

**EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)**

SAINT CHRISTOPHER AND NEVIS

NEVIS CIRCUIT

Claim Number: NEVHCV2020/0009

BETWEEN:

Earl Freeman

Claimant/Respondent

and

LEFCO Equipment Rental & Construction Company Ltd.

Defendant/Applicant

Before:

Mrs. Michelle John-Theobalds

Master [Ag.]

Appearances:

Mr. Patrice Nisbett for the Claimant/Respondent

Mr. Terrence Byron for the Defendant/Applicant

2021: March 15
2022: February 03

JUDGMENT

- [1] **JOHN-THEOBALDS M [AG.]:** This is an application by the defendant/applicant LEFCO Equipment Rental & Construction Company Ltd. ("Lefco") to set aside a judgment in default of defence dated 14th August 2020 and entered on 11th September 2020. By claim form and statement of claim filed on 24th January 2020,

the claimant/respondent, Mr. Freeman, sought the sum of EC \$84,000.00, being the amount outstanding for the rental of a pallet jack to Lefco. The claim form and statement of claim were served on Lefco on 29th January 2020 and an acknowledgement of service was subsequently filed by Lefco on 4th February 2020.

[2] On 14th August 2020, Mr. Freeman filed a request for entry of judgment in default of defence, since the period within which Lefco ought to have filed a defence expired on 27th February 2020. After the default judgement had been entered on 11th September 2020, Lefco filed the present application on 5th October 2020 requesting that this court set aside the default judgment.

[3] The principal issue to be decided is whether the application to set aside the judgement in default of defence ought to be granted. Lefco has premised its application on rule 13.3 of the Eastern Caribbean Supreme Court Civil Procedure Rules 2000 ("**CPR**") and this court must determine whether Lefco has advanced sufficient grounds to warrant setting aside the default judgment on this basis.

The Law on setting aside a default judgment

[4] Under rule 13.3 of the **CPR**, the court may set aside or vary a default judgment as follows:

"13.3(1) If Rule 13.2 does not apply, the court may set aside a judgment entered under Part 12 only if the defendant –

- (a) Applies to the court as soon as reasonably practicable after finding out that judgment had been entered;
- (b) Gives a good explanation for the failure to file an acknowledgement of service or a defence as the same case may be; and
- (c) Has a real prospect of successfully defending the claim.

(2) In any event the court may set aside a judgment entered under Part 12 if the defendant satisfies the court that there are exceptional circumstances."

[5] Lefco initially premised its application to set aside the default judgment, on two alternative grounds: rule 13.3(1) and rule 13.3(2) of the **CPR**. However, at the

hearing of this application, counsel for Lefco conceded that they had not satisfied the court under rule 13.3(1) so as to set aside the default judgment on that basis. Consequently, counsel elected to ground the application solely on the basis of rule 13.3(2). For the purpose of completion, it must be stated that Lefco has complied with rule 13.4, in that its application is supported by affidavit and a draft of its proposed defence has been exhibited. I now turn the parties' submissions.

Lefco's arguments

- [6] In its application to set aside the default judgment, Lefco argued that exceptional circumstances existed on the facts of the case. They argued that the terms of the agreement, as pleaded by Mr. Freeman, were too vague or uncertain to have any contractual force and that therefore, the claim was bound to fail. Lefco submitted that Mr. Freeman merely pleaded that they agreed to lease the pallet jack but failed to plead that there was an agreement that Lefco would pay for its use.
- [7] In written submissions filed in support of the application, Lefco contended that the statement of claim did not create any cause of action that was maintainable and that the pleading at paragraph 4 was, at its highest, an averment that on a certain day Lefco agreed to lease Mr. Freeman's pallet jack and use it at a certain location. Nowhere in the statement of claim did Mr. Freeman allege the price at which he rented the pallet jack.
- [8] Lefco further contended that Mr. Freeman admitted in his affidavit in response to the application, filed on 9th November 2020, that no price had been agreed upon at the time of the leasing. Lefco specifically points to paragraph 11 of Mr. Freeman's affidavit where he stated, "The fact that price was not mentioned at the time of the leasing is not fatal to the claim." Counsel for Lefco contended that the issue of payment only arose in 2016 when Mr. Freeman prepared the invoice for the rental of the pallet jack. Counsel further argued, in referring to paragraph 27 of Mr. Freeman's submissions, that the court should not be concerned with the price at which Mr. Freeman usually rents the pallet jack but should instead focus on the

