**ANTIGUA AND BARBUDA**
**THE EASTERN CARIBBEAN SUPREME COURT**

**IN THE HIGH COURT OF JUSTICE**

**CLAIM NO. ANUHCV2006/0065**

**BETWEEN:**

**AMERICAN INTERNATIONAL BANK (IN RECEIVERSHIP)**

Claimant

**and**

**(1) LANDMARK LTD.**
**(2) WOODS DEVELOPMENT LTD.**

Defendants

**Appearances:**

Mr. Hugh Marshall Jr. and Mrs. Cherissa Thomas - Roberts for the Claimant
Mr. Dane Hamilton Q.C. and Mr. D. Raimon Hamilton for the Defendant

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**2009: February 17**
**2009: December 22**

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**JUDGMENT**

1. **Harris, J.:** This is a breach of contract claim by a commercial mall tenant, the Claimant (American International Bank) and counterclaim by the service company concerning the long standing commercial contractual relationship between the parties and includes the generation and supply and issues arising thereto, of electricity services to the said commercial mall tenant by the private service company (the 1st Defendant) engaged for the purpose by the mall management company, Woods Development Company Ltd. /2nd Defendant ("**Woods**").

2. The Tenant/Claimant, American International Bank (referred to as "**the tenant**" or "**AIB**" or "**the Claimant**" as the context requires), accepts that it was contractually obliged to pay for the provision of electricity services to its premises, but to pay it to the 2nd Defendant/Woods., and not so obliged to pay the service company, Landmark Ltd./1st Defendant ("**Landmark**") - a company that was lawfully engaged by the 2nd Defendant/ Woods Development Ltd ("Woods") and the claimant's landlord/Epicurean Ltd. – without, the Claimant contends, its initial knowledge or its approval[1]. The Claimant claims, inter alia, that there is no privity of contract between itself and Landmark Ltd. The Claimant's Landlord, Epicurean Ltd., is not a party to this action. The claimant did pay some EC$10,000.00 to Landmark on account, towards its indebtedness, the balance of which at the time of filing the counterclaim stood at EC$ 492,279.89 and continuing.[2] Further, the Claimant submitted in its closing submissions only, that a contract or that part of the contract, for the generation and supply of electricity is contrary to S. 5 of the Public Utilities Act ("**the Act**") and consequently illegal or void and as a consequence unenforceable. The Claimant is asking for several forms of relief including; a number of Declarations, Restitution of monies had and received by the 1st Defendant, an Injunction, Damages (exemplary and aggravated) interests and costs[3].

3. The 1st and 2nd Defendants – Woods and Landmark respectively - being the material utility service provider and the Mall Management Company , deny the claimant's claim in its entirety and for themselves, counterclaim that the claimant was contractually bound to pay for the provision of the utility and electrical services by an implied contract arising between either the; **(a)** claimant and the Landmark/1st Defendant, by virtue of the course of conduct between them; or, **(b)** the said Claimant and the second Defendant/ Woods Development Ltd, by virtue of the Lease agreement between the claimant and its landlord/Epicurean Ltd along with the course of conduct between the Claimant and 2nd defendant from the inception, in 1994-1996; **(iii)** that to hold

[1] The Claimant did pay the provider/1st Defendant a part of the sum due for the provision of the said services.
[2] See Trial Bundle pp156-170 and pages ending at pp 352 for the invoices evidencing the ongoing indebtedness to a total of EC$1,734,378.93
[3] The relief is fully set out below at paragraph 22.

otherwise would result in the claimant being *unjustly enriched* at the claimants expense thereby calling on the claimant to make *restitution* of the benefits received; **(iv)** and, upon proper construction of section 5 of the Public Utilities Act, the contract for the provision of electricity services, on the facts of this case, is not rendered unenforceable by virtue of an illegal or void contract.

HELD

**4.** Each of the claims of the claimant and relief thereto is hereby dismissed for want of proof. Further, the claimant being contractually bound either **(i)** by virtue of the lease agreement with Epicurean Ltd along with the course of conduct with the 2nd Defendant and by its own admission in the statement of case or, by **(ii)** the course of conduct between the claimant and 1st Defend ant; r esulting in the formation of a c ollateral contract with the 1st claimant; to pay for the provision and consumption of the electricity to the claimants premises and to do so to the 2nd Defendant or the 1st Defendant respectively. Further, the contract is not by virtue of illegality or it being void, rendered unenforceable by section 5 of the Public Utilities Act. Firstly, the real purpose of the Act is not to nullify or render unenforceable any c ommercial dealings and contractual obligations in the course of electricity generation and supply causing widespread loss to business such as malls and other commercial buildings. It is not intended to prevent the private commercial arrangement for the collection of revenues on behalf of APUA and/or the generation of electricity to consumers (tenants) where APUA has by its inability or other incapacity, ceased to provide an electricity supply and verbally instructs the commercial consumer to generate and supply its own electricity. Secondly, even if the contract were illegal or void as the case might be, the CPR 2000 requires the Claimant to plead its case fully and to set out what it relies upon for it's claim or its defence to the counterclaim so as to put the other party on notice as to what case it has to defend. The Claimant has failed to do so and will not be permitted rely on the Act for its defence to the counterclaim. The APUA or other authority remains free to invoke the provisions of the Act and take the requisite action against person who offends against the Act including, if it is so determined, the Defendants. There is Judgment on the counterclaim on the basis that the 1st and 2nd Defendants have proved the provision of

the electricity service to the claimant's premises, the accuracy of the invoices, the validity of the contractual obligation of the claimant to pay the said sum to the Defendants.[1]

**Background**

**5.** On or about the 11th day of November, 1994 the Claimant entered into a Lease for a portion of the premises known as Cassada Gardens and New Winthropes; 42 1894A; 988. The portion of the premises was a Mezzanine Floor of an upstairs of a Supermarket. The claimant was the Lessee. The Lessor was an entity in the form of a locally incorporated company known as Epicurean Limited.[2] Epicurean Limited was the Registered Proprietor in absolute of the above described parcel of land which sat at 'Woods Mall' unit. The unit was one of several units that comprised a commercial development known as Woods Mall. Unit proprietors in absolute, on entering into the conveyance to acquire the units, in fact also entered into an agreement with the 2nd named Defendant to cause to be paid for certain services provided to the owners as a part of the commercial complex. These services include electricity. As part of the Lease between the said Epicurean Ltd and the Claimant, the Claimant expressly acknowledge the rights and the obligations of its Lessor; Epicurean Limited, the rights and obligations of the 2nd Defendant and agreed to meet its share of the electricity consumption and other costs. The 2nd Defendant commenced the provision of the services and the claimant paid for the service until the impasse several years later that led to this action. The electricity was generated and supplied by the Antigua Public Utilities Authority ('the APUA' or 'the authority' ) unless it could not do so, at which time, at the oral request of APUA, Woods (as "Manager") and years later its agent Landmark, generated and supplied the APUA electricity shortfall. The impasse is that in 2005, the 2nd defendant engaged Landmark to supply the utilities to the demised premises and to carry out the other 'Management' activities. Despite the notification of the engagement

[1] If I were wrong on the effect of section 5 of the APUA Act, and the contracts were to be unenforceable, then the claimant having being enriched by the receipt of electricity services at the Defendant's expense, it would be unjust to allow the claimant to retain the benefit which he freely accepted and expected to pay for. The Court would make an order for Restitution in favor of the 1st Defendant in the sum claimed in the counterclaim.

