BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

CV 150 of 2012

BETWEEN

JUNIOR WOOD TRUCKING SERVICES INC. **CLAIMANT**

AND

WINSTON BUTCHER **DEFENDANT**

Before Dr. The Hon. Madam Justice Sonia L. Richards, Judge of the High Court

2016: July 04, 11, 14, 18
September 19
October 10
2017: February 09
October 12
2019: March 12

Mr. F. Albert Pollard, Attorney-at-Law for the Claimant.
Mr. Chester L. Sue and Mr. Philip Gaskin, Attorneys-at-Law for the Defendant.

DECISION

Introduction

[1] The issue before the Court is whether the Defendant, having admitted

the debt sued for by the Claimant, is entitled to set-off an amount said to be owed to him by the Claimant.

Factual Background

[2] The Claimant is a company incorporated in Barbados with its registered office at 143, Roebuck Street, Bridgetown. Its business includes bobcat, backhoe, freighting and transport services. Junior Norman Wood ("Mr. Wood") is the Managing Director and sole director of the company.

[3] The Defendant is in the business of building and renovations. His business was formally known as Precision Contractors and Maintenance. After incorporation, the name was charged to Precision Contractors and Renovations Inc.

[4] By a claim filed on 30 January 2012, the Claimant alleged that the Defendant owed it $10,030.61 for goods and services provided to the Defendant. A total debt of $12,106.18 was claimed, inclusive of interest, court fees and legal costs.

[5] A defence and counterclaim were filed on 19 July 2013. The Defendant did not deny the debt to the Claimant. However, he disputed the claim on the basis that the Claimant owed him $20,175.38 for a chainlink fence which it destroyed. The Defendant alleged that he rented a piece

of land from the Claimant, which he had enclosed with a fence at his own expense. The Claimant breached the tenancy agreement and illegally removed the Defendant's fence. On this basis the Defendant wished to set-off the cost of the fence against the debt he owed to the Claimant. He counterclaimed for an outstanding balance of $10,144.77, after deducting the money owed to the Claimant from the cost of materials and labour used in constructing the fence.

[6] The Claimant filed a reply to the defence and a defence to the counterclaim on 31 July 2013. It denied the existence of any tenancy agreement between the parties, or the wrongful destruction of the Defendant's fence pursuant to the wrongful termination of a tenancy.

[7] On 24 April 2014, this Court dismissed an application by the Claimant to strike out the Defendant's plea of set-off in the counterclaim. However, judgment was entered for the Claimant on its claim, but the judgment was stayed until the determination of the counterclaim.

<u>The Evidence for the Defendant</u>

[8] The Defendant testified that around November 2008, he agreed to rent a piece of land at St. Barnabas in St. Michael from the Claimant. He was working on a project in the area and needed somewhere to store materials. Mr. Wood is said to have acted on behalf of the Claimant.

The annual rent was $50. The Claimant cleared the land at the Defendant's expense. The Defendant then fenced the lot and began storing his materials there.

[9] The Defendant's evidence is that soon after going into occupation of the lot, Mr. Wood told him that it was sold and that the Defendant would have to move. The Defendant said he told Mr. Wood that he had nowhere else to go and that Mr. Wood would have to give him time. Sometime after this conversation, the Defendant arrived at his home to find mangled fencing material blocking his driveway. It was the fence from St. Barnabas.

[10] The Defendant paid someone to remove the fencing from his premises. He believed that he was renting the land from the Claimant, and that Mr. Wood acted as the agent of the Claimant when the Defendant rented the land and when the fence was removed.

The Evidence for the Claimant

[11] Mr. Wood provided documentary evidence proving that the St. Barnabas lot was owned by he and his wife and not by the Claimant. He denied ever giving the Defendant permission to occupy the lot, or agreeing to rent the lot to him. He contended that if any rent was

charged, which was denied, it would not have been for $50 per year when the annual land tax for the lot was $279.