price as actually agreed by the parties for the rental of the pallet pack. Counsel contended that if Mr. Freeman sat down and simply made up an invoice, this bore no relation to the agreement between the parties, since the price ought to have been agreed.

- [9] Lefco quoted several learned authors, to support its position and also sought to rely on the case of **G. Scammell and Nephew, Limited v H. C. and J. G. Ouston**¹ in its written submissions and at the hearing. Ultimately, Lefco argues that the admission by Mr. Freeman signified that no price was mentioned, far less agreed, at the time of leasing the pallet jack. This therefore means that the claim is not maintainable at law since the terms of the agreement are too vague and the crucial element of payment was not agreed upon by the parties. Since the price was not mentioned at the time the agreement was entered into, they argue, how then could it be said that they had agreed to pay? Lefco therefore urges this court to find that there are exceptional circumstances warranting the setting aside of the default judgment.

Mr. Freeman's arguments

- [10] In response, Mr. Freeman repeatedly contended that the claim was maintainable at law since the pallet jack was leased to Lefco, Lefco utilized the same and returned it after use. He also avers that there was a binding contract since the terms of the agreement were definite and certain. In the affidavit in response to the application and in the written submissions, he however admits that the price was not mentioned at the time of the leasing. Mr. Freeman submitted that it was to be implied that after Lefco utilized the pallet jack, he would then bill for its use. At the hearing, counsel for Mr. Freeman stated that it must be inferred that once a leasing arrangement was entered into, there must be payment and compensation for such. There were no authorities advanced by counsel for Mr. Freeman to support such an argument.

¹ [1941] AC 251.

Analysis

- [11] To place this matter into context, it may be useful to outline the law in relation to exceptional circumstances. An applicant who has failed to satisfy all the elements of 13.3(1) may still have recourse to 13.3(2) if the applicant can prove the existence of exceptional circumstances warranting the setting aside of a default judgment. Rule 13.3(2) was included in the **CPR** after amendments came into effect in 2011. As stated by Michel J (as he then was) in the case of **Graham Thomas v Wilson Christian trading as Wilcon Construction**,² the effect of 13.3(2) was to dilute the rigidity of 13.3(1). His Lordship opined:

“[1] Prior to the coming into effect of the amended Civil Procedure Rules on 1st October 2011, the law as to the setting aside of a regularly-obtained default judgment in the Eastern Caribbean was very clear and very rigid.

[2] ...

[3] It is reasonable to conclude that it was primarily to dilute the rigidity of our own Rule 13.3 (1) and to bring it more in line with the English Rule by providing greater latitude to our judges to find the justice of the case rather than merely to find the presence or absence of three set prerequisites that the new sub-rule (2) of Rule 13.3 was introduced. The amended Rule 13.3, after setting out the rigid provisions of 13.3 (1), then introduces a new 13.3 (2) which states that – “In any event the court may set aside a judgment entered under Part 12 if the defendant satisfies the court that there are exceptional circumstances.””

- [12] Despite the addition of rule 13.3(2), the **CPR** does not provide an explanation as to what amounts to exceptional circumstances. For this, we must look to the case law, where this question has been examined in a plethora of cases. In **Inteco Beteiligungs AG v Sylmord Trade Inc**³ at paragraph 31 Bannister J stated that:

“For an exceptional circumstance to fall within sub-rule 13.3(2) it must, in my judgment, be one that provides a compelling reason why the defendant should be permitted to defend the proceedings in which the default judgment has been obtained.”

² [2012] ECSCJ No. 178.