[2] Epicurean Ltd was not joined by either the claimant or Defendants in this matter.

of Landmark to carry out the functions of Manager, several invoices of this fact sent to the Claimant, the claimant's admitted receipt of the invoices an its consumption of the electricity to which the invoices referred, its acknowledged liability for same and the receipt of the provision of services for some 4 years to date, the claimant has not satisfied it liability.

**6.** The multiple and layered contractual arrangements connecting the parties are, very simply, that by the Deed dated 9th day of November, 1994 Epicurean ltd. purchased from Woods Development Ltd. – the 2nd Defendant - certain property situate at 'Woods Mall', Antigua[1]. By virtue of this Deed the said Woods Development Ltd. was appointed 'the Manager' by the purchaser, Epicurean Ltd., to act on the purchasers' behalf in carrying out the various management duties. The Deed also provides for the Manager engaging any person to carry out its duties under the Deed[2]. In so far as is relevant, parts of the Deed are set out below:

> *"**THIS DEED** made on the 9th day of November, 1994, **BETWEEN WOODS DEVELOPMENT LIMITED** a Company duly incorporated under the companies Act Chapter 358 of the Laws of Antigua and Barbuda and whose registered office is at 26 Cross Street in the City of Saint John in Antigua and Barbuda (hereinafter referred to as the VENDOR) of the FIRST part the said **WOODS DEVELOPMENT LIMITED** (hereinafter referred to as the MANAGER) of the SECOND part and **EPICUREAN LIMITED** a company duly incorporated under the Companies Act Chapter 358 of the laws of Antigua & Barbuda having its registered office situate at Church Street in the city of Saint John's in Antigua and Barbuda (herein referred to as the PURCHASER) of the THIRD part is a supplemental to an Instrument of Transfer of even date whereby the lands comprised therein (herein called 'the Property') was transferred by the VENDOR to the PURCHASER subject to and with the benefit of the reservations restrictions easements rights covenants stipulations and provisions herein contained."*

[1] See paragraph 305 of Trial Bundle, volume5.The similar Deed entered into between AIB and Woods Mall and exhibited at pp558 of vol. 6 and 7 of the Trial Bundle concerns another parcel in the Woods Mall not directly relevant to this action.
[2] See section 3 of the Deed.

*" 2. The Manager in consideration of the premises has agreed to deal generously with the management administration and maintenance of the centre in accordance with the provisions contained herein and in particular in accordance with the covenants on the part of the manager specified in the First Schedule hereto and to join herein in manner hereinafter appearing."*

*"The Purchaser hereby appoint (s) the Manager to be his sole and exclusive managing agent from the date of completion of construction of the Shopping Centre, to manage the shopping centre with power to act on behalf of the Purchaser in carrying out the duties herein set out and to enter into such contracts and agreements as may be necessary and proper in the performance of such duties."*

*" 2. The Manager in the performance of such duties shall:*

*(a) Exercise all reasonable care and diligence and act in a faithful and honest manner.*

*(b) Enforce all terms, covenants, conditions and obligations contained in the Purchase Agreement dated the 15th day of June, 1997 and made between the Vendor and Purchaser:"* [1]

*"The Manager may engage any person, firm or corporation to do any work or perform any services for the purchaser within the scope of the Manager's duties under this Agreement, without being in breach of any fiduciary relationship with the Purchaser provided that any person, firm or corporation so engaged shall have in the opinion of the Manager adequate expertise or suitable qualifications to do such work or perform such services."*

**7.** The duties of the 'Manager' include those disclosed in clause 7 and clause 9 [2] of the Deed of the 9th of November, 1994 and is set out for convenience below.

*" 7. The Manager will be responsible for the payment of electricity charges to the Antigua Public Utilities Authority and in addition will be responsible for the running of the generator. Each owner will have his premises individually metered and the manager will render an invoice for electricity monthly which the purchaser will settle within 14 days, failure to do so which will result in the disconnection of electricity supply by the manager to the Purchaser.*

[1] See pp 306 of Trial Bundle.

[2] The provision and cost of electricity supplies – "Public services and utilities"- as the purchasers covenant, was passed on to the 1st Defendant.

*"**Second Schedule – Purchaser's Covenants***

*9. The Purchaser shall enter into possession of the Property upon the date of payment of all monies due under the Building Agreement contained in the Eight Schedule hereto and shall be entitled to all rents and profits and use in respect of the Property as from the said date: the Purchaser, as owner of Parcel No. 1135 shall be responsible for the cost of the insurance, maintenance and upkeep of this property and for all public services and utilities and other expenses charged or supplied to the property including property tax PROVIDED THAT THE VENDOR shall be responsible for and shall pay all such charges in respect of the period prior to that date."*

**8.** Further, by Registered Lease under the Registered Land Act [dated the 11th November 1994,] The Epicurean Ltd let part of its property purchased from Woods Development Ltd. (referred to in the DEED above) to the Clamant, American International Bank (in receivership)(AIB). This leased premises is the property to which the electricity services were provided, the real subject of this action.

**9.** In this lease the Lessor, Epicurean Ltd., covenanted to enforce the performance and observance of the terms of the 1st and 2nd Defendants of the deed of the 9th November between Woods Development Ltd. and Epicurean Ltd. (see paragraph 8 above). The schedules to the Deed of the 9th of November, inter alia, set out the regime in relation to the provision and payment for the supply of electricity. This regime is brought to knowledge of the claimant by virtue of this reference to the Deed and its provisions in the subsequent Lease between the claimant and the Epicurean Ltd. In so far as is relevant to the provision of the utility services, the lease provides as follows:

*"1. That for the benefit of the demised premises they shall if the circumstances so require enforce the observance of;*

*(a) The covenants stipulations undertakings and duties on the part of Woods development Ltd. specified in the First Schedule to a Deed dated the 9th day of November, 1994 made between Woods Development Ltd. of the first part woods Development Ltd. of the second part and the lessors of the*

*third part and registered in the Deeds Registry of Antigua in Liber H volume 147 at folios 1782-1785 (hereinafter called "the said Deed").*

2. *To observe and perform the covenants specified in the Second Schedule to the said deed".*

**10.** The conjoined affect of these two agreements is to impose an obligation on Woods Development Ltd. and/or Epicurean to meter the subject premises, supply electricity, to invoice the shop owners (such as the claimants), enforce payment for it and, to impose on the tenant of the lease - the claimant -, the obligation to settle such invoice within 14 days of billing, failing which electricity to the premises may be disconnected. I note also that clause 1 of the 1st Schedule of the Deed permits the 'Manager' (Woods Development Ltd/2nd Defendant) to enter into such contracts and agreements as are necessary and proper in the performance of its duties in relation to the purchaser/Epicurean Ltd (and in my view, those claiming through them) and the demised premises. The terms and conditions that the Claimant was subject to, were known by the Claimant, or otherwise were brought to his constructive notice if not actual notice by virtue of the incorporation of the relevant terms of the said Deed of the 9th November, 1994 in the lease of 11th November, 1994. Thereafter, the evidence is that the claimant paid Woods Development Ltd for the provision of electricity service as per invoice.

