that "*it is our experience that not every invoice received from Bibby had the sticker attached*".

10. In addition notice of assignment was given on the monthly statements of account sent by Bibby to the Customers. Bibby also said that between March 2000 and April 2013 purchase ledger controllers of the Customers at various branches had regularly confirmed that the balances of which they gave details took into account any valid Debit Notes and would be paid when due. No mention of the rebate was ever made in these conversations. The existence of the rebate was said to have been raised as a reason for non-payment for the first time just before Morleys went into administration.

11. The Customers sought summary judgment in respect of the entirety of Bibby's claim. Bibby sought summary judgment on the rebate issue alone. On 29 January 2014 these applications came before HHJ Bird, sitting as a judge of the High Court in the Mercantile Court in Manchester.

12. By a judgment dated 12 March 2014 the judge gave summary judgment in favour of the Customers in respect of the rebate point and the Debit Notes but held that the issue in relation to early settlement discount would need to proceed to trial.

13. The judge set out section 136 of the *Law of Property Act 1925* which provides:

> "*136.--(1) Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of, charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice-*
>
> *(a) the legal right to such debt or thing in action;*
>
> *(b) all legal and other remedies for the same; and*
>
> *(c) the power to give a good discharge for the same without the concurrence of the assignor …*"

14. Having done so he referred to a passage in *Chitty* (para 19-070) in which the editors say that:

> "*… where a claim arises out of the contract under which the debt itself arises, and the claim affects the value or amount of the debt which one of the parties purported to assign for value, then, if the assignee subsequently sues, the other party to the contract may set up that claim… by way of defence against the assignee as cancelling or diminishing the amount to which the assignee asserts his rights under the assignment…*"

and to the view of Professor Goode that this was an application of the principle that the assignor could not transfer greater rights than he himself possessed and was distinct from the rule that the assignee takes subject to equities having priority over the right of the assignee.

15. The judge then said that the proper approach to be taken in respect of a factor and his customers was set out in *Business Computers Ltd v Anglo African Leasing* [1977] 1 WLR 578 where Templeman J, as he then was, said:

> "*The result of the recent authorities is that a debt which* ***accrues due*** *before notice of an assignment is received whether or not it is payable before that date,* ***or*** *a debt which arises out of the same contract as that which gives rise to the assigned debt or is closely connected with that contract may be set –off against the assignee. But a debt which is neither accrued not connected may not be set-off even though it arises from a contract made before the assignment.*"

16. In relation to the defence of equitable set off the judge took the required degree of closeness between claim and cross claim from the decision of Rix LJ (with whom Patten and Maurice Kay LJJ agreed) in *Geldof Metaalconstructie NV v Simon Carves Limited* [2010] EWCA Civ 667; [2011] 1 Lloyd's Rep 517. In that case Rix LJ said at [43]:

> "*(v) Although the test for equitable set-off plainly therefore involves considerations of both the closeness of the connection between claim and cross-claim, and of the justice of the case, I do not think that one should speak in terms of a two-stage test. I would prefer to say that there is both a formal element in the test and a functional element. The importance of the formal element is to ensure that the doctrine of equitable set-off is based on principle and not discretion. The importance of the functional element is to remind litigants and courts that the ultimate rationality of the regime is equity. The two elements cannot ultimately be divorced from each other. It may be that at times some judges have emphasised the test of equity at the expense of the requirement of close connection, while other judges have put the emphasis the other way round.*
>
> *(vi) For all these reasons, I would underline Lord Denning's test, freed of any reference to the concept of impeachment, as the best restatement of the test, and the one most frequently referred to and applied, namely: "****cross-claims…so closely connected with [the plaintiff's] demands that it would be manifestly unjust to allow him to enforce payment without taking into***

