ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

HCVAP 2010/003

BETWEEN:

AMERICAN INTERNATIONAL BANK (In Receivership)

Appellant

and

[1] LANDMARK LTD.
[2] WOODS DEVELOPMENT LTD.

Respondents

Before:

The Hon. Mde. Janice M. Pereira	Justice of Appeal
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Errol Thomas	Justice of Appeal [Ag.]

Appearances:

Mr. Hugh Marshall with him Ms. Cherisa Roberts for the Appellant
Mr. Dane Hamilton QC with him Mr. D. R. Hamilton for the Respondents

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2010: June 30;
2011: July 4.

Civil Appeal - Contract - whether a contract existed between the appellant and the 1st or 2nd respondent for the provision of electricity and other utility services to the appellant - principal and agent - whether the 1st respondent was an agent of the 2nd respondent - whether the trial judge erred in entering judgment for the 1st respondent on its counterclaim having found that the 1st respondent was agent of the 2nd respondent - whether there was an implied contract as between the 1st respondent and the appellant by which the 1st respondent provided the services and for which payment was to be paid to the 1st respondent as a principal and not as agent for the 2nd respondent - costs

The appellant (AIB) is an Antiguan International Business Corporation and is in receivership. The 1st and 2nd respondents Landmark Ltd. ("Landmark") and Woods Ltd.

("Woods") respectively are two Antiguan companies doing business in Antigua. AIB entered into a lease of various units comprising the Mezzanie Floors at Woods Centre with Epicurean Ltd. ("Epicurean"). AIB in turn sublet some of those units to other entities. Epicurean entered into a Deed with Woods ("the Deed of Management") for the management of the Woods Centre. Epicurean was described therein as the Purchaser and Woods was described as the Manager. Under the Deed of Management Woods covenanted to provide electrical and other utility services to the various units comprising the Woods Centre. These covenants contained in the Deed of Management formed part of the Deed of Lease between AIB and Epicurean. The Deed of Management also provided that Woods may engage any person, firm or corporation having adequate expertise to do any works or perform any services for the Purchaser. In 2005, Woods engaged Landmark to supply the utilities to the premises and to carry out the other "Management" activities. By letter dated 31st January 2004, Landmark gave notice to AIB and other unit owners that it had been appointed as contracting agent of Woods to provide the services.

Landmark began billing AIB for the services in February 2005. AIB failed to make payments to Landmark for the services and in essence asserted that it was under contract with Woods for the provision of the services and for which it should offset the amounts billed in respect of the services against an outstanding loan made to Woods. Litigation ensued between the parties. Woods denied that it had any contractual debt owing to AIB as it says that AIB was debarred from seeking relief on the ground of illegality. During this period disconnection threats were made by Landmark. AIB paid (it claims under duress) $10,000.00 to Landmark in January 2006 on account of the amounts billed for the services. Landmark disconnected the services from AIB's premises on 1st February 2006. AIB sought injunctive relief and further launched proceedings seeking relief under several heads namely: (1) a declaration to the effect that there was no contract between it (AIB) and the 1st respondent ("Landmark") for the provision of electrical and other utility services ("the Services") to AIB for which payment was to be made by AIB to Landmark as billed by Landmark. (2) a declaration to the effect that a contract existed as between AIB and the 2nd respondent ("Woods") for the provision of the Services. Landmark counterclaimed for sums it says were due and owing from AIB in respect of the Services. Woods did not counterclaim. The trial judge dismissed AIB's claim in its entirety save for declaring that there is an existing contract between Woods and AIB for the provision of the Services to the premises occupied by AIB at Woods Centre which commenced in or about 1994 and exists to date. He also entered judgment for Landmark on its counterclaim against AIB in the sum of $1,734,378.93 for payment in respect of the Services and made costs orders against AIB in favour of Landmark and Woods.

AIB appealed, in essence, contending that some of the trial judge's orders were inconsistent with his reasoning. Landmark cross appealed and challenged the judge's finding and declaration to the effect that there was a subsisting contract as between AIB and Woods for the provision of the Services, and that Landmark is the agent of Woods.

Held: allowing AIB's appeal and setting aside the costs orders and dismissing Landmark's cross appeal; Thomas J.A. [Ag.] dissenting:

1. That the court does not consider that the trial judge was doing more than treating the 1st respondent as agent and the 2nd respondent as principal together as being in a contractual relationship with the appellant. Thus the trial judge spoke of an "implied contract" between the claimant and the defendants as distinct from being between the claimant and the 1st defendant, Landmark.

2. That the evidence showed that the 2nd respondent engaged the 1st respondent pursuant to the covenants contained in its Deed of Management and thus introduced the 1st respondent into the picture. Nowhere does that Deed stipulate that the 2nd respondent's obligation under the Deed cease or are then transferred to such third party entity as an independent obligation of that third party.