**11.** The Claimant in its Reply and its Defence to the Counterclaim avers that it has discharged its obligations to pay for the electricity consumed, by it by setting it off against a loan repayment obligation the 2nd Defendant has with the claimant Bank, now in receivership. The claimant avers that the second defendant initially had a overdraft facility of over EC$8,000,000.00 which now stands at over EC$19,000,000.00 and that the 2nd Defendant and the Claimant had a verbal arrangement whereby the Claimant discharged its liability for the consumption of the utilities by having it set off against the over draft liability. Further, the claimant contends that in any event there is no privity of contract between the claimant and the 1st defendant/Landmark.

**12.** Finally, I note that there are other components to the utility services provided to the subject premises, including a service charge to include sewage and other miscellaneous services and a separate electricity charge for the air conditioning which is shared between Epicurean Ltd and AIB/Claimant. There is no dispute over the existence of these components in this action.

**The Statute**

**13.** The relevant statute in this matter, upon which the claimant now invokes and relies, as rendering the contract illegal or that part of the contract between the Claimant and the 1st Defendant – if the Court were to find that a contract subsisted between the two – or between the claimant and the 2nd Defendant Woods Development ltd. is the Antigua Public Utilities Act cap 359 sections 5 (1), (2), (3). I set the relevant sections out below for convenience.

> "Section 5 (1) of the public Utilities Act Cap 359 of the Laws of Antigua and Barbuda, provided that only the Authority set up under that Act (hereinafter called the "APUA") shall have the exclusive right to supply electricity within the states of Antigua and Barbuda. The section reads as follows:
>
> *1. 5 (1) Subject to sub-section (2) the Authority shall have the exclusive right to generate, distribute, supply and sell electricity within Antigua and Barbuda and to perform services incidental thereto.*
>
> *2. (2) The Authority may give written permission to any person to generate and supply electricity at any place within Antigua.*
>
> *3. (3) Any person who generates, distributes, supplies and sells electricity without the prior written permission of the Authority shall be guilty of an offence and liable on summary conviction to a fine not exceeding three thousand dollars or to imprisonment for a term not exceeding 6 months".*

**14.** The Claimant submits, and did so for the first time in this action in its cross examination of the witnesses for the defendants and in its closing address to the court; that if an otherwise valid and binding contract for the generation and supply of electricity by the defendants to the claimants subsisted between the claimant and the defendants or through anyone whom the defendants claim, the effect of this Act would be to render

the contract or relevant contractual term illegal or void and as a consequence unenforceable. The substance of the claimant's contention is that the defendants cannot enforce the contract which has at its heart, the performance of an illegal act; which is the generation and supply of electricity services without written permission to do so.

**15.** The Defendants contend that; *"This argument is specious because the section is not mandatory but permissive, all it means is the Authority can give written permission, not that one cannot generate electricity without written permission. It is up to the Authority to bring legal criminal proceedings under section 5 (3)[1]."*

**16.** Further the Defendant contends that as far back as 2003, the Authority instructed the defendants that they would not be able to generate electricity and the defendant would have to provide its own electricity. This contends the defendants, was an implied permission or waiver by APUA. The defendant contends and Court accepts that the uncontested evidence is that APUA ceased delivering power from July, 2003 to April, 2007 and thereafter not consistently. Further, the defendant's contend and the Court accepts, that the evidence is that the APUA invited the defendant's to generate their own electricity to meet the APUA shortfalls. Up until recently it was a notorious fact that the central supply of electricity in Antigua was wanting.

**Unjust Enrichment – Restitution**

**17.** Restitution flows from an unjust enrichment. The Defendants in their counter claim do not specifically raise the issue of the unjust enrichment of the claimant/defendant to the counter claim. The unjust enrichment is first specifically canvassed in the written closing submissions of the defendant. It appears from the Authorities that this species of relief need not be pleaded or otherwise specifically raised at trial for the court to

[1] See paragraph 9 of "Submissions on behalf of the Defendant"

invoke its assistance in a matter. In any event it arose in response to the Claimant raising in its defence to the counterclaim, the effect of section 5 of the Public Utilities Act and doing so late in the actual trial hearing.

**18.** A Defendant (defendant to a counterclaim included) who is not contractually bound may have benefitted from services rendered in circumstances in which the court holds him liable to pay for them. Such will be the case if he freely accepts the services – as did the claimant/defendant in the instant case. In the view of the editors of Goff and Jones (**Goff and Jones**) The Law of Restitution, 5th Edition, the AIB/Defendant (to the counterclaim) will be held to have benefitted from the services rendered; "*if he as a reasonable man should have known that the plaintiff who rendered the services expected to be paid for them, and yet he did not take responsible opportunity open to him to reject the proffered service. Moreover, in such a case he cannot deny that he has been unjustly enriched ...*"[1] **(emphasis mine)**.

**19.** An unjust enrichment pre supposes three (3) things[2] **(i)** The Defendant must have been enriched by the receipt of a benefit **(ii)** the benefit must have been gained at the plaintiff's expense **(iii)** it would be unjust to allow the defendant to retain that benefit.

**20.** In this case, the defendants/counterclaimant's claim in the alternative to their contractual remedies, that the three (3) suppositions enumerated above apply in this case and contend that the claimant has been *unjustly enriched* by his consumption of the electricity provided to the subject premises.

**21.** The restitutionary claim is invoked in the event the Court holds that the contract(s) is unenforceable. If a valid contract subsists between the parties, then as a general rule the parties are to seek their relief in accordance with the terms of the contract.

[1] Goff and Jones, The law of Restitution, 5th Edition, page 18.
[2] Goff and Jones page 15

**The Pleadings – Relief**

**22.** The Claimant claims the following relief:

"1. A Declaration that there exists no contract between the Claimant and the 1st Defendant for the provision of electricity and other utility services to premises occupied by the claimant.

2. A Declaration that all material times there existed a contract between the Claimant and the 2nd Defendant for the provision of electricity and other utility services to premises occupied by the claimant at Woods Centre, which commenced in or about 1994 and exists to date.

3. A Declaration that the monies paid by the claimant on or about 13th January, 2006 were obtained by the 1st Defendant from the Claimant by improper and illegal pressure and threats and without consideration for the same except the purported forbearance by the 1st Defendant to suppress the supply of electricity and other essential services to premises occupied by the Claimant and that any contractual arrangement flowing from the payment of the said moneys is voidable and ought to be set aside.

4. Restitution of moneys had and received by the 1st Defendant

5. An injunction prohibiting the 1st Defendant by its officers, servants, or agents or otherwise howsoever from withholding from the claimant.

1. The supply of electricity
2. The supply of water
3. The provision of sewage treatment or similar services
4. The supply of air-conditioning services
5. The supply of maintenance services of the premises as is ordinarily the case, at any time, or from taking any action whatsoever to prevent the provision of the said services and amenities, in a manner consistent with good commercial

practice, to the Claimants premises at Woods Centre, St. John's Antigua.

6. Damages for unlawful conspiracy by the defendants to injure the Claimant.

7. Damages for unlawful interference with the economic interests and contractual rights of the claimant by the 1st Defendant.