> ***account the cross-claim****". That emphasises the importance of the two elements identified in Hanak v. Green; it defines the necessity of a close connection by reference to the rationality of justice and the avoidance of injustice; and its general formulation, "without taking into account", avoids any traps of quasi-statutory language which otherwise might seem to require that the cross-claim must arise out of the same dealings as the claim, as distinct from vice versa. Thus, if the Newfoundland Railway test were applied as if it were a statute, very few of the examples of two-contract equitable set-off discussed above could be fitted within its language. I note that in Chitty on Contracts, 30th ed, 2008, Vol II, at 37-152, the test for equitable set-off is formulated in terms of Lord Denning's test*"

17. Before the judge Mr Sinnett, who then appeared for Bibby, conceded that there was a close connection between the Supplier's claim (in effect brought by the Factor) and the Customer's cross claim to a rebate. But he submitted that there would be no manifest injustice in allowing Bibby to recover on the claim without regard to the cross claim. This was because, although the Customers knew that Bibby had taken an assignment of the debts owed to the Supplier, they never brought the rebate arrangement to Bibby's attention. The sticker imposed an obligation on the Customers to notify Bibby of the rebate arrangement. Further, between March 2000 and January 2013 exchanges took place between Bibby and the Customers in which Bibby sought confirmation of the balance of account and, whilst told what it was, was never told about the rebate. These matters were such that no equitable set off arose; alternatively they gave rise to an estoppel.

*Equitable set off*

18. In relation to equitable set off the judge was satisfied [34] that the sticker imposed no obligation on the Customers to reveal to Bibby the rebate arrangement. Although the request was phrased as an apparent obligation ("*should be informed*") the sticker was in truth simply a request. There was no contract between Bibby and the Customers and no extra contractual basis on which any obligation to inform could arise.

19. The judge held that the verifications of balances given between March 2000 and January 2013 could not sensibly be interpreted as any kind of assurance, promise or representation that there was no rebate arrangement. The verification required a ledger balance to be given. It was not suggested by Bibby that the balances quoted, which dealt with sums outstanding on purchase invoices in any given month, was factually incorrect. The rebate was payable in January each year on the totality of sales by the Customers in the previous year. There was no reason why the Customers should reflect the rebate in the figures recorded on the ledgers. Bibby was under an obligation to make its own enquiries and the Customers were under no obligation to raise the question of the rebate.

20. The judge was satisfied that the claim to the rebate was so closely connected with Bibby's demand that it would be manifestly unjust to allow Bibby to enforce payment without taking account of the rebate cross claim. All the sums claimed by way of rebate had fallen due by January 2014. If the Supplier had brought an action against the Customers for payment of invoices after January 2014 the customers would have been entitled to set off the sums due on the rebate and Bibby could be in no better

position. The judge was fortified in his conclusion because, so he held, the claim and cross claim almost certainly arose out of the same contract.

*Estoppel*

21. The judge referred to Lord Diplock's formulation of a threefold test in *Lowe v Lombank* [1960] 1 W.L.R. 196. The first test was: Did the Customers make a clear and unambiguous representation to Bibby? Applying that test he was satisfied that there was no clear and unambiguous representation by the Customers to Bibby that no right of rebate existed or that no such right would be relied on. At best a representation about the state of the account at any given point was ambiguous with regard to the existence of a rebate. Failure to tell Bibby about the rebate did not amount to any representation, there being no obligation on the Customers to disclose it.

*Independent set off*

22. Although in the light of his findings the judge did not need to do so he went on to consider the question of independent set off. Mr Sinnett had argued that the initial notice given in March 2000 operated as notice of assignment of all future debts so that any cross claim arising after that notice was given could not be set off. The matter could not, however, finally be determined in Bibby's favour in any event because there was a triable issue as to whether that notice had been given.

23. The judge would, had it been necessary, have decided that the rule in *Roxburgh v Cox* (1881) 17 Ch D 520 applied, namely that an attempt to assign a future debt will be construed as a contract to assign and will bind the debt as soon as it comes into existence. So the assignee of a future debt cannot give a notice of the assignment which is effective to prevent a set off until the assigned claim comes into existence. It is not clear to me what consequence the judge would (on the assumption that the take-on letters had been received) have thought flowed from that proposition in this case so far as the validity of any independent set off was concerned.