3. That the trial judge ought to have granted to the appellant both declarations prayed in paragraphs 1 and 2 of its claim. The order made at paragraph 60 (iii) is in error as a matter of law and fact in so far as it treats the 1st respondent's status as agent for Woods as giving rise to another contract, having definitively concluded, as he did in paragraph 51, that the 1st respondent contracted with the appellant in the capacity as agent only.

4. That the fact that the 2nd respondent contracted the 1st respondent to supply the Services to the appellant which the 2nd respondent was contractually obliged to do, does not thereby bring about a new independent contract as between the 1st respondent and the appellant or alter the contractual relationship as between the appellant and the 2nd respondent.

5. That the trial judge was in error in entering judgment on the 1st respondent's counterclaim in as much as its claim to the said sum is premised on a contract as existing between the 1st respondent and the appellant, as principals.

6. That the order that the appellant pays the judgment award to the 1st respondent as the sole counterclaimant as a good discharge for its judgment debt to the 1st and 2nd respondents lacks clarity, and to the extent that the trial judge sought to treat the 1st respondent's counterclaim as the counterclaim of the 2nd respondent, is wholly erroneous and cannot be sustained as the 2nd respondent, by asserting that the 1st respondent was an independent contractor, would necessarily be saying that no sums were outstanding to it for the services supplied to the appellant.

7. That the trial judge's orders deviated in part from his reasoning and conclusions and as a result he made costs orders which were in error. The general rule is that costs follow the event. AIB ought to have succeeded on its primary claims and ought to have been awarded its costs. Landmark's counterclaim ought to have been dismissed and a costs order made against Landmark in favour of AIB on the counterclaim.

JUDGMENT

[1] PEREIRA[1], J.A.: The issue arising on this appeal is whether there is a contract for the supply of electricity and other utility services between the appellant and the 2nd respondent or whether such a contract exists as between the appellant and the 1st respondent. The appellant ("AIB") on 16th February 2006, brought an action against the respondents in which it sought various remedies and primarily two declarations which are relevant for the purposes of this appeal. The first declaration sought was to the effect that there was no contract between it (AIB) and the 1st respondent ("Landmark") for the provision of electrical and other utility services ("the Services") to AIB for which payment was to be made by AIB to Landmark as billed by Landmark. The second declaration sought the converse; to the effect that a contract existed as between AIB and the 2nd respondent ("Woods") for the provision of the Services. The trial judge, at paragraph 60 of his judgment, in essence, said that AIB's claim was 'dismissed in its entirety save for below which in effect stated as follows:

> (ii) That it is declared that there is a subsisting contract between Woods and AIB for the provision of the Services to the premises occupied by AIB 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 the Services between AIB and Landmark as agent for Woods;
>
> (iv) That there be judgment for Landmark on its counterclaim against AIB in the sum of $1,734,378.93 up to the end of March 2008, and the continuing electricity costs 'provide' AIB's premises calculated thereafter, to the date of judgment;

[1]Formerly George - Creque.

(v) That AIB to pay the judgment award to Landmark, (being the sole counterclaimant) as a good discharge of its judgment debt to AIB (and Woods);

(vi) That AIB substantially losing on its claim 'to Woods' do pay to Woods 60% of the prescribed costs on the claim;

(vii) That Landmark substantially succeeding against AIB in obtaining judgment on the counterclaim and AIB to pay Landmark 80% of the prescribed costs on the counterclaim. This order carried a footnote which, in part was to the effect that Landmark did not succeed in proving that Woods had no contractual relations with AIB.

(viii) That the judgment carried interest at the rate of 9.5% per annum from the date of the filing of the claim to the date of judgment and as from the date of judgment at the statutory rate of 5% per annum until satisfaction."

[2] AIB appealed. Even though its complaint is listed under three grounds they can all be conveniently subsumed into one main ground with the consequential ground relating to the award of costs; namely:

(1) That the trial judge, having found that the contract for the provision of the Services was between AIB and Woods and that Landmark was the agent of Woods, erred in failing to hold that AIB could set off as against Woods an amount owing to AIB by Woods in respect of an undisputed loan advance made by AIB to Woods.

(2) As a corollary to (1) that the trial judge also erred in failing to award AIB its costs of the trial.

[3] Landmark also filed a Notice of Appeal which may be treated as a Counter Notice[2]. There is no cross appeal or counter notice on behalf of Woods.

[2]AIB's Notice of Appeal was filed on 22nd January 2010. There is no affidavit as to date of service on Landmark contained in the Record, which would determine the computation of time for filing a Counter Notice. [CPR 62.8] Landmark's Notice of Appeal was filed on 12th February 2010.

Landmark challenges the judge's finding and declaration to the effect that there is a subsisting contract as between AIB and Woods for the provision of the Services, and that Landmark is the agent of Woods. In essence, Landmark complains that the trial judge ought to have found that there was an 'implied contract' as between Landmark and AIB by which Landmark provided the Services and for which payment was to be made to Landmark as an independent contractor and not as agent for Woods, the trial judge having found [judgment paragraph 45] that the evidence established an implied contract between the claimant [AIB] and the defendants [Landmark and Woods] for the continued provision of electricity and payment by the claimant on a monthly basis.