8. Damages against the 1st Defendant for intimidation.

9. Damages for breach of contract against the 2nd Defendant.

10. Aggravated and exemplary damages against the Defendants.

11. Interests provided by section 27 of the Eastern Caribbean Supreme Court Act;

12. Further and other relief that the Court deems fit.

13. Costs.

**23.** The 1st Defendant in its claim counterclaim claims the following:

i. The sum of $ 492.279.89 and such other further sums as and when the same becomes due until judgment

ii. Interest at the rate of 9.5% per annum pursuant to the Eastern Caribbean Supreme Court Act.

iii. Prescribed costs.

On the following grounds:[1]

That a valid implied contract for the supply of electricity services to the claimant's premises subsisted between the parties. Further; "*The Claimant has failed to pay and/or refused to pay the invoices submitted to it for the services provided by the 1st Defendant notwithstanding its acceptance of the existence of an account between itself and the 1st Defendant and its payment of $ 10,000.00 thereon on that account on January 31st, 2006.*"

[1] See pleadings

**Issues**

**24.** The issues that I am called upon to resolve arise from the pleadings as set out above. The Trial Bundle does not disclose a Pre-trial memorandum setting out the issues that the parties require the Court to resolve.

**25.** In the first instance. Whether the claimant has proved any basis for the relief set out on his claim form and repeated above for convenience. In particular clause 1 – 10 of the said claim for relief and more particularly still, clause 1 and 2.

**26.** Whether a contract for the provision of the service was created and at the relevant time subsisted between the **(i)** Claimant and the 1st Defendant and/or, **ii)** Claimant and the 2nd Defendant.

**27.** Whether the 2nd Defendant and 1st defendant were in a relationship of principal and Agent respectively, with each other.

**28.** Whether the Public Utilities Act, renders the contract for the provision of the utilities illegal or void and as a consequence, unenforceable.

**29.** If there was either no contract between the parties or the contract is unenforceable, whether the Claimant was unjustly enriched by its receipt of the utility services. Whether the circumstances of this case justify the invocation of restitutionary relief for unjust enrichment of the Claimant.

**30.** Whether the failure of the Claimant/Defendant to the counterclaim – AIB -, to plead the effect of the Statute, precludes it from relying on it for its defence.

**31.** Whether the defendant's - Woods and Landmark - failure to specifically plead Restitutionary relief on the grounds of unjust enrichment precludes them from now raising it in their closing submissions and relying on it as the basis for its alternative relief in the counterclaim.[1]

**The Evidence and findings**

**32.** There is no dispute over the existence and execution of the various contracts i.e. **(i)** that which is encompassed by the Deed of the 9th November, 1994 between the Woods Development Ltd. as the Vendor (and also as the 'Manager') and Epicurean Ltd. as the Purchaser **(ii)** The lease under the Registered Land Act with Epicurean Ltd. as the landlord and the Claimant /Defendant to the counterclaim, American International Bank as the tenant of the 11th November, 1994.

**33.** The evidence disclosed that in the beginning the AIB, Woods Development Ltd and Epicurean Ltd shared directorships. Further, it appeared from the evidence that the said Woods Mall was in substantial part at least, financed by AIB. Mr. Beaulieu testified that he was a director of Epicurean Ltd and Woods Development Ltd. and that a Mr. Cooper was a director of Woods and AIB. He said that in the 1990's AIB, Woods Development and Epicurean maintained a close and good relationship. Further, Mr. Edward Smith of AIB testified that it had lent both Defendants millions of dollars in the past. I note also that exhibited in the Bundle, Vol. 6 and 7 at pp 558, the Claimant/AIB entered into a near identical agreement (in 1997) with Woods Development for another unit of no

[1] The 1st Defendant, Landmark, through his Attorney, did allude to the principle of unjust enrichment in its letter dated the 25th October, 2005 to the Claimant's Attorney's, Watt and Associates. The letter is to be found at pp343 of the Trial Bundle.

concern to us in this matter, as did Epicurean (by the 9th Nov. 1994 Deed). By virtue of this also, the Claimant company would have been intimately familiar with the legal and commercial regime in place for the provision and payment of utility services provided to the premises. The institutional knowledge, if nothing else, would contain the details of the legal/commercial relationships the claimant had with the parties with respect to the provision of and payment for the utility services to the premises. Further, the evidence discloses that AIB was not a small player in the Woods Mall. It financed the development of the mall, occupied and did lease for 99 years, a large mezzanine floor from a large unit owner – Epicurean Ltd., subleted to several tenants gen erating substantial rental income and consumed ample amounts of electricity. Everything about the claimant suggests that in this small Antiguan economic and commercial environment and smaller still, the small Woods Mall commercial community, it would attract treatment as that of a significant unit owner as opposed to a mere small commercial tenant.

***34.*** The Claimant has accepted that he was invoiced for the provision of the electricity services by Landmark. The claimant has accepted that he has consumed the electricity he was invoiced for. In cross examination, the sole witness for the Claimant, the Official Receiver Edward Smith testified; *"I accept we have been receiving electricity for four years."* He continued when shown the documents at pp.158 – 170 of the Trial Bundle[1]; *"these are the copies of invoices sent to me by Landmark Ltd – it appears that way. No we have never paid them, they are still pending. I accept we consume electricity as per invoice ...We are not in dispute that we are to pay for electricity consumed, but the issue is, to whom"*. Further, he acknowledged receiving the invoice from Landmark at pp 351 of the bundle which begins at 1st February 2005 and runs to the 31st march 2008, for the sum of EC$1,734,378.93. I accept this invoice as evidencing the truth of what it states. I find also that the claimant did consume the electricity for which he was invoiced and which forms the claim in this matter, continuing up to today. Further, the case for the defendants is that the APUA billed the Defendant's and was paid by the Defendants substantial amounts representing the claimant's consumption of APUA

[1]Represents the period, February 2005 up to when he says he first new of Landmark, October 2005.

electricity. West Indies Oil Company was paid by the Defendants for its supply of fuel to operate and generate electricity to the Woods mall and to the claimant. The claimant was directed to the respective invoices and did not seek to refute them. I accept the payment by the defendants to APUA and West Indies Oil as part of the proved facts in this case.

**35.** The Claimant curiously denies being aware of Landmark taking over the provision of the electricity service from January, 2005. American International Bank stated that it wasn't until much later in 2005 that he became aware of this fact[1]. I note however that invoices are in the name of Landmark Ltd. and are so entitled and dated as early as the 1st of January 2005.[2] Further, I note that the mall is a relatively small mall. It is difficult to accept that American International Bank was not aware of the change in the service provider at the very least by observation or hearsay coupled with the patent heading of the documents in the name of Landmark. Further, the 1st Defendant alleges that notice of the change of provider of the services from the 2nd Defendant to the 1st defendant was initially given by letter of 17th October of 2004. Be that as it may, by the evidence of Mr. Smith of the claimant company, he came to know of Landmark's role at least by the letter of October 2005. For the reasons included in this paragraph and in paragraph 33 above, I conclude that he had actual notice of the commencement of Landmark's services in 2004 and in any event by the end of February of 2005. To date the Claimant has not paid the balance due on the invoices to any of the Defendants or other entity.

