24 APRIL 2014

BARBADOS

IN THE HIGH COURT OF JUSTICE

CIVIL DIVISION

No. 150 of 2012

BETWEEN:

JUNIOR WOOD TRUCKING SERVICES INC. **CLAIMANT**

AND

WINSTON BUTCHER **DEFENDANT**

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

2014: February 21
April 15, 24

Mr. F. Albert Pollard, Attorney-at-law for the Claimant.
Mr. Chester Sue, Attorney-at-law for the Defendant.

DECISION

Introduction

[1] By a Notice of Application filed on 30 August 2013, the Claimant company is seeking the following orders from the Court:

(1) that the plea of set-off in the Defendant's counterclaim be struck out;

(2) that summary judgment be entered against the Defendant;

(3) interest; and

(4) costs.

The Factual Background

[2] The application before the Court arises out of a claim filed on 30 January, 2012, in which a sum of $12,106.18 was claimed from the Defendant. This sum represents money owed to the Claimant, and it is made up of a debt of $10,030.61, with added interest, court fees and legal costs.

[3] The Statement of Claim alleges that between 17 November, 2008, and 06 April, 2009, the Claimant provided goods and services to the Defendant, pursuant to a series of oral agreements. The goods and services included cement, concrete bricks, BRC, sand, stone, steel, marl fill, top soil and the freighting of rubble. It is further alleged that the Defendant refused to pay for these goods and services, despite requests for payment.

[4] The Defendant's Acknowledgement of Service was filed on 04 June 2012. No admissions were made with respect to the whole or part of the claim. Next, the Defence and Counterclaim were filed on 19 July, 2013. The Defendant disputed the claim on the grounds that the Claimant was also indebted to him, in the sum of $20,175.38, for a chain link fence destroyed by the Claimant. Another issue raised by the Defendant was the breach of a tenancy agreement between the parties.

[5] The Defendant did not deny his indebtedness to the Claimant. What he did was to ask the Court to set-off the amount he owed the Claimant against the

cost of the materials and labour used to erect the fence. He then counter-claimed for the outstanding balance of $10,144.77 due to him, with interest and costs.

[6] The Claimant filed a Reply to the Defence, and a Defence to the Counter-claim on 31 July 2013. The Claimant denied the existence of any tenancy agreement between the parties, or the wrongful destruction of the Defendant's property pursuant to any wrongful termination of a tenancy by the Claimant. It is against this background that the Claimant's application is before the Court.

[7] The grounds of the application are that:

(1) the Defendant through his then attorney-at-law by letter dated 26 November, 2010 acknowledged the sum claimed;

(2) the Defendant has not denied the claim in his defence and counterclaim;

(3) it is not a valid defence at law or equity to set-off a personal claim against a corporate entity's claim;

(4) the Defendant has no real prospects of successfully defending the claim or prosecuting the action for set-off of its counterclaim; and

(5) the Claimant knows no reason why the case or any issue arising in the case should be disposed of at a trial as it is a question of law whether a set-off is available in these proceedings.

The Relevant Rules

[8] The Claimant's Notice of Application does not mention any particular Part or Rule of the Supreme Court (Civil Procedure) Rules 2008 ("the CPR"), under which the application is brought before the Court. It is at page 4 of the written submissions that counsel for the Claimant mentions Parts 15 and 26 of the CPR, under the heading "REAL PROSPECTS". In this regard, the Court supports Alleyne J.'s comment on "the desirability of displaying the provisions on which an application is grounded prominently on the face of the notice of application". (See **Blackett et al v. Alexander et al,** No. 578 of 2008, decision dated 01 March, 2013. Alleyne J. endorsed a statement by Michel J. (Ag.) in **Choo Loi Poi et al v. Frederick**, at para. [6] of the **Blackett** judgment).