³ [2013] ECSCJ No. 151.

[13] The case went on to show that a circumstance which is routine would not amount to an exceptional circumstance and therefore could not be a proper ground for setting aside the default judgment.

[14] In **Carl Baynes v Ed Meyer**,⁴ Pereira CJ, when referring to what amounted to an exceptional circumstance, elucidated at paragraph 26 that:

“What amounts to an exceptional circumstance is not defined by the Rules and no doubt, for good reason. What may or may not amount to exceptional circumstances must be decided on a case by case basis. I am in full agreement ... that it must be ‘one that provides a compelling reason why the defendant should be permitted to defend the proceedings in which the default judgment has been obtained’. It must be something more than simply showing that a defence put forward has a realistic prospect of success. Showing exceptional circumstances under CPR 13.3(2) does not equate to showing realistic prospects of success under CPR 13.3(1)(c). They are not to be regarded as interchangeable or synonymous. CPR 13.3(2) is not to be regarded as a panacea for covering all things which, having failed under CPR 13.3(1), can then be dressed up as amounting to exceptional circumstances under sub-rule (2). Sub-rule (2) is intended to be reserved for cases where the circumstances may be said to be truly exceptional, warranting a claimant being deprived of his judgment where an applicant has failed, to satisfy rule 13.3(1). A few examples come to mind. For instance, where it can be shown that the claim is not maintainable as a matter of law or one which is bound to fail, or one with a high degree of certainty that the claim would fail or the defence being put forward is a “knock out point” in relation to the claim; or where the remedy sought or granted was not one available to the claimant. This list is not intended to be exhaustive.”

[15] On appeal to the Privy Council,⁵ the Board upheld the approach taken by Pereira CJ in the Court of Appeal. At paragraph 17 of the judgment, the Board stated:

“17. The Board can see no reason to question the approach taken by the Court of Appeal to the meaning of the phrase “exceptional circumstances” in the context of rule 13.3(2) of the CPR. The structure of the rule suggests that the phrase calls for something more than a real prospect of success and the Board respectfully endorses the reasoning of Pereira CJ at para 26 of her judgment as to its meaning in this context.”

⁴ ANUHCVP2015/0026 (delivered 30th May 2016, unreported).

⁵ Meyer v Baynes [2019] UKPC 3.

- [16] In **Wakeem Guishard v The Attorney General**,⁶ Glasgow M, using the guidance offered by Pereira CJ in **Carl Baynes**, stated at paragraph 49 of the judgment that:
- “.....exceptional circumstances are said to arise where, among other things, the claim is demonstrably incapable of prevailing as a matter of law or it is bound to fail as such.”
- [17] Having regard to the law, as set out in the cases above, the issue becomes whether there are exceptional circumstances warranting Mr. Freeman being deprived of his judgment. If such circumstances do exist, they must be so compelling as to permit Lefco to defend the proceedings.
- [18] The crux of Lefco’s argument is that the claim is not maintainable at law and is ultimately bound to fail. Lefco argues that the pleaded agreement is so uncertain that it is unenforceable. Lefco relied on the decision in **Scammell** to support this position. In that case, Ouston agreed to purchase a new motor van from Scammell but stipulated that the balance of the purchase price should be set upon hire-purchase terms over a period of two years with some of the figure being offset by a van that Ouston already owned. Scammell refused to proceed with the sale before the hire purchase terms had been agreed, and it was this action which caused Ouston to bring a claim for breach of contract for the supply of the vehicle. Ouston argued that there was clearly contractual intention between the parties and that this was enough to form a binding agreement between them. Scammell on the other hand contented that since the hire purchase agreement had not been finalized, the agreement was void on the basis of uncertainty. Consequently, neither party was bound by it. The ultimate outcome by the House of Lords, was that the phrase “on hire-purchase terms” was vague and therefore, it was necessary that further agreement be reached by the parties. As a result, there was no enforceable contract between the parties.
- [19] In the case at bar the question is whether the failure of the parties to agree to an essential element of the contract, the lease price, would make the entire agreement

⁶ BVIHCV2016/0319 (delivered 24th October 2017, unreported).

unenforceable and would therefore mean as Lefco contends, that the claim is not maintainable at law and one that is bound to fail placing it squarely in the category of an exceptional circumstance warranting the setting aside of a default judgment.