[12] Mr. Wood also denied that the lot was cleared on the Defendant's instructions. It was cleared immediately after he purchased it to discourage individuals from using an old house that was on the property. It is Mr. Wood's evidence that he discovered that the Defendant was occupying the lot when he took a prospective purchaser to view the lot. The Defendant was requested on at least three occasions to remove the fence.

[13] Mr. Wood took some of his staff with tools and removed the fence. According to him the fence was carefully dismantled and then taken to the Defendant's residence. He denied that the fence was damaged. The two staff members who accompanied Wood also gave evidence, in addition to his sister and a gentleman with experience in erecting fences.

<u>Analysis of Evidence and Findings of Fact</u>

[14] The Claimant was not the owner of the land at the relevant time. Mr. Wood and his wife purchased the land on 07 December 2005, and sold it on 31 December 2009, approximately four years later. According to

the Defendant, the fence was removed after he was told that the land was sold. This is confirmed by Mr. Wood's oral evidence that:

> "On the morning that the lady that purchased the land called me, and she was ready to cut the foundation, I took a number of my staff with tools and went over to the lot and carefully dismantled [the fence]; put the pipes, the two gates, rolled up the wire, put it on the truck and took it over to [the Defendant's] residence…… The lady that purchased the land had a backhoe waiting to cut the foundation, and that equipment is what we used to take up the poles….I did not remove the fencing at St. Barnabas myself. I saw it being removed….I took [the fence] down after the transaction with the purchase of the land. I cannot remember how long that was. The lady called me when she was ready to cut the foundation".

[15] The evidence of both the Defendant and Mr. Wood reveals that, when the fence was removed, Mr. Wood was not the owner of the land. It belonged to a third party. Therefore, the Defendant was no longer committing a trespass vis-à-vis Mr. Wood. There is no evidence of any interaction between the new owner and the Defendant. The new owner dealt exclusively with Mr. Wood, presumably on the basis that she was entitled to vacant possession of the lot when she purchased the land.

[16] The Court is not persuaded that there was an agreement for the rental of the lot before it was sold. The documentary evidence produced does

not reach the standard required to prove this. However, the Court was told that Mr. Wood did not show the Defendant the land or take him there. Therefore, this Court is required to infer that the Defendant found the land on his own, and more significantly, that he was able on his own to determine the boundaries for placement of the fence. The Defendant's evidence is that Mr. Wood told him where to find the land.

[17] It makes no sense for the Defendant to expense himself to secure and fence a lot for which he had no permission; and then to brazenly engage the Claimant to make several deliveries to the same St. Barnabas premises. Mr. Wood's sister confirmed that deliveries were made to St. Barnabas, and that "On occasions [the Defendant] instructed me to send goods to the same place". This Court does not believe that the Defendant moved on to the lot without permission.

[18] Another curiosity is that Mr. Wood said he only discovered that the Defendant was in occupation of the lot when he took a prospective purchaser to view the lot. According to Mr. Wood:

> "I have no idea how long the fence was there. When I realized it was there was the day I took the lady to look at the spot….It was more than three months….In the interim I contacted [the Defendant] and told him about my intentions and asked him to remove the fence. My intention was to get him to take down the

> fence so that the sale of the land could go through. My intention was to sell the land and I needed the fence taken down".

[19] What Mr. Wood did not say is also significant. There is no evidence of righteous indignation, on the part of Mr. Wood, as to how the Defendant could be so bold as to occupy his land without his permission; no evidence of a confrontation between Mr. Wood and the Defendant; no evidence of Mr. Wood berating or using muscular language to the Defendant; no evidence of correspondence sent to the Defendant demanding that he leaves the premises forthwith because he was there without permission.

[20] Instead, Mr. Wood tells the Court that his only intention was to get the Defendant to remove the fence before the land was sold. Indeed, the fence was still there after Mr. Wood had sold the land. The second exhibit to the statement of claim is an invoice from the Company to the Defendant dated 18 November 2008. This document establishes that the Defendant was in occupation of the St. Barnabas lot at least a full year before Mr. Wood sold it.

