

Date: 1998 11 10
Docket: CV 06600

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

STITTCO UTILITIES NWT LTD.

Plaintiff
(Defendant by Counterclaim)

- and -

**AL'S TRUCK STOP LTD., and AL'S TRUCK STOP LTD.,
carrying on business under the firm name and style of
Al's Truck Stop**

Defendants
(Plaintiffs by Counterclaim)

- and -

CARTER INDUSTRIES LTD.

Defendant by Counterclaim

Defendant asserting its unliquidated negligence claim as equitable set-off against plaintiff's claim in debt. Equitable set-off disallowed, and plaintiff granted summary judgment.

Application heard: September 9, 1998

Reasons filed: November 10, 1998

REASONS FOR JUDGMENT OF THE HONOURABLE JUSTICE J.E. RICHARD

Counsel for plaintiff:	A. Wright
Counsel for defendant:	W. J. Kenny, Q.C.
Counsel for Carter Industries Ltd.:	S. Miller
(Defendant by Counterclaim)	

CV 06600

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

STITTCO UTILITIES NWT LTD.

Plaintiff
(Defendant by Counterclaim)

- and -

**AL'S TRUCK STOP LTD., and AL'S TRUCK STOP LTD.,
carrying on business under the firm name and style of
Al's Truck Stop**

Defendants
(Plaintiffs by Counterclaim)

- and -

CARTER INDUSTRIES LTD.

Defendant by Counterclaim

REASONS FOR JUDGMENT

[1] The plaintiff, in a debt action against the defendant, seeks summary judgment. The main issue on this application is whether a claim in negligence by the defendant against the plaintiff and another, which is contained in a counterclaim and for which the defendant claims set-off, is a bar to the plaintiff's request for summary judgment.

[2] A synopsis of the factual background is required. The plaintiff is a supplier of propane fuel and related goods and services in the town of Hay River, and the defendant is, or was, one of its customers. By agreement between the parties the plaintiff provided propane fuel and other goods and services to the defendant in the period November 1993 to April 1996. The plaintiff sent invoices and monthly statements to the defendant, which gave particulars of recent transactions and of the balance owing. The invoices totalled in excess of \$72,000. The defendant made periodic payments on account, though never in full satisfaction of the current outstanding balance. The defendant's last payment on account was made in February 1996. As at July 31, 1996 the outstanding

balance was \$49,718.26. This amount includes financing charges (apparently the plaintiff invoiced the defendant interest at 1.5% per month on amounts not paid within 30 days).

[3] On August 21, 1996 the plaintiff commenced these legal proceedings, seeking judgment for \$49,718.26 plus interest at 1.5% per month from July 31, 1996. The alternate interest claim is interest pursuant to the *Judicature Act* rather than at 1.5% per month.

Tort action by way of counterclaim

[4] In June 1995 the defendant Al's Truck Stop Ltd. and an associated company Aljon Holdings Limited commenced legal proceedings in this Court (CV 05851) against the plaintiff here Stittco Utilities NWT Ltd. and another party Carter Industries Ltd. The statement of claim alleges that the defendants named therein committed negligent acts in August 1992 whereby the plaintiffs named therein suffered damage.

[5] The factual foundation for the negligence claim begins in 1990. At that time Al's Truck Stop and Aljon took the initial steps in developing a business venture on Lot 1593 in Hay River. The proposed business venture was to include, *inter alia*, a service station/gas bar. In contemplation thereof, in 1990 Al's Truck Stop and Aljon installed two large underground petroleum fuel storage tanks. A large cement pad was installed above the location of the tanks. Ventilation pipes ran from the underground tanks through the ground cover and the cement pad and were affixed to the cement pad. The service station/gas bar was not ready to commence its business operations until August 1994.

[6] In 1992 Stittco, being a distributor of propane gas in Hay River, was in the course of extending its main underground distribution line to another sector of the town. The route of the distribution line "extension" passed by and adjacent to Lot 1593.

[7] Stittco hired Carter to install the gas line. Carter's work generally involved excavation, installing the line, and back filling. In the statement of claim in CV 05851 it is alleged that in carrying out this work Carter struck and dislodged the cement pad and/or the ventilation pipes. It is alleged that this in turn caused damage to and compromised the structural integrity of the underground storage tanks. It is alleged that there was water seepage into the tanks, and that the water froze, causing further damage. Al's Truck Stop and Aljon say that the full extent of the damage was not realized until 1994 when they were ready to fill the underground tanks with petroleum fuel products. In their statement of claim they allege that they suffered damage as a result of the negligence of

Carter for which negligence Stittco as principal is also liable, including the cost of removing and replacing the underground tanks, ventilation pipes and cement pad, and loss of business profits. In the statement of claim Al's Truck Stop and Aljon seek a damages award in excess of \$300,000.