24. In the result the judge was satisfied that summary judgment should be granted to the Customers in respect of the deductibility of the rebate and also in respect of the £ 32,555 worth of Debit Notes, but not the early settlement discount, given that there was a dispute as to whether or not the invoices had been paid on time.

*To whom was the rebate payable?*

25. An issue that was raised before us was whether the rebate was payable to the Customers or to Headlam Group Plc, their parent company. The judge did not address this issue because it was not raised before him. Paragraph 5 of the Defence had pleaded that each individual sale contract included a rebate term namely that *the Defendants* i.e. the Customers were entitled to a rebate equivalent to 10% of the total sale contract price. In their Reply Bibby made no admission as to the Rebate Term asserted in the Defence but averred that, if the Customers were able to prove it, then the contractual effect of such arrangement was that the Customers would pay the full value of the Morley invoices assigned to Bibby and as a separate and free standing contractual obligation Morley would pay the amount due under the rebate to the *Defendants*.

26. There was plenty of evidence as to the rebate term. In paragraph 3.9.3 of his witness statement of 29 October 2013, the date of the defence, Mr Brewer, the Chief of Executive of Headlam Group Plc, gave evidence that rebates of 10% were paid to Headlam in 2008, 2009, 2010, 2011 and 2012. It is true that in paragraph 1 of this statement he referred to "*Headlam Group Plc ("Headlam")*". But in the second sentence of the same paragraph he said that "*For convenience I refer to "Headlam" below, save where it is necessary to refer specifically to either defendant*". Whilst the drafting is maladroit, in context and having regard to the references to "Headlam" in the body of the witness statement, that must mean that the reference in para 3.9.3 is to the two defendant companies.

27. Similarly in her witness statement of 5 December 2013 Ms Farrell of Bibby said, at [16], that it did not appear to be substantially in dispute that "*(c) (subject to Bibby putting the Defendants to proof) Morleys had a rebate arrangement with the Defendants which was settled by Morleys making payment direct to the Defendants in 2008, 2009, 2010, 2011 and 2012 (Brewer paragraph 3.9.6)*". If Bibby had pleaded (or raised in evidence the suggestion) that the payments were made to the parent company, the Customers could have produced the accounts which, we were told, showed that the rebates were paid in respect of the individual company accounts.

28. In those circumstances I do not regard it as open to Bibby now to say that the rebate was or may have been payable to the parent company. In any event the evidence shows that it was not.

*Discussion*

29. An assignment of future debts is effective in equity: *Tailby v Official Receiver* (1888) 13 App Cas 523. It is not necessary to decide whether such an assignment is a good assignment for the purposes of section 136, as Lord Alverstone LCJ thought to be the case (*obiter*) in *Jones v Humphreys* [1902] 1 KB 10, 13; and as appears to have been conceded by counsel in *Pfeiffer GmbH v Arbuthnot Factors Ltd* [1988] 1 WLR 150 and, initially, by Mr Mills in his first skeleton argument on appeal. The classic view is that only an existing chose can be assigned; but equity will enforce a promise for consideration to assign a future chose; and there will be an assignment in equity so soon as the property comes into the hands of the assignor, but not before: *Snell* (33rd edition) 3-030-032; *Raiffeisen Zentralbank Osterreich AGG v Five Star Trading LLC* [2001] AC 825 at [75]. No point was taken that Morleys should have been a party to the suit; and Bibby will take subject to equities whether the assignment is effective under the statute or only in equity.

30. An assignee of debts, such as a factor, will seek to recover the whole of the debt assigned. He may fail to do so for at least four reasons. First the debtor may show that the money claimed is not due, in whole or in part, either because of some substantive defence or some right of abatement. Second, the debtor may have a contractual right of set off.