Background summary

[4] In order to place the issues and the relationships between the parties in perspective, a background summary is necessary which also takes account of the pleaded cases:

(a) AIB is an Antiguan International Business Corporation and is in receivership. Landmark and Woods are two Antiguan companies doing business in Antigua.

(b) On or about 11th November 1994, AIB entered into a lease with Epicurean Ltd for the lease of the Mezzanine Floor at Woods Centre ("the Premises"). AIB in turn sublet various parts of the premises to other entities.

(c) AIB alleged that Epicurean Ltd. is indebted to it in respect of an outstanding loan amount of approximately US $6 million which Epicurean has either neglected or refused to service.[3] AIB further says that Epicurean bills AIB for a 1/3 portion of the utility costs of the air conditioning of the Epicurean Building and that AIB pays Epicurean for those costs by offsetting those charges and its lease payments against

[3]Epicurean Ltd. is not a party to the proceedings.

Epicurean's outstanding loan to AIB, [paragraphs 4 and 5 of Statement of Claim].

(d) AIB further alleged [paragraph 6 of Statement of Claim] that Woods is indebted to AIB in respect of an outstanding loan made by AIB to Woods of approximately $25 million; that since 1994, Woods provided the Services to AIB and that Woods having failed to service the loan, the bills for the Services are offset against the outstanding loan.

(e) AIB also alleged that steps were taken by the Epicurean to end AIB's tenancy of the Premises in 2000 and 2002.

(f) By letter dated 31st January 2004[4], Landmark gave notice to AIB that it had been appointed as contracting agent of Woods to provide the Services. AIB says that it was not aware of that letter until 25th October 2005.

(g) On 7th February 2005 Woods sent another letter to the unit owners informing them that Landmark had been appointed to handle maintenance at the Woods Centre, Landmark began billing AIB for the Services in February 2005. AIB says Woods was under contract for the provision of the Services. AIB offset the amounts billed in respect of the Services against Woods' outstanding loan.

(h) Litigation ensued between the parties. Efforts were made at negotiation. AIB contends that during this period threats of disconnection of the Services were made by Landmark and that 'under duress' AIB made a payment of $10,000.00 to Landmark in January 2006. Threats of disconnection of the Services continued in respect of the further sums which Landmark says were due and owing for the Services.

[4] Landmark was an incorporated entity at that date.

(i) Landmark made good on its threats and disconnected the Services from AIB's premises on 1st February 2006. AIB sought injunctive relief and on 16th February 2006 launched these proceedings in which it sought relief under several heads. The first two being for the declarations to which I have alluded above.

(j) AIB asserts that Landmark was created as a vehicle by Woods (acting through one Mr. Beaulieu who was the principal of both Woods and Landmark), and interposed by Woods as the entity providing the Services for the predominant purpose of rendering nugatory the manner by which AIB paid for the provision of the Services by offsetting the bills for Services against Woods' outstanding loan and that the appointment of Landmark by Woods as the entity providing and billing AIB for the Services was an unlawful and unilateral variation of the contract to supply the Services as between Woods and AIB.

(k) Landmark and Woods served a joint defence. Woods pleaded the terms of a Deed dated 4th November 1994 between Epicurean and Woods whereby Woods covenanted with Epicurean to manage and maintain the Woods Centre for the benefit and upkeep of the Centre for all unit owners. Woods also covenanted to engage any person firm or corporation having adequate expertise to do any works or perform any services for the Purchaser within the scope of the Manager's duties. The Purchaser in turn covenanted to pay the Manager all such sums payable in respect of the expenses and other impositions referable to the insurance, maintenance, sewage garbage collection, repairs and electricity for any unit. It also gave to Woods the right to cut off the Services if on 14 days' notice to the Purchaser; payment for the Services had not been made. AIB's lease of the Premises with the Epicurean contained like terms.

(l) Landmark was incorporated in November 2004. Landmark was then engaged by Woods to perform the Services, Woods says, as an

independent contractor, and that a letter was sent out on 31st January 2004 to all unit holders including AIB informing of the impending change-over from Woods to Landmark; that a formal change-over took place in 31st January 2005 and a further notice dated 7th February 2005 was sent out to all Unit holders including AIB[5].

(m) Landmark and Woods further alleged that all other unit holders save for AIB accepted this arrangement and paid for the Services as billed by Landmark; that by 17th October 2005, notwithstanding being billed by Landmark for the Services, AIB failed to make payment to Landmark and AIB was informed of its arrears or payment for the said Services in the sum of $173,493.49.[6]

(n) AIB responded that there was no contract as between it and Landmark for the provision of the Services and thus Landmark's demand was unfounded. AIB does not deny that it consumed electricity and other services supplied. It says however that payment was to be to Woods in the manner previously arranged by offsetting the payments for the Services against Woods' debt to AIB on its outstanding loan.