[21] The Defendant did not deny that Mr. Wood required him to leave the premises because of a pending sale. All the Defendant asked for was time to find an alternative location.

[22] Mr. Wood did not arrange removal the fence immediately. In fact, his evidence is that he asked the Defendant to remove it on three separate occasions. And he waited until the land was sold and the purchaser was about to begin construction on the land. There is no indication that Mr. Wood expressed any concern that the Defendant had no permission to be there. This is consistent with granting the Defendant permission to remain on the lot until certain events occurred. Mr. Wood appears to have been sensitive to the Defendant's need to find alternative commercial space. And he took no umbrage with the Defendant about illegal occupation of the land.

[23] The Court finds that the evidence and actions of Mr. Wood and the Defendant are consistent with some agreement between them to allow the Defendant to use the premises. Although the Court has seen no satisfactory documentary evidence to substantiate a tenancy, the Court finds that at the very least the Defendant was a licensee at St. Barnabas.

[24] Megarry & Wade's "The Law of Real Property",7th ed., informs us that:

> "A licence is a mere permission which makes it lawful for the licensee to do what would otherwise be a trespass. Such rights are commonplace, and examples include lodging in a person's house, going on to his land to play cricket, storing goods on his premises, or advertising on a hoarding on his

> wall. Such a licence is merely a defence to an action in tort and confers no estate or interest in land. A licence in connection with land while entitling the licensee to use the land for purposes authorized by the licence does not create an estate in land". (Para. 34-001).

[25] Because a licence to use land is personal, it can only be enforced against the person who created it if there are contractual remedies. And, unlike easements, the licence does not run with the land, and it cannot be enforced against a purchaser or transferee of the land over which it exists. (See Martin Dixon, "Modern Land Law", Eleventh ed., 2018, at p.369).

[26] Mr. Wood offered the Defendant a bare licence, that is:

> "…a license which is not supported by any contract, and includes a gratuitous permission….Such a licence may be expressly given or may be implied….A bare licence can be revoked at any time on reasonable notice without rendering the licensor liable in damages, but the licensee will not be a trespasser until he has had reasonable time to withdraw". (See Megarry & Wade, supra para. [24] at para.34-003; see also Dixon, supra para. [25] at para. 9.3.1).

[27] The Defendant never alleged that he was not given a reasonable time to withdraw from the St. Barnabas property. It is telling that he did not pursue the allegation that when the fence was removed some of his

materials were also removed. (See para.[38] infra). The Court prefers Mr. Wood's evidence that he observed "building debris, ends of wood. Rubble on the spot indicated that somebody in construction was on the spot". What remained to be removed was the Defendant's fence. There is no claim that the Defendant had insufficient time to do so.

[28] The Defendant occupied the St. Barnabas premises with the knowledge, consent and permission of Mr. Wood, until he was asked to leave. However, Mr. Wood lost the right to evict the Defendant, or to abate a trespass by the Defendant, after 31 December 2009 when he sold the land. Thereafter, neither Mr. Wood nor the Claimant had the legal authority to remove the Defendant's fence except with the permission of the Defendant or at the request of the new owner. The Defendant gave no permission and there is no evidence that either Mr. Wood or the Claimant acted as the agent of the new owner. There is insufficient evidence on which the Court might infer that either of them acted as agent for the purchaser.

Is Set-Off Possible

[29] In the earlier related case **Junior Wood Trucking Services Inc. v. Winston Butcher, CV No.150 of 2012, Hgh. Ct. B'dos, decision dated 24 April 2014,** this Court referred to the relevant legal principles

relating to set-off in this way:

> "[26] Legal set-off is available to a defendant, where both claims are for liquidated sums. That is, the sums claimed must be capable of being ascertained at the time of pleading. The sums claimed need not be connected, and they need not be debts. (See Atkins Encyclopaedia of Court Forms in Civil Proceedings, 2nd ed. Vol.36, 2009 Issue at page 353; also **Axel Johnson Petroleum AB v. MG Mineral Group AG, The Jo Lind [1992] 2 All ER 163,** at 166-167 per Leggatt LJ).
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> …..
>
> [29] A fundamental principle of set-off is that in each transaction the parties must be the same. It is only mutual debts owed between a claimant and a defendant that can be set-off against each other. One author, who considered the principle of mutuality, wrote that:
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> > "Mutuality in fact refers to two characteristics, that the demands must between the same parties, and that they must be held in the same capacity, or right, or interest. It is concerned with the status of the parties and their relationship to each other. It is not concerned with the nature of the claims themselves….The requirement of same parties is intended to ensure that A's right to sue B may not be set-off against A's indebtedness to C, or that a joint demand may not be set-off against a separate demand. The same

> capacity or right means that each of the parties, who is liable to the other, must be beneficially interested in a cross-claim against the other. In other words, 'there must be identity between the persons beneficially interested in the claim and the person against whom the cross-claim existed' ". (R. Derham, "Set-off", 2nd ed., 1996, at pages 319-320).

[30] Simply put, the Defendant's right to set-off is restricted to a debt owed to him by the Claimant. In other words the debt must be owed to him by the corporate entity and not by the individual Mr. Wood. In resolving this issue the Court must first determine if the Claimant was responsible for removing the fence without legal authority. Secondly is the question whether the fence was damaged as alleged by the Defendant.

(1) Who Removed the Fence

[31] The Defendant's case is that in breach of a rental agreement between the parties to this action, the Claimant wrongfully removed and damaged his fence. The evidence, as pointed out earlier, does not substantiate the existence of a tenancy. The land was owned by Mr. Wood, the Claimant's Managing Director. The evidence also established that Mr. Wood did not own the land when the fence was

removed. Additionally, there is no evidence that the fence was removed on the instructions of the new owner. Mr. Wood's clear evidence is that the fence was removed to abate a trespass on land owned by Mr. Wood.

[32] In his affidavit in response filed on 21 May 2015, Mr. Wood deposed that "When the Defendant failed, neglected or refused to remove the fence as requested it was carefully removed by me in my personal capacity as joint owner to abate a trespass and delivered to the Defendant". Mr. Wood had no legal foundation to justify the removal of the Defendant's fence after he sold the land.

[33] Then in his witness statement filed on 08 July 2015, Mr. Wood admitted that "I had the chain link fence carefully removed, rolled and delivered with the fence poles to the Defendant's address using the services of my company,[the Claimant]". Therefore, it was open to the Defendant to bring a separate action based on the unlawful removal and damage to the fence either against Mr. Wood, or against the Claimant, or against both of them as joint tortfeasors. Instead, the Defendant chose the route of set-off and counterclaim against the Claimant in this action.

[34] Apart from Mr. Wood's admission, there is ample evidence that the Claimant was involved in the removal of the fence. Employees of the Claimant were directed by Mr. Wood to go to St. Barnabas and remove the fence. In his oral evidence Mr. Wood said that "I took a number of my staff with tools and went over to the lot and carefully dismantled [the fence]".

[35] The evidence of Maroni Thomas is that:

> "In 2009 I was working at [the Claimant]. I recall going to a lot at St. Barnabas. I drove there. I drove a truck from [the Claimant]. We were told to go and take down a fence….The boss Junior Wood gave me the instructions".

This evidence is confirmed by another employee Erskine Cole.

[36] It is the finding of this Court that the Claimant is a proper party to the counterclaim for the purpose of a set-off. The Claimant was proved to be instrumental in the removal of the fence. There is identity between the person beneficially interested in the claim and the person against whom the cross-claim is made. (See Derham supra at para.[29]).

(2) Was the Fence Damaged/Destroyed

[37] The Defendant alleges that the Claimant destroyed his chain link fence when it was removed. He asserted that he counterclaimed against the

Claimant because that company destroyed his fencing. He claimed $20,175.38 for labour and materials used in erecting the fence.