**36.** The Claimant has not denied that he is legally obliged to pay for electricity services consumed on his premises. He asserted that his obligation is to pay the sum to his landlord, Epicurean Ltd. or to Woods and not Landmark Ltd with whom he has no

[1] He alleges in his statement of claim at para 17 having received a letter from the 1st defendant on the 17th of October 2005 making a demand for payment.
[2] The earliest date is set out as "2/1/2005". Whether the month is January or February, they both speak to a period very early in 2005.

contract.[1] The claimant acknowledges having paid for electricity in the past to the 2nd Defendant notwithstanding not having entered into a written contract with the said 2nd Defendant.[2] I do however find that the Claimant is liable to pay the sum claimed including the ongoing consumption to date.

**37.** The Claimant in effect denies that the course of conduct between itself and Landmark Ltd. which included acknowledging the receipt of the invoices, promising to pay the invoiced amounts by letters dated the 3rd and 13th January 2006 and actually paying $10,000.00 on account toward reducing the indebtedness to Landmark Ltd. amounts to an implied or collateral contract between itself and Landmark Ltd/1st Defendant.

**38.** Landmark, even as an agent, has the right to enforce a contract in the circumstances of this case. In paragraph 864 of Halsbury's Laws, 4th edit the editors state the law thus: *"Any person who makes a contract in his own name without disclosing the existence of a principle, or who, though disclosing the fact he is acting as an agent on behalf of a principal, renders himself personally liable on the contract, is entitled to enforce it against the other contracting party, notwithstanding that the principal has renounced the contract."*

**39.** The Claimant testified *that the $10,000.00* paid to Landmark was paid under threat of disconnection - under duress.

**40.** Looking at the text and tone, of the letters including those of the; 17th October, 2005, the letter from the claimants Lawyers of the 21st October 2005, the AIB Letter of the 3rd Jan. 2006 to Landmark Ltd, Landmarks letter to AIB of the 4th Jan. 2006 and AIB response on the 13th Jan. 2006 to the Defendants demand for satisfaction, I do not see there reflected, the duress and or actionable intimidation now claimed by the Claimant. I note also, that the lease agreement (read together with the Deed) provides clearly for

[1] See the claimant's statement of claim - Cl. 33(3) - where it avers that it is contractually bound, up to the present time, to receive and pay for utilities from Woods/2nd defendant.
[2] No written contract has been alleged, proved or otherwise found by this court.

disconnection as a sanction for not paying the electricity charges within 14 days of the monthly invoice. Normal commercial practice I believe, supports the view that the sanction of disconnection is expected when a electricity bill of the magnitude of the subject invoice is not paid. There is no contention by the claimant in his defence or evidence outside of the allegation of the "set off", that he had already paid for the services to Woods (by virtue of his lease with Epicurean and his admitted contract with Woods; see also para.10 above) whom it had received the service from since on or about 1994, or to any other entity that he may hold as being entitled to receive this payment. I reject the claimant's contention that he paid the $10,000.00 under duress as now alleged. Not even in the claimant's witness statement did he raise the issue of duress even though the creation of a contract was raised in the defense of the Defendants.

**41.** The Claimant's evidence in chief is devoid of any support or any sufficient support for its contention that there was a set–off against the 2nd Defendants and Epicurean Ltd. indebtedness to the American International Bank against American International Bank electricity consumption indebtedness.[1] In any event, I accept counsel's observation that the instant action concerns a debt incurred during a period unrelated to that which marks the alleged set-off referred to by the claimant. Further, if as the evidence alluded to, the said issue of the loan to the 2nd Defendant and the subsequent set-off formed the basis of another action in the High Court, where it has been raised or properly could have been raised and that other matter is either ongoing or has been disposed of, then in the appropriate circumstances, raising it in this action would be an abuse of process.[2]

**42.** In cross examination in response to certain questions put to the Claimant, Mr. Smith attempted to raise the issue of the said indebtedness to the claimant. Although the said indebtedness along with the payment of the $10,000.00 under threat, the allege

[1] See the witness statement of Mr. Smith for AIB.
[2]Cause of Action estoppel and Issue estoppel; see Lord Keith of Kinkel in Arnold v North West Bank PLC (H.L(E)) [1991] 2 A.C. 93; Not enough detail of the issues supplied in our case to make a finding.

unlawful conspiracy by the Defendants to injure the Claimant, unlawful interference with the economic interests and contractual rights of the Claimant by the 1st Defendant and the allegation of Intimidation, were all raised (and denied by the Defendants) in either the Claim Form or the Statement of Claim, none of these allegations were supported by sufficiently cogent evidence or any evidence at all that would elevate them from mere assertions in pleadings to proved facts[1].

**43.** I accept that from the Statement of Case and the evidence of the Claimant, one can conclude that he had a contract with Woods for the supply of utilities to the claimant's premises for the use and benefit of the claimant [2] and indeed, the evidence in the matter has not detracted from the preponderance of the evidence that the Claimant's primary obligation was to pay the invoiced sums to the 2nd defendant/Manager/Woods Development Ltd or whosoever the said Manager lawfully engages to provide the subject services. The witness statement of the claimant, at clause 5 goes the furthest in establishing the said legal relations and refers to *"...the provision of electricity and air conditioning services supplied by the second named Defendant under contract to the Claimant."*[3] ***(emphasis mine)***

**44.** By virtue of the Deed of the 9th November as and to the extent incorporated in the Lease of the 11th November, the claimant's landlord, Epicurean Ltd, appointed the 2nd defendant as the mall manager and accepted and retained in its 11th November Lease with the claimant, the said "Managers" right to contract its service functions out to another entity.[4] I find that this 'right' would also have been in the contemplation of the claimant and the 2nd defendant at the time of the creation of their contract for the provision of the subject services. It is initially to the 2nd defendant/Manager that the claimant, way back in 1994-1996, after leasing the premises from Epicurean Ltd,

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[1] See the allegations pleaded in paragraph 1-10 of the Claim Form at page 118-119 of Trial Bundle volume 2 and the Statement of Claim from page 120 of the said Trial Bundle.
[2] See also the Clause 3, 4, and 5 of the witness statement of the Edward Smith for the Claimant.
[3] See also clause 33(2) of the claimant's statement of claim for the claimant's assertion that it is contractually bound to pay the 2nd defendant for the consumption of the utilities.
[4] See clause 11 and 15 of Jean Beaulieu witness statement and clause 5,7 and 13 of the witness statement of John Carter together with the cross examination evidence of them both for the evidence in support of Landmark being engaged to provide services.

entered into legal relations with the 2nd defendant for the provision of services, including electricity services. So settled was the claimant's obligations to pay for the said services, that it alleges in its claim that it set off its utility indebtedness against an alleged loan that Woods had with the claimant Bank (AIB). This relationship endured for many years, so that the fact that the claimant intended to contract for the provision and payment for the services and did so contract with the 2nd defendant is not, prior to January 2005, or now, in dispute. The claimant Bank (AIB), went into receivership on or about 1998. The claimant has not alleged nor sought to prove (and in any event, in my view, has not so dispelled the allegation supported by a preponderance of evidence that it was obliged to pay the 2nd defendant or its lawful agent for the provision of the services) that it was not contractually obliged to pay the 2nd defendant for the provision of the services consumed prior to 2005 or indeed thereafter.