(o) Woods denied that it had any contractual debt owing to AIB as it says that AIB was debarred from seeking relief in respect thereof by virtue of the judgment in Claim No. 72/2002[7] against Woods on the ground of illegality.[8]

(p) Landmark and Woods further asserted that if a contract existed as between AIB and Woods for the supply of the Services, (which Woods denied) that it came to an end on 31st January 2005 when Woods engaged Landmark as the supplier of the Services and AIB's utilization of

[5]See: paragraphs 7 and 8 of Defence at pg. 268 Record.
[6]See: paragraphs 9 -11 of Defence – pg. 269 Record.
[7]Claim No. ANUHCV 2002/0074 American International Bank v Woods Estate Holding Ltd. and Woods Development Ltd.
[8]See: paragraph 16 of Defence – pg. 271 Record.

the Services, and that this gave rise to an implied contract to pay Landmark for the Services and that this contract was freely acknowledged by AIB in writing on 13th January 2006.[9]

(q) Landmark only, counterclaimed for a sum of $492,279.89 due, it says, in respect of the Services supplied on the basis of a contract as between AIB and Landmark.

The findings of the trial judge

[5] It is necessary to set out the findings of the trial judge relevant to the central issue raised on this appeal, namely; whether a contract existed as between Landmark and AIB as principal parties, and then to relate those findings to the declarations and orders made by the trial judge. At paragraph 44 of his judgment the trial judge said this:

> "... It is initially to the 2nddefendant/Manager that the claimant, way back in 1994 - 1996, after leasing the premises from Epicurean Ltd, 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. ..."

[6] The trial judge then continued at paragraph 45 thus:

> "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 the electricity by the Claimant, the invoicing of the claimant for the said consumption, the undertaking by the Claimant in letter of 13th January 2006 to pay the invoiced sums, the payment of the $10,000.00 towards the electricity invoices, ... establishes an implied contract between the Claimant and

[9]See: paragraph 19 Defence – pg. 272 Record.

Defendants for the continued provision of electricity and payment by the Claimant on a monthly basis." (my emphasis)

[7] At paragraph 46 the trial judge stated thus:

> "The evidence discloses the elements of both (1) a clearly subsisting contract between the Claimant and the 2nd Defendant who since 1994 - 1996 provided electricity and other services to the Claimant (ii) and subsequently, from 2005, a contract between the 1st Defendants [sic] and the Claimant either as agent of the 2nd Defendant or to a much lesser extent, as a wholly independent service provider."

At paragraph 50 he went on to say in part as follows:

> "... 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. ... A private arrangement concerning the provision and payment for electricity to the subject premises, between the 2nd Defendant and 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 unto the scene and into a contract with the Claimant, as a wholly independent contractor with no connection to the Deed and the Lease referred to several times earlier, unless by some other agreement with the Claimant and relevant other parties. The claimant contends in part and I agree that no such alternative wholly independent agreement has been so proved in this matter."

[8] At paragraph 51 the trial judge concluded thus:

> "I am satisfied on the preponderance of the evidence that the relationship between the 2nd 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 as principal for the reasons provided above. ..." (my emphasis)

AIB's case on Appeal

[9] Mr. Marshall, counsel for AIB contends that the trial judge's findings and reasoning throughout was to the effect that Landmark was an agent of Woods and accordingly that there was no contract existing between Landmark and AIB as

principals for the provision of the Services and accordingly the first two declarations sought by AIB had been made out and were findings against Landmark and Woods. AIB says further that when, having so reasoned he went on without explanation to enter judgment for Landmark on the counterclaim for the amounts claimed by it as due in respect of the Services supplied, and to order 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 defendant (and the 2nd defendant) is erroneous and inconsistent with his judgment. In short it says that whilst it seeks to uphold the learned judge's reasons and the conclusions reached, the consequential orders made thereon are at odds with his reasoning and requires correction.

Landmark's Cross - Appeal

[10] Landmark, the cross-appellant challenges primarily the finding by the trial judge that it was Woods' agent. Landmark relies on the trial judge's finding [paragraph 45] that the evidence adduced by Landmark 'establishes an implied contract between the claimant and the defendants. Landmark says that by this the learned judge could only have meant that Landmark had established by evidence a contract between itself and the claimant collateral to the existing agreement such as there was in the Deed and the Lease. That such a contract would not have contradicted the express terms of the written one but would have existed as a wholly independent agreement. I disagree with this proposition as it goes against the trial judge's reasoning set out in paragraphs 46 - 50 and his express conclusion arrived at in paragraph 51 and reiterated in his conclusion in paragraph 54. Even though various portions of the judgment may be considered as lacking in clarity, what is ultimately deduced is that the trial judge concluded that the basis for Landmark's contractual relations with AIB was as agent of Woods. There is specifically no finding by the trial judge that Landmark had an independent contract in its own right with AIB. He was at pains to point out that certain duties were imposed on Woods as the Manager of the Woods' Centre pursuant to the Deed between Woods and Epicurean who was described as the Purchaser/Unit