[9] A real prospect of success is the test formulated by Rule 15.2 of the CPR for determining the appropriateness of an order for summary judgment. The Claimant submits that the law does not permit the Defendant to set-off a personal claim against the claim of a corporate entity. It is argued that the Defendant has no real prospect of either successfully defending the claim, or successfully prosecuting the set-off action in the counterclaim. Again the reference is to the test under Rule 15.2 of the CPR. The submissions made on behalf of the Claimant are focussed on summary judgment. There is no

reference in the submissions to the test for striking out the defence under Rule 26.3 of the CPR.

[10] Writing about the summary judgment procedure, Kodilinye and Kodilinye opined that:

> ".....there are separate provisions in Rule 26.3.....giving the Court power to strike out the whole or part of a statement of case if it discloses no reasonable ground for bringing or defending the claim. The main distinction between striking out and summary judgment is that the former is aimed at weakness in the manner in which the issues are set out in the statements of case, whereas the latter is used in cases of defences that are weak on the facts and, since summary judgment is defined as 'a procedure by which the court may decide a claim or a particular issue without a trial' [**Martinez v. Elijio** (2006) SC Belize, No. 97 of 2005 (unreported)], it is clear that it applies also to cases or defences based on misconceived points of law." (Commonwealth Caribbean Civil Procedure, 3rd ed., 2009 at page 63)

[11] Another commentary on civil procedure observes that the striking out provision in Rule 26.3 of the CPR "is regarded as shading into applications for summary judgment, which have traditionally been regarded as a means for attacking cases which are weak on the evidence....". (Blackstone's Civil Practice, 2011, at para. 33.7).

[12] The interplay between the striking out and summary judgment rules, in the procedural rules in England, was noted in The Caribbean Civil Court

Practice (2008). This was in the context of a "combined challenge" to a claimant's case by a defendant. (See page 231 NOTE 23.23). The suggestion there is that:

> "....the court ought normally to start by considering the first challenge, for which it will not need to consider any evidence; if the claimant's statement of case if found to contain a coherent set of facts which disclose a legally recognisable claim against the defendant, the defendant is entitled by [CPR Pt 15] to try to persuade the court that, notwithstanding that fact, the claimant has no real prospect of success; it is at this stage that the court will normally consider any evidence that the parties may adduce: **Chief Constable of Kent v. Rixon** [2000] All ER (D) 467, CA, Brooke LJ.".

[13] The Court will be guided by this approach in relation to the Claimant's application, in so far as the Court will examine the defence to see if it contains "a coherent set of facts which disclose a legally recognisable claim against the [Claimant]". There is nothing complicated about the defence as drafted in this particular case. The defence is an attempt to set-off a debt owed to the Claimant, against another debt said to be owed by the Claimant to the Defendant. There is also the Defendant's counterclaim for a balance remaining to him after provision, by way of set-off, is made for the debt due to the Claimant.

[14] The Claimant's application is for the Court to strike out the Defendant's plea of set-off. It seems to the Court that if this order was granted, the defence as pleaded would collapse, and the counterclaim rendered otiose. This would lead inexorably to summary judgment in favour of the Claimant. In these circumstances the Court will first consider whether there is a basis for striking out the defence under Rule 26.3 of the CPR. If the defence is struck out, then summary judgment under Part 15 of the CPR would follow automatically, without any need to consider or apply a test for summary judgment.

Striking Out of Defence

[15] Rule 26.3 of the CPR provides that:

> "(3) The court may also, in addition to all other powers under these Rules, strike out, at a case management conference or otherwise upon an application on notice, a statement of case or part of a statement of case if it appears to the court....
>
> (b) that the statement of case or the part to be struck out discloses no reasonable ground for bringing or defending a claim;".

A statement of case includes a defence or counterclaim (Rule 2.3).

[16] In relation to a similarly worded procedural rule in England (r.3.4(2)(a)), it was stated that:

"Applications....may be made on the basis that the statement of case under attack fails on its face to disclose a sustainable claim or defence. Traditionally this has been regarded as restricted to cases which are bad in law, or which fail to plead a complete claim or defence....