Is the claim maintainable at law?

[20] Lefco contends that Mr. Freeman's pleadings do not amount to an enforceable agreement or contract. They argue that in the absence of a pleading as to an agreement between the parties regarding payment for the use of the pallet jack, Mr. Freeman cannot maintain a claim for outstanding payment. In order to assess whether the claim is maintainable at law, it would be prudent to examine the pleadings in the claim form and statement of claim.

[21] The claim form reads:

"The Claimant, EARL FREEMAN of Prospect Estate, St John Parish, Nevis claims against
The Defendant LEFCO EQUIPMENT RENTAL & CONSTRUCTION COMPANY LTD of Prospect Industrial Site, St John Parish, Nevis
The Claimant claims that the Defendant entered into an arrangement in December 2014 and in breach of the said verbal agreement the Defendant has failed to pay the sum outstanding for the rental of the said piece of equipment."

[22] The statement of claim reads:

"4. The Claimant says that on the 8th day of December 2014 the Defendant's employee and/or agent approached him and the company agreed to lease his pallet jack for use on its work site at the Bank of Nevis Building Charlestown Nevis.
5. The Claimant asserts that the said pallet jack was collected from his premises by an individual who at the material time was in the employ of the Defendant.
6. The Claimant states that the Defendant leased the pallet jack for the period 8th day of December 2014 to 1st day of May 2015. During the said period the Defendant's workmen utilize the said pallet jack carrying out the construction of the Bank of Nevis Building.
7. The Claimant says that in May of 2015 the Defendant returned the said pallet jack after it no longer required the usage of the same.
8. The Claimant asserts that he prepared his invoice for the rental of the pallet jack and he billed at the rate of \$100.00 per hour based on an 8 hour

work day five days per week. The total amount due for the leasing of the pallet jack for the period outlined is XCD\$84,000.00.

9. The Claimant contends that he submitted the said invoice at the offices of the Defendant situate at Prospect Industrial Site, St John Nevis.

10. The Claimant avers that despite numerous demands the Defendant has failed to pay the amount due to the Claimant for the rental of the said pallet jack.”

[23] The pleadings do not state that the parties agreed to a price for the use of the pallet jack. It does infer however, that there would be some expectation of payment by use of the term “lease”. Mr. Freeman has pleaded that the parties agreed to leasing the pallet jack, that the equipment was used by Lefco and eventually returned. The absence of a direct pleading as to an agreement to pay for the use of the pallet jack at the time of entering the lease, is a matter of utmost importance considering that Mr. Freeman’s entire claim is based on Lefco’s purported failure to pay. The matter is further compounded by Mr. Freeman’s later admission in his affidavit filed on 9th November 2020 that no price had been mentioned at the time of leasing the pallet jack.

[24] It is trite law that for an agreement to be binding and enforceable parties must have conclusively agreed on all the essential terms. As the learned authors of **Halsbury’s Laws of England**⁷ emphasized:

“To constitute a binding contract, there must be a concluded bargain; and a concluded contract is one which settles everything that is necessary, or essential, to be settled.”⁸

[25] The three basic essential terms of any binding contract include an agreement, an intention by the parties to create legal relations and consideration. As the learned authors of **Halsbury’s** noted, consideration is one of the essential elements of a valid contract and without it, a contract is rendered unenforceable.⁹ The basis of consideration is reciprocity, in that, parties exchange something of value in the eyes

⁷ 5th edition, Volume 22, Lexis Nexis, London UK, 2019.

⁸ Ibid at para 68, page 84.

⁹ Supra n. 7 at para 109, page 157.

of the law.¹⁰ Without consideration, an agreement is nothing more than a gratuitous promise, loan or gift.