31. Third, the debtor may have a cross claim which equity will regard him as entitled to set off against the debt such that only the balance may be claimed. If so, and subject to any question of estoppel, the factor, as assignee, can be in no better position than his assignor, whether the assignment takes effect as a statutory assignment or in

equity. It is no matter that the cross claim had not accrued due before the debtor had notice of the assignment.

32. Fourth, the debtor may have a cross claim which is independent of the claim against him in the sense that it does not fall into the category of a claim which forms the subject of an equitable set off. In such a case the factor/assignee cannot successfully be met by a cross claim which arose after the Customer/debtor had notice of the assignment.

33. We are presently concerned with claims in the third and, possibly, the fourth categories.

*Equitable set off*

34. The test for whether the facts give rise to equitable set off is that stated in *Geldof*. There are passages in the judgment below which, with respect, appear to me somewhat confused. Thus in [39] the judge said that equitable set off is "*not an equity and the right to raise it against the Factor is a facet of the nemo dat rule*". At [26] he said that the obligation to reveal the set-off was relevant when considering whether an estoppel arises and was unlikely to be relevant to the question of equitable set-off because that question "*(per Goode para 13 above) does not concern "equities" and because (per Geldof) issues of justice are relevant only to the question to issue of proximity*".

35. At [32] and [41] the judge said, somewhat puzzlingly:

> "*32 It seems to me that the Factor's concession of a close connection is in reality not a concession. It is premised on there being a 2 stage test to determine the existence of an equitable set off. The Factor's position is that a concession on the first element of the test (closeness) is not an end of the matter because issues of injustice must then be considered separately. For the reason that I have given it seems to me that that approach is mistaken.*
> …
>
> *41 There is no doubt that in considering whether an estoppel arises I must consider the dealings between the Factor and the Customers. The estoppel is an "equity". In my judgment it is under this heading that issues of "justice" are to be taken in to account*".

36. I suspect that the words used in [26] and [39] arise from a misunderstanding of a passage in *Goode* in which Professor Goode explains that the rule that the assignee takes *subject to defences* is simply an application of the *nemo dat* rule. He then goes on to consider three other rules in relation to defensive rights, one of which is that the assignee takes "*subject to equities having priority over the right of the assignee*". A set off of the kind now under consideration *is* an equity.

37. It is also incorrect to suggest that it is only in relation to estoppel that any issue of justice is to be taken into account. There is a single test for equitable set off but it has two elements. The composite test is whether the "*cross-claim is…so closely connected with [the plaintiff's] demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim*". As Rix LJ put it in

*Geldof* at (iv) "*it is not coherent to have a doctrine of equitable set off which ignores the need for consideration of aspects of justice and fairness*". It may be that in [32] the judge was saying no more than that the concept of justice has no wider application that is to be found in the composite test.

38. It does not seem to me, however, that any misunderstanding of the judge has led him into error. At [37] he applied the *Geldof* test. He was, in my judgment, right to hold that the Customers' claim to the rebate was a claim which, in equity, fell to be set off against the claim for the debt. The composite test *is*, in my view, satisfied. The rebate is due in respect, and as a percentage, of the several amounts which constitute the debts assigned. It is manifest that the Supplier could not demand payment without giving credit for the rebate that it had promised (if that rebate had accrued due). No more in my view, in this case, can the factor, which stands in the Supplier's shoes.

39. I entertain some doubt whether, as the judge found, the obligation to pay the rebate arises out of the same contract as that which gives rise to the debt. The correct analysis may be that there is an overarching agreement to pay the rebate in respect of goods paid for under contracts constituted by the several orders made by the Customers and the acceptance or fulfilment thereof by the Supplier. The alternative analysis is that it was a term of each contact to purchase goods that the Customers would be entitled to the rebate, the implication arising from the course of dealing between the parties. I do not think it necessary to determine this question. Either the rebate arose under the same contract or under an overarching contract. If the latter, the link between the two contracts was close to umbilical.