Cases where striking out.... is appropriate according to Potter LJ in **Partco Group Ltd v. Wragg** [2002] EWCA Civ.594, [2002] 2 Lloyd's Rep 343, at [46], include:

(a) where the statement of case raises an unwinnable case where continuing the proceedings is without any possible benefits to the respondent and would waste resources on both sides (**Harris v. Bolt Burdon** [2002] CPLR 9); and

(b) where the statement of case does not raise a valid claim or defence as a matter of law (**Price Meats Ltd v. Barclays Bank plc** [2000] 2 All ER (Comm) 346).". (Blackstone's supra, at paras. 33.7 and 33.8).

[17] The Kodilinyes posit that:

"A statement of case may be struck out on the ground that it fails on its face to disclose a claim or defence that is sustainable in law.... Rather than striking out, the court may allow a statement of case to be amended, provided that the circumstances are such that amendment would accord with the overriding objective.

Striking out will be refused if the court would be required to conduct a protracted examination of documents. On the other hand, the

> documents may clearly show that there is no sustainable case.". (supra, at pages 177-178).

[18] The Claimants' application is an interlocutory application initiated by a notice of application as required by Rule 26.3 of the CPR. Part 11 of the CPR sets out the general rules for interlocutory applications. Rule 11.4 (3) provides that:

> "Evidence in support of an application is not needed unless it is required by the nature of the case, or by
> (a) a rule;
> (b) a practice direction; or
> (c) a court order.".

[19] There is no requirement in Part 26, or in any rule of the CPR, for the filing of evidence in support of the application to strike out the defence. However, applications for summary judgment mandate the filing of evidence on affidavit in support of the application. (Rule 15.5 (1) (a)). The Court found no practice direction asking for evidence in support of an application to strike out. However, the Court made an order for the filing of the Defendant's affidavit. The affidavits filed on behalf of the parties are already before the Court. Even if they were unnecessary for the purpose of a determination under the striking out provision of the CPR, they were accepted by the Court, and they are not prohibited by the CPR.

[20] The Court is constrained to take this approach because of a recent decision of the Court of Appeal. In **Paradise Beach Limited and Paradise 88 Limited v. Edghill and Patel** (Civil Appeal No.10 of 2011, decision given on 12 December, 2012) the Court of Appeal considered Rules 26.3 (3) (b) and (c) of the CPR. And, in so doing, that court compared the pleadings, affidavits and correspondence filed by the parties, and concluded that they revealed "disputes on facts and law". (Para.[20] of decision).

[21] The Appeal Court in the **Paradise** case also established guidelines as to how a court should approach a striking out application. First, the court should not engage itself in a:

> ".....minute and protracted examination of the documents and facts of the case, in order to see whether [a party] really has a cause of action. To do that is to usurp the position of the trial judge, and produce a trial of the case in evidence tested by cross-examination in the ordinary way.". (Para. [21] of the judgment, quoting Danckwerts L.J. in **Wenlock v. Moloney and Others** [1965] 2 All ER 871. **Wenlock** was affirmed in **Chan Seek v. Alvis Vehicles Ltd.** [2003] EWHC 1238 (Ch.)).

[22] Next, the Appeal Court advised that it is not appropriate to strike out a claim where the central issues are in dispute. (Para. [22], citing **King v. Telegraph Group Ltd.** [2003] EWHC 1312 (QB)).

[23] Finally, the Court of Appeal directed that this Court must observe the overriding objective in Rule 1.1 of the CPR, because:

> "....in order to arrive at a just result it is necessary to bear in mind that the master or judge exercising his discretion to strike out a claim of this nature before trial must pay regard to the overriding objective in Rule 1.1 of the CPR, that is to say, the need to deal with cases justly. Dealing with a case justly includes, so far as practicable saving expense; dealing with a case in a way which is proportionate to the amount of money involved; ensuring that it is dealt with expeditiously and fairly; and importantly, allotting to it an appropriate share of the court's resources while taking into account the need to allot resources to other cases. (See **Christofi v. Barclays Bank plc** [2000] 1 WLR 937 at page 949).". (Para. [24] of decision).