[26] It is therefore essential to examine the agreement between the parties to determine whether a binding contract can be made out. In the present case both parties acknowledge that there has been no agreement on the price for the use of the pallet at all. In its draft defence Lefco states that the arrangement which was entered into was a gratuitous loan by Mr. Freeman for use of the pallet jack. This may therefore explain the reason for no mention being made of an agreement price.

[27] In **Scammell** although there was agreement on the purchase price, there was no agreement on the hire purchase terms and the court found that this was too vague to create a binding contract. Viscount Maugham opined:

“In order to constitute a valid contract the parties must so express themselves that their meaning can be determined with a reasonable degree of certainty. It is plain that unless this can be done, it would be impossible to hold that the contracting parties had the same intention.”

[28] The absence of a pleading as to an agreement to pay for the use of the pallet jack, really is the absence of a pleading as to the consideration for the lease of the equipment. By Mr. Freeman’s own admission, the matter of price never arose at the time of the lease. This must be regarded as a very critical factor and I am unable to agree with Mr. Freeman’s contention that “The fact that price was not mentioned at the time of the leasing is not fatal to the claim.”¹¹ The initial claim by Mr. Freeman is one for outstanding payment. If the Mr. Freeman himself admits that payment was never part of the discussion at the time of entering the agreement, it is difficult to see how such a claim could realistically now be maintained. It was also noted that nowhere in the pleadings did Mr. Freeman contend that discussions were held with Lefco surrounding the price or payment, prior to completing his invoice in 2016.

¹⁰ See Chitty on Contracts 33rd edition, Sweet & Maxwell, London UK, 2019 at para 4-002, page 404.

¹¹ See para 11 of Mr. Freeman’s affidavit filed on 9th November 2020.

- [29] Counsel for Mr. Freeman urged this court to infer that payment was due and owing for the use of the pallet jack. He further contended that it was to be implied that after Lefco's use of the pallet jack, Mr. Freeman would then issue Lefco with a bill. I fail to see how this can be inferred, especially where there was no written agreement. Parties are free to contract and decide amongst themselves the terms to be included into any agreement. The court should not be used to fill in the gaps, where parties themselves have neither agreed nor decided on the terms they wished to include in their agreements.
- [30] The learned authors of **Chitty on Contracts**¹² emphasized that it would not be legitimate under the guise of implying terms, to make a contract for the parties. They recognised that "a court can only imply a term into an otherwise concluded contract."¹³ Consequently, this court cannot now seek to finalize the agreement for the parties by inserting a term as to price or payment.
- [31] I am of the view that Mr. Freeman's failure to plead that there was an agreement to pay for the use of the pallet jack, along with his admission that a price had not been mentioned or agreed at the time of the lease are factors which render his claim unmaintainable at law. The essence of any claim at law for payment is that there must have been an underlying agreement or obligation to pay. On the facts, no such agreement to pay can be found. On the basis of Mr. Freeman's pleadings, it is clear that payment is an important aspect of the contract, as his claim is premised on Lefco's failure to pay for use of the pallet jack. It was therefore incumbent on Mr. Freeman at least to ensure that such a matter was included and settled at the time of their agreement in 2014. The pleaded agreement by Mr. Freeman therefore lacked consideration, an indispensable element for the existence of a binding agreement. Having regard to these factors, I consider that there are exceptional circumstances warranting the setting aside of the default judgment.

¹² 33rd edition, Sweet & Maxwell, London UK, 2019.

¹³ Ibid at para 2-120, page 270.

Conclusion

[32] I therefore make the follows orders:

- (1) The default judgment entered on 11th September 2020 is set aside.
- (2) The applicant/defendant shall file and serve its defence on or before 18th February 2022.
- (3) Costs on his application awarded to the applicant/defendant in the sum of \$1000.00 to be paid on or before 31st March 2022.

[33] Lastly, I wish to express my deepest apologies to the parties for the delay in the delivery of this judgment.

Michelle John-Theobalds
Master [Ag.]

By the Court

Registrar