owner of the Woods Centre for supplying certain services. AIB got its Lease of units at the Woods Centre from Epicurean. It was the Deed as between Epicurean and Woods as Manager, which allowed Woods to engage a person or entity with adequate expertise to perform those services which Woods had covenanted to perform. The fact that Woods was able to engage an adequately qualified person to supply some or all of the Services does not detract from the fact that the obligations to be performed under the Deed were nonetheless the obligations of Woods albeit performed through Landmark as the person so engaged. Accordingly, I do not consider that the trial judge was doing more than treating Landmark as agent and Woods as principal together as being in a contractual relationship with AIB. Thus he spoke of an 'implied contract' between the claimant and the defendants as distinct from being between the Claimant and the 1st defendant, Landmark.

[11] Mr. Hamilton, QC on behalf of Landmark contended that AIB did not adduce any evidence showing that there was no contract as between AIB and Landmark. However, it was open to the trial judge on the totality of the evidence led by all sides to draw reasonable inferences. He arrived at the conclusion, and in my view rightly, that Landmark was the agent of Woods. The fact that AIB accepted that it was billed by Landmark and that it made a payment of $10,000.00 to Landmark does not elevate Landmark to a position higher than as agent for Woods without more. It is well established that a debtor may pay his creditor by payment to his agent so held out as having authority to receive such payment.[10] The evidence showed that Woods engaged Landmark pursuant to the covenants contained in its Management Deed referred to earlier, and thus introduced Landmark into the picture. But nowhere does the Deed stipulate that Woods' obligations under the Deed cease or, are then transferred to such third party entity as an independent obligation of that third party.

[12] I agree with the arguments advanced by Mr. Marshall on behalf of AIB. It is pellucid that in the final analysis after considering all of the evidence the trial judge

[10]See: Halsburys Laws 4th Ed. paragraph 944.

concluded that the relationship as between Woods and Landmark was that of principal and agent respectively in respect of the contract for the provision of the Services to AIB. Accordingly, there were, in essence, two contracting principals in respect of the singular contract for the supply of the Services, namely AIB and Woods. The trial judge therefore ought to have granted to AIB both declarations prayed in paragraphs 1 and 2 of its claim. The order made at paragraph 60 (iii) is in my view erroneous since it adds nothing to the point and merely seems to treat the fact of Landmark's status as agent for Woods as giving rise to another contract which is wrong both as a matter of law and also as a matter of fact having definitively concluded, as he did in paragraph 51 that Landmark contracted with AIB in the capacity as agent only. The creation of an agency relationship between Woods and Landmark does not give rise to a wholly new contract as between Woods and AIB, or put another way, the fact that Woods contracted Landmark to supply the Services to AIB which Woods was contractually obliged to do, does not thereby bring about a new and independent contract as between Landmark and AIB or alter the contractual relationship as between AIB and Woods.

Judgment for Landmark on the Counterclaim

[13] It follows from what I have said above and as contended by AIB, that the trial judge was in error in entering judgment on Landmark's counterclaim in as much as its claim to the said sum is premised on a contract as existing between Landmark and AIB as principals. The net effect of the trial judge's finding that Landmark's contract with AIB was in the capacity as agent only, means that there was no independent contract as between AIB and Landmark in its own right which entitled Landmark to judgment on its counterclaim. Landmark's counterclaim accordingly ought to have been dismissed. Woods made no counterclaim on its own behalf and Landmark was clearly not claiming as the agent of Woods. Indeed both Woods and Landmark held to the view that Landmark was engaged by Woods as an independent contractor. The trial judge found to the contrary and there is no basis for upsetting this finding.

[14] The order of the learned trial judge to the effect that AIB pays the judgment award to Landmark as the sole counterclaimant as a good discharge for its judgment debt to Landmark and Woods lacks clarity and to the extent that it seeks to treat Landmark's counterclaim as the counterclaim of Woods, is wholly erroneous and cannot be sustained as Woods, by asserting that Landmark was an independent contractor, would necessarily be saying that no sums were outstanding to it for the Services supplied to AIB and as such no basis on which a claim could be entertained in respect thereof. That is their pleaded case and accordingly Landmark's counterclaim cannot be treated as the counterclaim of Woods requiring AIB to 'discharge its judgment debt' to Landmark and Woods.

The costs orders

[15] Because the trial judge's orders deviated in part from his reasoning and conclusions he made costs orders which were consequently in error. The fact is that AIB succeeded as against Landmark and Woods on its primary claim. The general rule is that costs follow the event. Accordingly there was no basis for ordering that AIB pays the costs of Woods. Similarly, in as much as on the judge's reasoning Landmark's counterclaim ought to have failed,there was no basis for ordering AIB to pay costs to Landmark. I would accordingly set aside those costs orders.