**45.** I also accept that the evidence of the 1st Defendant's witness and managing Director – Mr. John Carter including; the series of communications between Defendants and the Claimant, the lawful engagement of Landmark by Woods to provide, bill and receive payment for electricity to Woods Mall, including the fact of the actual provision of electricity to the Claimant, the consumption of that electricity by the Claimant , the invoicing of the claimant for the said consumption, the undertaking by the Claimant in letter of the 13th of January 2006 to pay the invoiced sums, the payment of the $10,000.00 towards the electricity invoices, the undertakings in Court in separate proceedings between the parties, to have the claimant extinguish its utility liability, made by the claimant's Lawyers – Watt & Associates – on the claimant's behalf, establishes an implied contract between the Claimant and Defendants for the continued provision of electricity and payment by the Claimant on a monthly basis.

**46.** The evidence discloses the elements of both **(i)** a clearly subsisting contract between the Claimant and the 2nd Defendant who since 1994-1996 provided electricity and other services to the claimant[1] **(ii)** and subsequently, from 2005, a contract between the 1st

[1] See claimant's statement of claim para 6; see also para 9 and 10 of the witness statement of Jean Beaulieu.

Defendants and the Claimant either as agent of the 2nd Defendant or to a much lesser extent, as a wholly independent service provider.

**47.** The question in relation to the 1st Defendant's claim is whether the 1st defendant provided the services to the claimant as agent of the 2nd defendant thereby leaving the 2nd defendant as the principal or whether the 1st defendant provided the services wholly independently.[1] It seems to me that for our purpose here, that either way, If I were to find the formation of an enforceable contract at all, it appears the Claimant, on an implied contractual basis (and on an implied agency basis in relation to Landmark) was duty bound to pay either Woods Development Ltd/2nd Defendant or Landmark Ltd/ 1st Defendant for the electricity services it consumed, was invoiced for and as pleaded by the Defendants.

**48.** Halsbury's Laws 4th edition at paragraph 944 provides that payment by a debtor to a third person at the request of the creditor is equivalent to payment to the creditor.[2] Payment to an agent with express authority to receive payment discharges the debt, as to payment in the ordinary course of business to a person held out as having authority to receive payment. [3] Accepting this as a correct statement of the law, then I hold that the claimant can discharge its liability to Woods by payment to Landmark and vice versa.

**49.** The Evidence of both Mr. Beaulieu of Woods and Mr. John Carter of Landmark and the law with respect to Agency, suggest that Landmark was given the authority to contract with the tenants and or unit owners and to provide the services and to collect payment for the service . This is not altogether any different from the basis upon which the Claimant initially in 1994-1996 apparently, happily contracted with Woods to have Woods provide the services even though arguably it had no privity of contract with

[1] See para 715 of Halsbury's Laws for the method of creation of the relation of agency orally and by implication.
[2] See letter dated Feb. 7th 2005 from Woods Dev. to "Unit Owners at pp340 of the Trial Bundle.
[3] Ibid; As to Landmark holding itself out as having the authority to provide the service and in any event, to receive payment for the service, see letter dated 31st January 2004 from Landmark to "Unit Owners" at page 324 of Vol.5 of the Trial Bundle and the series of letters from pp340 – 349 of Vol 5 along with the copies of invoices and statements of account from pp 353 in Vol. 5 of the said Trial Bundle.

Woods. The contracts between Landmark and unit owners or tenants were, however, rooted in the contractual arrangements found in the Deed and the Lease referred to in this judgment and indeed relied upon by the parties to this action. If this is so, then it is not for the claimant to dispute the obvious nature of the relationship between the 1st and 2nd Defendants. The Claimant would have had to enter into legal relations with the new provider which was engaged by Woods, for the provision and payment of and for the service, or lose the benefit of the service.

**50.** The legal regime governing the claimant's receipt and payment for electricity services is that which is evident in the conjoined effect of the Deed of the 9th and the Lease of the 11th. By those agreements, the claimant was bound to pay its Landlord, Epicurean Ltd, or the Management Company Woods Development Ltd (or any Company engaged by it). Unless otherwise agreed to by the claimant, Landmark can only enter into the picture and provide the services by virtue of its engagement by the 'Manager', Woods Development Ltd, for the purposes set out in the said Deed. Landmark, in my view, is an agent of the Manager, Woods Development Ltd and can lawfully demand and receive payment in that capacity. The Deed between the 2nd Defendant and the Claimant's Landlord, Epicurean did not provide for the provision of the utility services in a manner other than that which is therein provided. A private arrangement concerning the provision and payment for electricity to the subject premises, between the 2nd Defendant and the Epicurean, and inconsistent with the terms of the lease which the Deed required to be binding on the claimant, cannot now be imposed on the Claimant. Landmark cannot just *waltz* onto the scene and into a contract with the Claimant, as a wholly independent contractor with no connection to the Deed and Lease referred to several times earlier, unless by some other agreement with the claimant and relevant other parties. The claimant contends in part [1] and I agree, that no such alternative wholly independent agreement has been so proved in this matter.

[1] In fact they contend that no agreement whatsoever subsists between the claimant and Landmark.

**51.** I am satisfied on the preponderance of the evidence that the relationship between the 2nd defendant and 1st Defendant is one of principal and agent respectively and that Landmark contracted with the claimant in that capacity only. Further, I am similarly satisfied that the claimant is contractually bound to pay the continuing sum claimed by the 1st defendant, to either Landmark as an Agent of Woods or Woods Development Ltd (2nd Defendant) as principal, for the reasons provided above (including those in paragraph 48 and 49) .

**52.** THE EFFECT OF THE STATUTE ON THE CONTRACT FOR THE SERVICES

a) **Pleadings:** The Claimant has not pleaded the effect of the statute, the Public Utilities Act, on the contract(s) by the defendants to generate and/or supply electricity to the claimant. In Blackstone's Civil Practice, 2003 edition, it is said that a Judge must not give judgment relying on issues that are not in the Statement of Case.[1] It is however generally accepted, that one does not plead the law. In this case the claimant is relying on the statute as a complete defence to the counterclaim. Halsbury's laws state the law as; where a contract is on the face of it illegal or void the court will take notice of that fact and refuse to enforce the contract even though the vitiating factor has not been pleaded and even though the Defendant does not wish to raise the objection.[2] Taking this as a correct statement of the law, the Claimant need not plead the Statute or the circumstances prohibited by the Statute for it to rely on the effect of the said Public Utilities Act. However, this statement is first, a statement of the Law in the U.K and is to be read in the context of the Eastern Caribbean Court, Civil Procedure Rules (CPR2000), which in essence, provides at rule 10.5 and 10.7 (and learning thereto), that the defendant (to the counterclaim) is to set out the whole of his defence to a claim in his statement of case, including any allegations made by him.