40. Bibby asserts that it would be inequitable for the Customers to rely on any set off in respect of the rebate and that they are estopped from doing so. It relies in this respect on a number of cases in which equity has not allowed a debtor to assert his defences against an assignee. In the light of these it submits that it would be unconscionable for the Customers to have the benefit of a set off of the rebate when for 13 years they had been in communication with Bibby about the debt outstanding from time to time and whether and when it would be paid and did not mention the rebate.

*Wilson v Gabriel*

41. In *Wilson v Gabriel & Ors* [1683] 4 B & S 240 the plaintiff assigned the freight which was to become due from the defendants to a third party whilst it was being earned. The defendants claimed to be able to set off a debt due to them from the plaintiff which had accrued due before they became indebted to the plaintiff for any of the freight. They were held entitled so to do. Lord Cockburn CJ said:

> "*I can conceive a state of circumstances in which equity would prevent a party setting off a debt, namely where, by his own act he has placed the assignee in a worse position than he was before i.e. if he stands by and allows the assignor to assign the debt to him knowing that there is a set-off. I quite agree that it is inequitable, and it is a rule that he who seeks equity must do equity*".

In the light of the next case this *obiter* observation is, in my view, too wide.

*Mangles v Dixon*

42. In *Mangles v Dixon* (1852) 3 HL Cas 702, 733-4 A owned a vessel which he chartered to B on terms that B would pay or procure the payment of the freight by bills of exchange to be provided at various intervals, and, upon the return of the ship home, B was to give a bill at 90 days for the balance of the freight. By a further agreement of the same date the profit or loss on the adventure was to be shared between A and B equally. The arrangement appears to have been interpreted as meaning that B should actually pay half the freight as the charter proceeded and that an account should be taken after the vessel's return in which B should be liable for half the freight and the loss or profit would be shared.

43. A assigned the charter to C, a bank. C gave notice of the assignment to B. B made payments under the charter. The vessel returned home but the adventure was loss making. A became insolvent. B claimed against C to balance the accounts of profit and loss as he would have been entitled to do viz a viz A. He was held to be entitled so to do.

44. The Lord Chancellor held that it was not incumbent on B, when notice of assignment was given, to tell C that there were beside the charter party two agreements which provided for the sharing of profits and losses. *Prima facie* the obligation was on C to make inquiries. However;

> "*if that notice of the bankers had shown that they had been deceived, that they were advancing money upon a ground which they misunderstood, and if the charterers….had stood by, well knowing that circumstance and had been silent, ... the case would be altogether different. It would then have been incumbent upon [B] to disclose the real circumstances of the case to [C] and if they did not do so, they would be just as much bound as it is now considered that they ought to be bound*".

He held however that there was no reason for B to suppose that A had been committing a fraud upon their bankers. He held that:

> "*the principle is perfectly clear, that where there is no fraud, nothing to lead to the conclusion in the mind of the party who receives the notice, that the party who gives it has been deceived and is likely to sustain a loss, I say it is clear that the former is not bound to volunteer information. I conceive that equity will not require the party who received the notice, impertinently almost, to interfere between two parties who have dealt behind his back, and who have never made any communication to him, or even seen him, on that subject*".

*Athenaeum Life Assurance*

45. In *Athenaeum Life Assurance Society v Pooley* [1858] 3 De G and J 294 debentures in a company were given to Mr Pooley in pursuance of an arrangement which was a fraud on the company. The debentures were bought in the market in the ordinary course of business. The purchaser was held disentitled to recover because he could obtain no better right than that of Mr Pooley. In the course of his judgment Lord Justice Knight Bruce observed that there might be exceptions to the rule that the purchasers could be in no better position than that of the original holder and that if the

assignee had made inquiries in the proper quarter (semble the company) before paying his money he might be in a better position. Lord Justice Turner observed

> "*that the persons liable to the demand may so act as to create against themselves an equity preventing the application of the rule; there may be such dealings between the assignee and the party originally liable as to preclude that party from insisting as against the assignee upon rights which he might have claimed against the assignor*".