[24] The Court has to decide whether the defence of set-off as pleaded, is valid or sustainable in law. To this end the Court will refer to the relevant principles of law relating to set-off. The pleadings and the affidavits filed by the parties, will be evaluated against these principles of law. Bearing in mind the directives of the Court of Appeal in **Paradise**, the Court will then make a determination as to the viability of the defence.

Set-off: the Relevant Legal Principles

[25] Rule 16.6 of the English CPR recognises the defence of set-off. There was a similar provision in Order 18 Rule 17 of the 1989 Rules of the Supreme Court. However, there is now no similar rule in our CPR. There are two provisions in Part 18 of the CPR which appear to recognise set-off as a viable defence to a claim. Rule 18.1 (1) defines an "ancillary claim" as:

> "any claim other than a claim made by a claimant against a defendant or a claim by a defendant to be entitled to a set-off.... .".

Then Rule 18.7 places restrictions on the right to make a counterclaim or plead set-off in proceedings by or against the Crown. The Court has also noted that the Claimant did not generally challenge the right of a defendant to plead set-off in Barbados. All that the Claimant is saying here is that the Defendant in this case cannot set-off a debt owed to him by an individual, against a debt owed by the Defendant to a corporate entity.

[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.).

[27] An equitable set-off arises where there is a close commercial relationship between the parties. It is not necessary that the claim and cross-claim arise out of the same transaction, but there must be an inseparable connection between them. It does not matter whether or not either or both claims are unliquidated. (See Blackstone's, supra, at para.34.37(e); **Benford Ltd v.**

Lopecan SL [2004] 2 Lloyd's Rep 618; **Bim Kemi AB v. Blackburn Chemicals Ltd** [2001] 2 Lloyd's Rep 93; **Hanak v. Green** [1958] 2 QB 9; and **Axel Johnson** supra). An equitable set-off is possible where the cross-claim flows out of and is inseparably connected with the dealings and transactions which give rise to the claim. (Halsbury's Laws of England, 4th ed. Reissue, Vol.42, para.430; **Esso Patroleum Ltd v. Milton** [1997] 2 All ER 593).

[28] 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:

> "Mutuality in fact refers to two characteristics, that the demands must be 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).

[29] Halsbury's also explains the distinction between set-off and payment, and between set-off and counterclaim.

> ".....a plea of set-off in effect admits the existence of the claim, and sets up a cross-claim as being [the] ground on which the person against whom the claim is brought is excused from payment and entitled to judgment on the plaintiff's claim. Until judgment in favour of the Defendant on the ground of set-off has been given, the plaintiff's claim is not extinguished.....
>
> In its effect set-off is essentially different from counterclaim in that set-off is a ground of defence, a shield and not a sword, which, if established, affords an answer to the plaintiff's claim, but is a weapon of offence which enables a defendant to enforce a claim against the plaintiff as effectually as an independent action.". (Paras. 409 and 410).

[30] If a defendant is sued on a liquidated claim by an undisclosed principal, that defendant may set-off the debt due to him from the agent of the undisclosed principle. But there are certain conditions that the defendant must satisfy before the cross-claim is permitted. (Halsbury's Laws, supra, at para. 448).

Review of the Pleadings

[31] A review of the defence as pleaded clearly indicates that:

(1) the Defendant is relying on set-off as his defence;

(2) he does not deny the debt claimed;

(3) he alleges that the Claimant company owes him an ascertained sum of money for its destruction of a chain link fence owned by the Defendant;

(4) the amount owed to the Defendant by the Claimant is more that the amount owed to the Claimant by the Defendant;

(5) the Defendant is counterclaiming for the difference between the two amounts; and

(6) the Defendant is not making a claim for the alleged breach of a tenancy agreement between the parties.

[32] The Claimant's reply to the defence, and its defence to the counterclaim maintain that:

(1) there was never a tenancy agreement between the parties, far less a wrongful termination of a tenancy agreement;

(2) the Claimant never owned the land that the Defendant alleges was rented to him;

(3) it never destroyed a fence belonging to the Defendant; and

(4) the Defendant is not entitled to set-off his counterclaim.