[1] See Lipkin Gorman v Karpnarle Ltd [1989] 1WLR 1340; see also pp 134 of A Practical Approach to Civil Procedure, 4th edit, by Stuart Sime.
[2] Halsbury's Laws, 4th edit. para 838; see also Royal Exchange Assurance Corpn v Sjoforsaknings Aktiebolaget Vega [1902] 2KB 384.

b) **Unenforceability:** The Statute has not expressly forbidden the making of a contract for the generation and supply of electricity. Some statutes specifically state that a particular contract cannot be entered into or that it will not be enforceable. The contract with which we are here concerned in this matter raises the question as to whether the statute impliedly prohibits the making of such a contract or prohibits the performance of it.

c) Section 5 of the Act confers on the entity created by the same Act – APUA – the exclusive right to generate and supply electricity. It also provides at s. 5(2) that it can grant permission in writing to others to do the same. It is accepted that the Defendants in this matter did not have any written permission to generate and supply electricity. The evidence along with the demeanor of the witnesses for the Defendants – Mr. Beaulieu and Mr. John Carter repectively – reflected in my view, that they were clueless as to the requirement in the Public Utilities Act for the permission to generate and supply electricity to be obtained from the authority, in writing. The defendant's say, and it is not refuted, that APUA orally authorized them to generate and supply electricity whenever APUA could not generate and supply the Woods mall.

d) Section 5(1) is not in itself an express prohibition, but merely declaratory of the APUA's exclusive right. Its exclusivity is subject to the written permission granted to another person by the APUA. Section 5(1) is therefore not conclusive as to the status of contracts for the generation and supply of electricity. Sub-section 3 however, speaks directly to a person who generates and supplies electricity without written permission from the APUA. This sub section provides that if you do so generate and supply electricity without written permission you shall be penalized by way of the fine and or imprisonment there provided. Further, section 8 of the Act gives the authority the power to do anything or to enter into any transaction to facilitate the proper discharge of its function. Further still, section 9 of the Act expressly empowers the authority with Ministerial approval, to delegate its prescribed powers and duties. In my

view the Act, subject to its regulatory framework, contemplates the generation and supply of electricity by entities other than the UPUA and goes to some length to make clear that intent.

e) As to when an Act implies the prohibition of the forming or performance of a contract; In St. Johns Shipping Corpn v Joseph Rank Ltd [19570 1 QB 267, it was opined that if a contract has as its whole object the doing of the very Act which the Statute prohibits, it can be argued that you can hardly make sense of a Statute which forbids an act and yet permits to be made a contract to do it.

f) The evidence in the instant case inclusive of the documents relied on in the Trial Bundles, is that the contract or that part of the contract with which we are here concerned, between the claimant and the defendants, was for more than the provision of electricity, but the service covered also included sewage, water, maintenance and the like.[1]

g) The making of the contract is clearly permissible, for at any time subsequent to its making, but before commencement or performance, one may obtain the written permission or obtain the delegation from section 9, to generate and supply electricity to private premises by the owners of the said private premises. In the end, one has to look at the whole of the statute to determine what is its intention; what does it prohibit. Did the Act intend to prohibit others from generating and supplying electricity to the national grid or to the public generally? The legal character of the mall "Manager" is that all unit owners are 'shareholders' and owners of the mall management company Woods mall. Therefore the owners privately generated and supplied electricity to themselves. Did the Act intend only to penalize conduct or also to prohibit

[1] See para. 6 of claimant's Statement of Claim.

contracts.[1] The evidence in this matter is that the defendants, in the first instance merely collected and paid over to APUA what was due to APUA for their generation and supply of electricity. The defendants were merely conduits or implied agents if you will, of APUA, charged with the responsibility of collecting the APUA revenues from the AIB/Claimant. In this capacity neither of the Defendants were in breach of the Act.

h) In the second instance, when APUA, through lack of capacity or other disability, could not provide service to Woods Mall, they verbally informed the Woods Mall Manager/2nd defendant and 1st defendant and instructed them to generate and supply electricity to the owner's units. The subsequent generation and supply of electricity by the Mall Manager Woods/Landmark (which in any event appears on the evidence not to have been objected to by the APUA), does not on the evidence, affect the revenue of the APUA or its position in relation to the Public Utilities Act. The evidence discloses and I accept that the relevant electricity consumption meters on the units at woods mall were that of the APUA. Can it be said the Public Utilities Act was intended to prohibit contracts that operate in the manner set out above? To hold that it does prohibit the formation and performance or enforceability of such contracts would be a nonsense, wreak havoc on the commercial environment in Antigua and Barbuda and quite frankly would not accord with the notorious incapacity of APUA to generate and supply electricity at the material time.

i) The real purpose of the Act in my view, is not to nullify or render unenforceable any commercial dealings and contractual obligations in the course of electricity generation and supply causing widespread loss to private business such as malls and other commercial buildings especially where the Mall owners as in the instant case are supplying themselves alone.

[1] See pp 434, Law of Contract by Treitel, 11th edit.; see also the St. Johns shipping case, Supra.; Also, with the greatest respect for counsel for the Defenant's, I cannot agree with his argument against the application and effect of the Act on the contract as a complete defence to the claimant's reliance on the Act.. The argument is repeated at para. 15 above.t

j) The real purpose of the Act it seems to me, is to create a single corporate entity to take over the several utility operations in Antigua and to regulate and rationalize the supply of electricity, water and telecommunications for the benefit of the public at large, protect the revenues of the utilities for their application for improvement and development of the national service; by among other things, protecting the new entity as a provider against debilitating competition, and where beneficial, delegating its functions to other entities and not I may say, to prevent the efficient commercial and what appears to be a very public arrangement by the landlord and Defendants in this matter or other lawful entity to collect payment for the consumption of electricity on behalf of the licensed provider (APUA) and pay it over to the APUA, nor is it intended to prevent the private commercial and well known, albeit internal, private arrangement for the generation of electricity to consumers (tenants) where APUA has ceased to provide an electricity supply due to its inability or incapacity. As to the effect of the Manager charging an additional management fee for the provision of the service; this is unclear and importantly, the quantum not satisfactorily proved, and in any event subject to the *de minimis* rule.

**53.** THE APPLICATION OF RESTITUTION – UNJUST ENRICHMENT

a) **Pleadings:** The defendants are relying on the principle of unjust enrichment and calling on the claimant to make restitution if the contract between the parties for the provision of electricity services is rendered unenforceable by the said Act. The defendants have not pleaded unjust enrichment and restitution but raised it in their closing address in response to the claimant's *eleventh hour* reliance on the Public Utilities Act to bolster its defence to the counterclaim.

b) **The Law:** The editors of Goff and Jones on the Law of Restitution, 5th edition at pp 52, say that the claimant (including a counter claimant) can bring a restitutionary claim only if the contract can be brought to an end, rectified, rescinded or otherwise

set aside. This remedy is invoked only if the contract (or relevant severable contract term) is rendered unenforceable or otherwise does not subsist. Although I have held above, that there is a subsisting contract between the claimant and the defendants for the provision and payment of the electricity and other services, I believe that for completeness I should briefly address this final issue very briefly and give my findings as part of the judgment order.

c) In the event the contracts between the parties were to be found void or illegal and as a consequence unenforceable, can the Court order the claimant to make restitution to the Defendants or either of them on the ground that the claimant has been unjustly enriched? The law on this issue is for our purposes here set out ever so briefly in paragraph 16 to 20 above.