*Conclusion*

46. I am satisfied that neither equity nor estoppel can avail Bibby in the present case.

47. Bibby contends that in deciding whether there was sufficient connection between the claims for debt and the cross claim for rebate it was necessary to take into account "*the justice of the case*"; that the judge failed to do so; and that, if that is taken into account, the link between claim and cross claim is not sufficient to justify a set off. The judge should have held that Bibby had a real chance of showing that the relationship of closeness between claim and counterclaim had been severed by reason of the fact that over a period of 13 years the customers had been involved in a process of verifying outstanding invoices listed in statements of account, in circumstances where the Customers knew that Bibby had purchased the debts.

48. I disagree. The relevant exercise is not a general decision as to the justice of the case. The question is whether the connection between the claim by the Supplier and the cross claim by the Customer is so close that it would be unjust to allow the Supplier (and hence Bibby) to maintain the one without giving credit to the Customer for the other. The putative victim of such injustice is the debtor. On that question the answer is, in my view, plainly in the affirmative. It does not seem to me, any more than it did to the judge [39], that the action or inaction of the Customers towards Bibby can, in the present case, sever the link.

49. The giving of a rebate in respect of orders is a common occurrence. Bibby was entitled to contract with Morley on terms that there should be no rebate. It did not do that in so many words. However, the Factoring Agreement provided for the delivery of a Debt Schedule, and such delivery was, in relation to each Debt shown in it, to include a number of warranties including that "*payment of the Gross Amount of the Debt is an existing and binding obligation of the Customer and the Debt will not be reduced*" 8 (b) (i); and that "*the Goods have been delivered and to the best of the Client's knowledge , the Customer … will pay the Debt without any dispute or set off or claim*" 8. (b) (iii); and that "*the Debt … is unencumbered by any … other right which affects or may affect the Debt*": 8 (b) (iv). If Bibby wished to be told of rebates it could have contracted on terms that required the Supplier to give them that information. It could simply have asked the Supplier whether there were any rebate arrangements. It could have asked the Customers: noticeably the take-on letter did not do so.

50. But Bibby had no contract with the Customers. It is not suggested that the Customers ever saw the Factoring Agreement before the present dispute; and they were under no duty to inform Bibby of the rebate arrangements in contracts to which Bibby was not a party: see *Mangles v Dixon*. (No such duty was pleaded). Nor do I accept that there

are grounds to suppose that Customers knew that Bibby had been deceived as to the existence or otherwise of a rebate because it did not feature on the invoices; or that the Customers were in some other way fraudulent.

51. The fact that the take-on letter said that "*any right of set-off in respect of any sale you make to our client is not permitted*" does not avail Bibby. Whether any such right arises depends on the operation of equity in respect of the relation between Supplier and Customer. It does not depend on the permission of Bibby, a stranger to that contract. Bibby contends that the Customers must be taken to have known from the take-on letter that Bibby took the view that no set-off would be allowed, and that higher management should have ensured that Bibby was told that debt verifications were all subject to the rebate arrangements, the existence of the rebate arrangement being relevant to Bibby's decision whether or not to advance further funds.

52. The fact that Bibby sought to prohibit set off (which they had no power to do save by agreement with the Customers) does not seem to me to give rise to any obligation on the part of the Customers either to tell Bibby that they could not do that or to volunteer information about the rebate.

53. *Mangles v Dixon* makes clear that where there is no fraud (as would or might arise if the debtor knew that the assignee was being deceived) it is not incumbent on the debtor to volunteer information about the position as between him and the assignor. There is no realistic prospect of establishing fraud or anything like it in the present case. (Nor is any such allegation pleaded.).