[33] The pleadings alone raise triable issues on the counterclaim, that are best resolved after the hearing of the evidence by the Court, and essential findings of fact regarding a tenancy agreement, possession of the land at St.

Barnabas, and the destruction of the fence. The Court will now turn to the affidavits filed in order to determine whether the Defendant has no reasonable grounds for defending the claim; or whether issues remain that would necessitate a trial of this matter.

The Affidavits Filed

[34] An affidavit in support of the application was sworn to by counsel for the Claimant. That affidavit emphasized that the Defendant has not denied the claim for a debt owed to the Claimant. Two exhibits are annexed to the affidavit. The first exhibit is a letter dated 26 November, 2010, and forwarded to the Claimant, for the attention of its sole director Mr. Junior Wood. The letter is written by an attorney-at-law on behalf of the Defendant. The debt to the Claimant is acknowledged in the letter, however, damage to the Defendant's fence is alleged. An estimated cost for the damage is given, with a proposal to set-off the debt owed to the Claimant, against the assessed damage to the fence and materials.

[35] The second exhibit is a written reply dated 09 March, 2011, from counsel for the Claimant. Counsel pressed for immediate payment of the outstanding debt to the Claimant. He conceded that fencing owned by the Defendant had been removed from a property at Lot 145, 6th Avenue, St. Barnabas Heights,

St. Michael. However, the fence was said to have been removed to abate a trespass to the property.

[36] The March letter alleged that the Defendant was a trespasser on the property, which was owned by the Claimant's sole director and his wife. This property was never owned by the Claimant. The letter further informed the Defendant's attorney-at-law that:

> "The chain link fencing was, thereafter, carefully rolled and delivered with all poles, to [the Defendant's] address. Accordingly, my clients will not entertain any claim for alleged damage or loss.".

[37] The Defendant filed his affidavit in reply on 22 November, 2013. He contended that prior to the destruction of the fence he had conducted business with the Claimant over a 4 year period. It was stated that the sole director of the Claimant company acted for the Claimant and that all transactions were in the name of the Claimant. Documentary evidence of a cheque, receipt and invoice passing between the Claimant and either the Defendant or the Defendant's company, Precision Contractors & Maintenance Inc., were annexed to the Defendant's affidavit.

[38] The Defendant's affidavit further spoke of an oral agreement with the Claimant in November 2008, for the rental of the St. Barnabas property for the storage of construction materials. The annual rental fee was $50.00.

Pursuant to this agreement, the Defendant alleged that he purchased fencing material and erected a fence on the property. The land he said was cleared by the Claimant company.

[39] The Defendant says in his affidavit that shortly thereafter, the Claimant's sole director informed him that the St. Barnabas land was sold. The Defendant was requested to move. He asked for time to move because he had nowhere to go. The Defendant further alleged that:

> "10. Sometime after I found mangled material blocking the driveway of my home at Maxwell, Christ Church. A check at the land at St. Barnabas revealed that the fence had been torn down and removed...I verily believe that the [Claimant] through its agent/director destroyed and removed the fence.....and Junior Wood did inform me of this and the [Claimant] through Junior Wood delivered the mangled fencing to my said driveway.".

[40] The Defendant paid to have the damaged fencing removed from his driveway, and then sought the services of a lawyer to recoup his losses from the Claimant. A letter was forwarded to the Claimant on the Defendant's behalf. This is the same letter annexed to the affidavit of counsel for the Claimant, and it is referred to at paragraph [34] supra. The Defendant insists that he never made a personal claim against the Claimant's sole director. To the contrary, he contends that his claim has always been against the Claimant.

[41] Six days prior to the hearing of the application, and several weeks after the filing of the Claimant's submissions, an additional affidavit was filed on behalf of the Claimant by its sole director, Mr. Junior Wood. This final affidavit was not contemplated by the case management order given by the Court on 17 October, 2013. That order was limited to the filing of the Defendant's affidavit; and to the filing and exchanging of written submissions by the parties. It also fixed the date for the hearing of the application. However, counsel for the Defendant has not raised any objection to the filing of this second affidavit for the Claimant.