[38] In one of his affidavits the Defendant deposed that after he was asked to vacate the St. Barnabas land:

> "10…...I found mangled fencing material blocking the driveway of my home…. A check at the land at St. Barnabas revealed that the fence had been torn down and removed. I did not see the building material and I do not know what happened to it but I verily believe that [the Claimant] through its agent/Director destroyed and removed the fence and building material and [Mr. Wood] did inform me of this and [the Claimant] through [Mr. Wood] delivered the mangled fence to my driveway.
>
> 11. I paid "Fatman" $500.00 to remove the now useless fence from my driveway, and thereafter, through Mr. Steve Gollop, I sought to recover my loss from [the Claimant] as shown by letters referred to by [counsel for the Claimant]". (See affidavit filed on 22 November 2013).

[39] The Defendant represented to the Court that, on the basis of his experience in erecting chain link fences, the fencing left at his home could not be used again. He said that:

> "In my driveway I found poles with cement. Once you pull that wire you cannot use it again. I do fencing. The wire was not rolled up. Fencing comes rolled from the suppliers. Once the fencing is removed you

> cannot reuse the wire. I have taken down fencing to discard it. Once it is pulled you cannot use it a second time. From the time I opened [my] company I was doing fencing and construction. Once the fencing has been stretched you cannot get to use it back properly. By mangled I mean that the wire was twisted. The gates were there as well but I do not remember if they were dismantled as well. The gates are only just hinges to pull up really. Fatman did not give me a receipt".

[40] The Claimant denied any damage to the fence. Mr. Wood, Mr. Thomas and Mr. Cole all gave similar evidence of carefully dismantling and rolling up the fence; removing the poles with concrete still attached; placing the nuts and bolts in a container; and transporting everything to the Defendant's residence. The Claimant also called Neil Cooper-Lewis, to give evidence on its behalf.

[41] Mr. Lewis' evidence is that he was in the business of installing chain link fencing for over 26 years. He ran his own company from 2001. He told the Court that dismantled chain link fencing could be reused multiple times. Mr. Lewis said that:

> "The poles are taken out with concrete on them. The concrete can be removed. The poles can be reused with concrete on them if you want to. That is not done in my profession. One of the reasons it is not done is that you would have to dig too big a hole in order to reuse it. The concrete cannot be

> reused if you knock it off….When tensioned fencing wire is dismantled that was tied and hogringed, you can use it over and over again. You would have to get new ties and hog-rings…If you reuse the wire you do not run the risk of pulling the diamonds out of shape. Cutting is not the only way to dismantle ties and hogging. You can undo hogging and ties. If undone they can be reused".

[42] It is remarkable that in this digital era the Defendant took no contemporaneous photographs of the fence when he found it at his residence. And "Fatman", the individual alleged to have removed the fence, gave no evidence to support either the state of the fence or a fee of $500 to remove the fence.

[43] The Court accepts the evidence of Mr. Wood and the Claimant's employees that the fence was not damaged or destroyed when dismantled and transported to the Defendant's residence. The Court also accepts Mr. Cooper-Lewis' testimony that a dismantled fence can be reused.

[44] The Court notes that there is no evidence that the Defendant spoke to Mr. Wood about the Claimant destroying his fence. In fact, the Defendant did not make a claim for the fence until about 14 months after its removal, when his then lawyer wrote to the Claimant in response to its claim for monies owned by the Defendant.

[45] The receipts submitted by the Defendant for the fencing materials are dated November 2008. The Defendant stated in his affidavit of 22 November 2013 that he installed the fence around that time. (Para.7). All the receipts, together with the cost of removing the fence, total $15,041. This is just over $5,000 less than the $20,175.38 claimed for the installation of the fence. This discrepancy was not addressed or explained by the Defendant.

[46] The Court finds that the Defendant has not established, on a balance of probabilities, that his fence was either damaged or destroyed by the Claimant.

Disposal

[47] The counterclaim is denied, and the judgment entered on the claim in favour of the Claimant on 24 April 2014 is confirmed, with costs to the Claimant to be agreed or determined by the Court.

Sonia L. Richards
Judge of the High Court