*Estoppel*

54. In agreement with the judge I do not think it possible to construct from the communications between the parties, or the manner in which the Customers have conducted themselves, a clear representation as to the absence of any rebate. Confirmation by the purchase ledger controllers at individual branches (the individuals to whom Bibby spoke) of monthly balances did not address the quite different question as to whether any and, if so, what rebate would be payable in respect of the totality of sale prices. The evidence was that such controllers would not have access to the total figure on which the rebate was based. In circumstances where the Customers were under no obligation to volunteer information about their arrangements there is no room for implying into these communications some representation that the Customers would not rely on any rebate by way of set off. Nor can I regard the Customers as under a legal duty to tell Bibby of the rebate arrangements (on the footing, as was suggested, that the reasonable man would expect them, acting honestly and responsibly to do so) such that there was a duty to speak and an estoppel arose from their silence: *Spiro v Lintern* [1973] 1 WLR 1002.

*Independent set off*

55. In those circumstances it is not necessary to determine whether or not Bibby's claim may be invalid on account of independent set off, i.e. a right of the debtor which arises where the reciprocal claims do not arise out of the same or a closely connected transaction. As to that it would seem to me that any claim to rebate cannot accrue until the price, in respect of which the rebate is to be paid and which represents 10% of it, has, itself, been paid. When the price *is* paid the Supplier has an obligation to

pay the rebate in respect of it in January of the following year. The obligation to pay the rebate is then, in truth, *debitum in praesenti solvendum in futuro*. Since the assignment to Bibby, and notice thereof by the sticker on the invoices, will necessarily have preceded the payment of the price, the right to a rebate will not have arisen prior to either of those events so that independent set off is not available. The alternative view, namely that when the sale contract is made (at the latest by the acceptance of the goods) a right accrues to the Supplier in respect of the price and to the Customer in respect of the rebate, is not one which I presently favour.

*The Debit Notes*

56. The remaining issue is whether the Customers had provided adequate proof of the underlying claims that were the subject of the Debit Notes. In their Reply Bibby had admitted that the Customers were entitled to set off "*valid Debit notes properly impeaching the price of invoices which are the subject of this claim*", but put the Customers to strict proof of the amount of any such Debit Notes. Nothing further was pleaded or advanced in evidence.

57. The Customers had provided the Debit Notes to Bibby. The notes were not put before the judge but a schedule of them was. It distinguished between Customers and gave the number, date and value of the Notes and a description, being "Damaged Goods", "Wrong Goods", "Not Received" or "Wrong Price". No counter schedule was produced. Nor was it said that Bibby had no means of answering the schedule and that that was a good reason for not granting judgment.

58. Bibby accepts that the Debit Notes are evidence, but contends that they are insufficient proof of the cross claims. What was needed was an identification of the terms of the particular contract of sale and proof of the relevant cross claim. The judge held that the debit notes ought to be regarded as evidence of the matters they set out and that it was "*not good enough*" for the Factor to say that there were issues to be explored in order to obtain leave to defend.

59. In my view the judge was right. The defendants had produced the debit notes. They were pleaded in the Defence, which was supported by a statement of truth from Mr Brewer. They are evidence of the cross claims in like manner as an invoice may be evidence of the contract between the parties: *Holding v Elliott* (1860) 5 H & N 117. Nothing turns on the fact that physical copies of the Notes were not before the judge when they had been produced, pleaded, and spoken to in a witness statement; and nothing had been produced to contradict them or to provide grounds to believe that they were unreliable. In the absence of anything of that nature it was, in the circumstances of this case, I agree, not good enough simply to point to the incidence of the burden of proof.

60. In short the judge was right to hold that there was no real prospect of a defence succeeding other than in respect of the discount. Accordingly I would dismiss the appeal.

**Lord Justice Kitchin**

61. I agree.

## Lord Justice Laws

62. I, also, agree.