Conclusion

[16] For the reasons given above, I would allow AIB's appeal and dismiss Landmark's cross appeal and make the following orders:

(1) That the orders contained in paragraph 60 (i), (iii), (iv), (v), (vi), (vii) and (viii) of the judgment of the trial Judge are set aside.

(2) That it be declared that there is no contract as between AIB and Landmark for the provision of electricity and other utility services to the premises occupied by AIB at the Woods Centre.

(3) That the costs of AIB be paid by Landmark and Woods on the claim and counterclaim on the prescribed costs basis in the court below and on the basis of two thirds of those costs on the appeal in accordance with CPR 65.5 and 65.13 respectively.

[17] For completeness I would mention that AIB in its skeletal submissions asked this court to declare that the payments made by setoff to Woods' loan with AIB for services rendered by Landmark were validly made. I would refrain from making such a declaration for the simple reason that notwithstanding an averment by AIB as to the manner in which it made payments to Woods by way of setoff in respect of a loan facility to Woods, no such declaration was sought below.

Janice M. Pereira
(formerly Janice George-Creque)
Justice of Appeal

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

[1] THOMAS, J.A. [AG.]: These proceedings involve an appeal and cross appeal. The appeal is by American International Bank (In Receivership) and Landmark Ltd and Woods Development Ltd. The cross appeal involves Landmark Ltd and American International Bank (In Receivership). The appeal and cross appeal will be treated in turn.

[2] Justice of Appeal Janice George-Creque (as she then was at the sitting of the Court) has written a judgment in the matter which I have read and with which I respectfully disagree. In the circumstance I tender the following as my judgment in the said matter."

American International Bank (In Receivership) Appeal

[3] The Notice of Appeal filed by American International Bank (In Receivership) (the appellant) states in part the following:

1. Grounds of Appeal

(a) The learned trial judge erred in law having found that the relationship of the 1st respondent was the agent of the 2nd respondent, failed to find that the appellant could settle the debt to the principal being the 2nd respondent by a set off against an undisputed loan advance as was customary between the 2nd respondent and the appellant.

(b) The learned trial judge erred in law having found that the contract for the provision of services between the appellant and the 2nd respondent still existed failed to find that the appellant could set [of] the debt in the customary manner being as against the undisputed loan advance.

(c) The learned trial judge erred in law having found that there existed a contract between the appellant and the 2nd respondent and no contract as between the appellant and the 1st respondent in its own right failed to award the appellant the cost of the trial.

2. Order Sought

The relief sought from the Court of Appeal is:

(a) An Order that a set off against liability of the 2nd respondent to the appellant is valid satisfaction of the debt between the 2nd and/or 1st respondent and the appellant in respect of the supply of utilities and other services;

(b) An Order that the contract exists between the appellant and the 2nd respondent and that the 1st respondent is merely an agent of the 2nd respondent;

(c) An Order that the counterclaim be dismissed;

(d) An Order that the 2nd respondent pay the appellants cost on the claim in the court below and in the appeal;

(e) An Order that the 1st respondent pay the appellant's cost in the court below and on the appeal with respect to the counter claim.

[4] Grounds (a) and (b) will be treated as a single ground. However, the implications of this ground warrant a brief incursion into the pleadings in so far as the questions of contract, principal and agent, the loan of the 2nd respondent and set off are concerned.

[5] In the claimant's claim form the essentials, for these purposes, are for a declaration of the non-existence of a contract between the claimant and the 1st respondent, and further a declaration of a contract between the claimant and the 2nd respondent.

[6] In its statement of claim the matter of a set off of money owed for services against money owed to the claimant by the 2nd respondent is pleaded at paragraph 15. And in relation to the said paragraph pleaded, the respondents at paragraph 16 of their defence deny the matter of a set off and further that the 2nd respondent did not contract any debt with the claimant for which it is liable. And further still that the claimant was debarred by the High Court from seeking relief on the ground of illegality.[11]

[11] Suit No. ANUHCV2002/0074: American International Bank v Woods Estate Holdings Co. Ltd and Woods Development Limited.

[7] In its counterclaim the 1st respondent claims the sum of $492,277.89 and such further sums as and when the same become due until judgment. This is on the basis of non-payment of invoices submitted to it for services provided by the 1st respondent "notwithstanding its acceptance of the existence of an account between itself and the 1st respondent and its payment of $10,000.00 thereon on that account on 13th January 2006".

The Matter of the contract

Submissions

[8] The appellant submitted that a contract exists with the 2nd respondent since the inception of that contract for the provision of services. It is further submitted that two contracts cannot exist on the same facts between the same parties for the same thing at the same time. However, it is contended, that if there exist a contract between the appellant and the 2nd respondent as found by the trial judge that satisfaction in the usual manner in the usual and established practice is good.

[9] In so far as the 1st respondent is concerned, reference is made to the appellant's contentions that: the appointment of the 1st respondent by Woods Development was an unlawful and unilateral variation of a contract for services between Woods Development and the appellant; the contention that there is no contract with the 1st respondent; and that there is no privity of contract and that the contractual obligations with Woods Development continues.