[8] The statement of claim in CV 05851 was filed in June 1995. Each of the defendants Carter and Stittco filed a defence in September 1995.

[9] The within action, a debt action, was commenced by Stittco in August 1996 to recover the outstanding balance owing by its customer Al's Truck Stop. In October 1996 Al's Truck Stop filed a statement of defence and counterclaim. The defence is merely a general denial that the debt is owed. The defendant specifically denies agreeing to pay interest at 1.5% monthly on the outstanding balance. The counterclaim contains the identical allegations as made in the statement of claim in CV 05851. The pleading claims entitlement to a set-off.

Application for summary judgment

[10] The plaintiff's request for summary judgment is made pursuant to Part 12 of the **Rules of Court** and the following excerpts are pertinent:

R.174(1) A plaintiff may, after a defendant has delivered a statement of defence, apply with supporting affidavits or other evidence for summary judgment against the defendant on all or part of the claim in the statement of claim.

...

R.176(1) In response to the affidavit material or other evidence supporting an application for summary judgment, the respondent may not rest on the mere allegations or denials in his or her pleadings, but must set out, in affidavit material or other evidence, specific facts showing that there is a genuine issue for trial.

(2) Where the Court is satisfied that there is no genuine issue for trial with respect to a claim or defence, the Court shall grant summary judgment accordingly.

(3) Where the Court is satisfied that the only genuine issue is the amount to which the applicant is entitled, the Court may order a trial of that issue or grant judgment with a reference or an accounting to determine the amount.

(4) Where the Court is satisfied that the only genuine issue is a question of law, the Court may determine the question and grant judgment accordingly.

[11] The plaintiff in the sworn affidavit of Noel Demarcke establishes the existence of the outstanding debt. The defendant in response to this application for summary judgment files two sworn affidavits of Allan Johnson. Nowhere in those affidavits does Mr. Johnson dispute the existence of the outstanding debt which is the foundation of the within lawsuit (save the “interest” issue which I will discuss below).

[12] The real question, then, is whether the defendant can claim set-off by virtue of its negligence claim against Stittco and Carter.

[13] In my view of the matter there is no sufficient connection between the unliquidated claim of the defendant and the liquidated claim of the plaintiff. They do not arise out of the same transaction or the same contract. There is no equitable reason, within the defendant’s allegations in its counterclaim, to protect the defendant against the plaintiff’s demand for payment for goods and services provided. The clear *nexus* required for equitable set-off is missing. See *Abacus Cities Ltd. v. Aboussafy* (1981) 29 A.R. 607 (Alta.C.A.); *Coba Industries Ltd. v. Millie’s Holdings Ltd.* (1985) 65 B.C.L.R. 31 (B.C.C.A.); *Telford v. Holt* (1987) 81 A.R. 385 (S.C.C.).

[14] I accordingly am of the opinion that as a question of law, whatever be the merits of the negligence claim against the plaintiff, it does not constitute a proper set-off in the within action. The determination of this question of law can be made by examination of the pleadings and of the materials filed on this application and is expressly contemplated by Rule 176(4).

Claim for Interest

[15] I return to the issue of interest claimed at 1.5% per month on the outstanding balance. At the hearing of this application plaintiff’s counsel conceded that there was no express agreement to pay interest at that specific rate. He relies instead on the alternate claim for interest pursuant to the *Judicature Act*.

Conclusion

[16] The plaintiff's application for summary judgment is granted. Judgment will issue for that portion of the \$49,718.26 which represents goods and services provided, excluding interest or financing charges (the plaintiff's brief indicates this figure to be \$41,970.54). The plaintiff's judgment shall also include an award of interest in accordance with s.55 of the *Judicature Act* on any unpaid amount from 30 days after the rendering of the invoice/statement to the date of judgment. Finally, the plaintiff shall be entitled to its party and party costs.

J.E. Richard,
J.S.C.

Dated at Yellowknife, NT, this
10th day of November 1998

Counsel for plaintiff:	A. Wright
Counsel for defendant:	W.J. Kenny, Q.C.
Counsel for Carter Industries Ltd.: (Defendant by Counterclaim)	S. Miller

IN THE SUPREME COURT OF
THE NORTHWEST TERRITORIES

STITTCO UTILITIES NWT LTD.

Plaintiff

(Defendant by Counterclaim)

- and -

**AL'S TRUCK STOP LTD., and AL'S TRUCK STOP LTD.,
carrying on business under the firm name and style of
Al's Truck Stop**

Defendants

(Plaintiffs by Counterclaim)

- and -

CARTER INDUSTRIES LTD.

Defendant by Counterclaim

REASONS FOR JUDGMENT OF
THE HONOURABLE JUSTICE J.E. RICHARD