*d)* As a matter of Public Policy, the Courts are reluctant to support a restitutionary claim and assist a party who has to rely upon an illegal act (The generation and/or supply of electricity without written permission) as a necessary part of his claim. However, Goff and Jones[1] at pp 67 make the point that; *"Because a successful plea of illegality allows a defendant to retain an enrichment which may be manifestly unjust, it should succeed only in the clearest of cases."*

*e)* Goff and Jones continue at pp 46; "... *it would be unconscionable for the defendant, having received an incontrovertible benefit at the plaintiffs' expense, to reject a claim that he should make restitution."*

f) The instant case is not the clearest of cases for the statutory unenforceability of a contract. The success of this plea by the claimant/Defendant to the counterclaim, would undoubtedly allow the claimant to retain an enrichment which would be manifestly unjust. The unjust enrichment in this case will, having regard to the law, attract an order for the claimant to make restitution to either of the defendants in

[1] Supra.

the sum claimed in the counterclaim inclusive of the continuing loss to date. The Public Utilities Act is not definitive on whether a contract such as the contract(s) we are here concerned with, is illegal, void and unenforceable. The Act does not expressly prohibit the formation, performance and enforceability of the subject contract(s). In all the circumstances of this case and the law, I hold that the contracts over which we are here concerned are not, by the Act, impliedly rendered; illegal, void and unenforceable.

**CONCLUSION**

**54.** The Court has found there to be a contract between the Claimant and the 2nd Defendant as principal and between the claimant and the 1st Defendant as the agent of the 1st Defendant. I find that payment of the amount due on the counterclaim to the 1st defendant discharges the debt owed to the principal/2nd Defendant or the 1st Claimant as agent of the 2nd Defendant.

The Court has found that the 1st defendant has proved its' counterclaim and the claimant's Judgment debt in law can be discharged by paying the sum ordered to be paid to either the 1st Defendant or the 2nd Defendant. However, in this action, it is the 1st Defendant that has counterclaimed for an Order for payment in settlement of the proved debt. The 2nd Defendant has not claimed that payment be made to itself.

***55.*** The judgment debt as supported by a statement of account – *Customer Balance Detail* - exhibited in Trial Bundle, vol. 5 at pp 351-352 and supporting invoices from pp 353-433 of the said Trial Bundle, represents the period February 2005 to March 2008 is EC$1,734,378.93 inclusive of the EC$492,279.89 referred to on the counterclaim.[1] The court is dissatisfied with the manner and extent of the proof of the exact quantum of the debt. A party ought not to throw the bundle of invoices of various descriptions, at the feet of the Court and in effect say; *here, you work it out.*

[1] See Trial Bundle.

**56.** The 1st Defendant counterclaims at pp 150 of the Trial Bundle, that there is due and owing the sum of EC$492,279.89 as of January 31, 2006 which amount continued to increase by the provision of further services to EC$1,734,378.93 by the end of March 2008[1]. Regrettably, although the 1st Defendant is entitled to payment for the provision of services from January 2006 to date of Judgment – if proved – I have not had sight of any documents in the bundle evidencing the material electricity consumption from March 2008 nor has the court been directed to any nor has the quantum been acknowledged in the testimony of the witnesses. For this reason I can make no dollar award for the quantum not either expressly or impliedly proved for that period. However, the claimant has admitted and the court accepted, that the claimant has consumed and is liable for the continuing cost of that consumption, now, up to the date of judgment.

**57.** The Judgment sum attracts both the fixed[2] and the discretionary interest[3]. So, what discretionary interest rate does the court apply if any? This court finds much logic in the learning in the UK White Book 2000 volume 1. Where an issue arises as to the appropriate S.27 interest rate to apply to a particular type of action including the instant judgment debt; *"...it is within the discretion of the Court to award interest at the judgment Act rate, and there is nothing exceptional about using such rate as an exercise of discretion. When a court is considering the appropriate rate of interest for a period from the date of the cause of action to the date of the judgment, the rate payable on judgment debts is a convenient starting point"* (see 7.0.15, Civil Procedure, Vol. 1 2000.) The white book is here referring to our equivalent of interest pursuant to the Judgment Act which is 5% per annum, applicable on a judgment sum from the date of judgment to satisfaction, as an appropriate starting point. I adopt this reasoning and consider 5% as the lower end of the scale in this case and do so even if I were not to consider this matter as being wholly commercial. I accept that on the highest end of the

[1] See pp 352 of Trial Bundle.
[2] The Judgment Act.
[3] Section 27 of the Supreme Court Act.

scale, a recent transaction of a wholly commercial character such as this one, will attract the prevailing annual interest rate suggested by the claimant, as 9.5 %.[1]

**58.** The Court has found that the Public Utilities Act does not render the subject contracts either illegal or void and finds that the contracts are valid and enforceable.

**59.** The Court has also found as a fact, that were the contracts determined to be unenforceable, the claimant would have been **(i)** enriched by the benefit of the receipt of the electricity serviced generated and/or supplied to the claimant by the defendants; **(ii)** That the said benefit was gained at the Defendant's expense; **(iii)** That it would be unjust to allow the claimant to retain the benefit of the supply and consumption of electricity. Therefore the claimant would be ordered to make restitution to the defendants; in the sum claimed together with the continuing losses.

**60.** For the reasons provided above; IT IS HEREBY ORDERED as follows;

**(i).**That the claim for the Claimant is dismissed in its entirety save for, "(ii)" below;

**(ii).**That it is declared that there is a subsisting contract between the 2nd Defendant and the claimant for the provision of electricity and other utility services to the premises occupied by the Claimant at Woods Centre, which commenced in or about 1994 and exists to date;

**(iii).**That there is also a subsisting contract for the provision of electricity services, between the claimant and the 1st Defendant as agent of the 2nd defendant.

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[1] In **Tate and Lyle Food and Distributor** v **G.L.C.** [1981] 3 AER 716 at 722 d-j. Forbes J put it thus: *" I feel satisfied that in commercial cases the interest is intended to reflect the rate at which the plaintiff would have had to borrow the money to supply the place of that which was withheld.";* The award of interest on damages is part of the attempt to achieve *restituto in integrum;* ***see also, Alston Engineering Sales and Service Ltd. (2003) UKPC (PC); Kemp v Tolland*** *[1956] 2 Lloyds Rep 581 (691).*

**(iv).**That there is judgment for the 1st Defendant on the counterclaim in the sum of $1,734,378.93 up to the end of March 2008 and the continuing electricity costs provide the claimant's premises calculated thereafter, to the date of this judgment;

**(v).**That the Claimant to pay the judgment award to the 1st Defendant and sole counterclaimant, as a good discharge of its judgment debt to the 1st claimant (and the 2nd defendant);

**(vi).** That the Claimant substantially losing on its claim to the 2nd Defendant, do pay the 2nd Defendant 60% of the Prescribed Costs on the Claim;

**(vii).** That the 1st Defendant substantially succeeding against the Claimant claim and obtaining judgment on the counterclaim, that the claimant pay 80% of the Prescribed Costs to the 1st Defendant on the counterclaim.[1]

**(viii).** That the Judgment sum attracts; interest at the rate at 9.5% per annum from the date of the cause of action commencing in February 2005, to the date of Judgment on the 21st of December 2009 **AND** the Judgment Act interest at the statutory rate of 5% per annum from the date of this Judgment on the 21st of December 2009 to date of full satisfaction.

**David C. Harris**
High Court Judge
Antigua & Barbuda

[1] The 1st Defendant did not succeed in proving that the 2nd defendant had no contractual relations with the Claimant (see para. 19 of the Defence and the Counterclaim at para. 19, pp 148 of T.B vol. 2); Further, the 1st Defendant did not disprove, on the claim, that the 2nd defendant had a contract with the claimant up to date (see also para. 19 of the Defence at pp 148 of Trial Bundle vol. 2).