[10] These issues are all doubted by learned senior counsel Mr. Hamilton by saying that the engagement of the 1st respondent by Woods Development Ltd. was authorized by the Deed registered between Woods Development Ltd. and Epicurean Ltd. As such it did not constitute an unlawful variation of the contract between Woods Development Ltd. and the appellant. And finally there exists a contract between the appellant and the 1st respondent.

Analysis

[11] The analysis must necessarily begin with brief mention of the fact that Landmark Ltd. was specifically incorporated to provide maintenance services inclusive of water and sewage and to supply utilities to Woods Centre[12].

[12] Mention must also be made of a Deed duly executed by Woods Development Ltd. (vendor and the manager) and Epicurean Ltd. (purchaser).

[13] In the First Schedule to the said Deed (Manager's Covenants) the purchaser (Epicurean) appointed the manager to be its sole and exclusive managing agent to inter alia, manage the shopping centre.

[14] At paragraph 3 of the said First Schedule to the Deed the manager is given these powers:

> "The manager may engage any person, firm or corporation to do my work or perform any services for the purchase 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 his opinion of the manager. Adequate expertise or suitable qualifications to do such work or perform such services".

[15] The submission on behalf of the appellant either ignores or treats lightly the importance of the said Deed between Woods Development Ltd. and Epicurean Ltd. The submissions stick hard to the contention that the contract at the inception with the 2nd respondent is the operative contract.

[16] It is clear from the evidence that with effect from 31st January 2004 Landmark Ltd., the 1st respondent, had the legal responsibility to supply utilities to Woods Centre,

[12] Witness Statement of John Beaulieu, Record of Appeal, page 419.

and letters[13] to this effect were sent to unit owners, including the claimant/appellant.

[17] In relation to a letter written specifically to the appellant, the response is in part as follows:

> "As indicated to you during our conversation the Bank is in receivership and not in a position to settle the amount in full right away. However, as a show of good faith we enclose First Caribbean Draft No. 237433 for ECD 10,000 to be applied to our account. Additional sums will be paid on a monthly basis. There is a payment expected within the coming months, from which the arrears will be liquidated".

[18] The letter ends by saying: "Kindly accept our assurances that we intend to work diligently towards regularizing this situation and welcome an opportunity to discuss this matter further".

[19] It is patent that the letter raises no objection to Landmark being the new supplier of electricity to the appellant. Rather, it expressly recognizes the existence of legal relations and even reminds Landmark of the existence of an injunction against it prohibiting the suppression of electricity. Added to that $10,000.00 is said to Landmark "to be applied to our account.

[20] With respect to the said letter Mr. Dane Hamilton, QC for the 1st respondent submits that

> "If the Appellant claimed that there was no contract, its letter of February 13th 2006[14] was an agreement as to the existence of a contract between itself and the First Respondent. It was supported by consideration not the least the payment of $10,000 the terms of which were accepted by the First Respondent. The Agreement was complete and certain in its terms[15]".

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[13] Letters from Landmark Ltd dated 31st January 2004 and Woods Development Ltd dated 7th February 2005, Record of Appeal pages 270 and 271 dated 4th January 2006.

[14] The Court regards this date as being a typographical error as the letter referred to is dated 13th January 2006.

[15] Chitty on Contract 29th Ed paragraph 22-012-024 is cited.

[21] There can be no doubt that there exists a subsisting implied contract between the 1st respondent and the appellant, as determined by the learned trial judge.

[22] The legal circumstances giving rise to such a contract are explained in Chitty on Contracts[16] in this way:

> "Contracts may be either express or implied. The difference is not of legal effect but simply of the way in which the consent of the parties is manifested. Contracts are express when their terms are stated in words by the parties. They are often said to be implied when their terms are not so stated, as, for example, when a passenger is permitted to board a bus: from the conduct of the parties the law implies a promise by the passenger to pay the fare, and a promise by the operator of the bus to carry him safely to his destination. There may also be an implied contract when the parties make an express contract to last for a fixed term, and continue to act as though the contract still bound them after the term has expired. In such a case the court may infer that the parties have agreed to renew the express contract for another term. Express and implied contracts are both contracts in the true sense of the term, for they both arise from the agreement of the parties, though in one case the agreement is manifested in words and in the other case by conduct. Since, as we have seen, [97] agreement is not a mental state but an act, an inference from conduct, and since many of the terms of an express and contract are often implied it follows that the distinction between express and implied contracts has very little importance, even if it can be said to exist at all".

[23] I am of the view that in this instance the operative conduct of the parties, being the appellant and the 1st respondent must be the letters exchanged. And this rhetorical question must be which 'account' was the appellant referring to in its letter of 13th January 2006. For sure, this letter cannot be wished away.

[24] It follows that the appellant's contention that there exists a contract between itself and the 2nd respondent is unsustainable. It is so because of the appellant's own submission that there cannot be two contracts between two different sets of parties with respect to the same subject matter. The appellant clearly and abundantly accepted that Landmark was the supplier of the electricity.