[42] Mr. Wood's affidavit was for the purpose of proving that the land at St. Barnabas was owned by him and his wife Mary Wood. According to the conveyance exhibited, the land was purchased by them on 07 December, 2005. A plan of the land is also annexed to the affidavit. A third exhibit is a letter from Computer Information Services Ltd., indicating that a search of the Land Registry records did not reveal any acquisition of property by the Claimant, in an unregistered area, "from 1997 to 2013".

The Effect of the Affidavit Evidence

[43] The Claimant's two affidavits sought to prove conclusively to the Court that the Defendant should not be allowed to maintain his plea of set-off. The second affidavit shows that the Claimant did not own the St. Barnabas land

at the relevant time, and so could not have rented it to the Defendant. A tenancy agreement between the Claimant company and the Defendant is therefore denied.

[44] However, an invoice which is annexed to the Claimant's Statement of Claim (Exhibit JWTS 2), indicates that construction related materials were delivered by the Claimant to the Defendant at 6th Avenue, St. Barnabas, St. Michael. This is the same address as the commercial lot which the Defendant alleged was rented to him by the Claimant. The invoice is dated 18 November, 2008, and suggests to the Court that the Claimant, through its sole director, was aware that the Defendant was in occupation of the St. Barnabas land. Yet counsel for the Claimant alleged in his correspondence of 09 March, 2011, that the Defendant occupied the land without the knowledge or consent of Mr. and Mrs. Wood.

[45] Even if the Court accepts that the Claimant company did not own the land, the circumstances under which the Defendant came to be in occupation of the land remain a live issue. Why is the Claimant delivering materials to the Defendant at an address where the Claimant alleges that the Defendant is trespassing? The Defendant's occupation of the St. Barnabas land is not tangential to his plea to set-off a debt owed to him by the Claimant. It is part

of a factual matrix against which the Claimant is alleged to have incurred the debt to the Defendant.

[46] The Defendant's affidavit alleges a course of dealings, between himself and the Claimant, which led to the Claimant incurring the debt to him. It is only after a trial that the Court would be able to make critical findings of fact that would determine whether the Claimant was responsible for unlawful damage to the Defendant's fence. Because the Claimant did not own the St. Barnabas land, it does not follow, necessarily, that the Claimant was not responsible for destroying the fence. The Defendant alleged that the Claimant rented the land to him, cleared the land, received the rent and finally destroyed the fence. The Claimant says that it was Mr. Wood who was abating a trespass. These are essentially triable issues that are not fully answered by the response that the Claimant did not own the land.

[47] The Defendant's affidavit also hints at other issues that as yet are not refined in his defence. For example, he alleges a course of dealings between the parties. Is he raising an equitable set-off that has not been pleaded specifically? (See **Frank's International Trinidad Limited v. Operational Support Services Company Limited**, No. 316 of 2012 T&T HC, judgment delivered 04 October, 2012). Is the Defendant seeking to show that the Claimant was an unknown principal? (See para. [30] supra). Is the Claimant

estopped from saying that no representations were made to the Defendant about the ownership of the land? At this stage, amendments to the pleadings are still possible.

[48] Another possible issue necessitating a trial is whether there was an agency agreement between the Claimant and Mr. Wood, and if so, who was the agent for whom. If Mr. Wood acted as the agent for the Claimant, under certain circumstances a set-off against the Claimant is possible. (Again see para. [30] supra).

Disposal

[49] The Court is unable to say at this point in the proceedings that the defence discloses no reasonable ground for defending the claim. Therefore, the Claimant's application is refused.

[50] To the extent that the debt to the Claimant is not denied there will be judgment for the Claimant on its claim. However, judgment is stayed until the final determination of the counterclaim, at which time costs and interest will be determined. The costs for this application are awarded to the Defendant, to be agreed or assessed.

S. L. Richards

Sonia Richards

Judge of the High Court