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[16] Ibid at paragraph 12.

Principal and Agent

[25] The finding by the learned trial judge that the legal relationship between the 2nd respondent and Landmark was that of principal and agent cannot stand. And I consider it fair to say that it is common ground that this is so but for different reasons.

[26] Therefore, the appellant is correct in saying that the learned trial judge's findings of a contract between the appellant and the 1st respondent contradict the further findings of principal and agent in this context. And the 1st respondent is also on good ground by submitting that it never pleaded that it was the agent of Woods Development Ltd.

Second Defendant's loan and set off

[27] Without any incursion into any question of the 2nd respondent's debt, the relevant principle of law is that there is no basis upon which there can be a set off by the 1st respondent so as to settle the 2nd respondent's debt since the 1st respondent has not been shown to be a party to any such debt.

Conclusion on Ground (d) and (b)

[28] The appellant's first ground of appeal therefore fails since the existence of a contract with the 1st respondent, the question of principal and agent, as between the 1st and 2nd respondents cannot arise in this legal context. Further, the question of set off of the 2nd respondent's debt by the 1st respondent also does not arise since inter alia, the 1st respondent has not been shown to be a party to any such debt. Further, the appellant's letter of 13th January 2006 acknowledged its indebtedness to the 1st respondent without any mention of set off for a debt owed by the 2nd respondent undisputed or otherwise.

Ground (c)

[29] This ground relates to the contention that the learned trial judge failed to award costs of the trial to the appellant.

[30] The portion of the learned trial judge's Order which relates to this ground of appeal reads thus:

> "(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...
> (vi) That the Claimant substantially losing to on it Claim to the 2nd Defendant do pay the 2nd Defendant 60% of the prescribed costs on the Claim".

[31] It has already been determined that there was no contract between the appellant and the 2nd respondent, and as such the appellant's case fails and not being the successful party cannot be awarded costs.

The First Respondent Cross Appeal

[32] Landmark Ltd., the 1st respondent in its Notice of Appeal states in part the following:

I. Grounds of Appeal

1. Having expressly found in paragraph 45 of his judgment that the evidence led by the 1st respondent established an implied contract between the claimant/appellant and defendants (respondents) the Learned Judge erred and or misdirected himself both on the evidence and in law, in that:

(i) He failed to hold on the evidence that the 1st respondent was the only counterclaimant which led evidence as to the existence of a contract;

(ii) That the implied contract was between the 1st respondent and the appellant;

(iii) That the said implied contract was valid and enforceable without more, by the 1st respondent;

(iv) That the appellant was liable to the 1st respondent the only party to the contract for the provision of electricity to it from 1st February 2005 to present.

Further or alternatively

(v) The learned judge ought to have found that the appellant was liable to the 1st respondent (Landmark Ltd) for the provision of electricity services supplied to the appellant after 31st January 2005 and continuing thereafter.

(a) as an independent contractor and/or;

(b) as the person lawfully nominated by the 2nd respondent as the person or entity which would provide, bill for and accept payment on its own behalf for electricity supplied to Woods Mall and the appellant as he so found in paragraphs 43 and 44 of his judgment.

2. (i) The learned judge misdirected himself on the evidence and in law in his finding that the 1st respondent is an agent of the 2nd respondent who is the principal;

(ii) In holding that there is also a subsisting contract for the provision of electricity services between the appellant and the 1st respondent as agent of the 2nd respondent.

3. The learned judge gave no or insufficient weight to evidence of fact including his finding that:

   (i) The claimant admitted that he was invoiced by the 1st respondent for the provision of electricity;

   (ii) The claimant admitted consumption of the electricity invoiced;

   (iii) That the appellant never paid any of the invoice sent to it by the 1st respondent;

   (iv) That the 1st respondent paid APUA for the electricity consumed by the appellant and its tenants and paid substantial amounts to West Indies Oil Company for fuel supply used to generate the electricity consumed by the appellant and its tenants;

   (v) That the appellant had actual notice of the commencement of Landmark (1st respondent) power generation in 2004 and in any event by the end of February, 2005;

   (vi) That the appellant has no contract for the supply of such services with Woods Development Ltd. (2nd respondent).

II. Order Sought

   (i) That there be judgment on the counterclaim for the 1st respondent in respect of the electricity supplied and consumed by the appellant up to the date of judgment;

   (ii) That the appellant pay and discharge the judgment debt to the 1st respondent;

   (iii) That there is a subsisting contract for the provision of electricity, services between the appellant and the 1st respondent;

(iv) That there be costs to the 1st respondent occasioned by this appeal and any application thereunder.

Analysis and Conclusion

[33] The reality of the 1st respondent's grounds of appeal is that they are substantially addressed by the determinations made in relation to the appellant's appeal. The principal determination being that a subsisting implied contract exists between the appellant and the 1st respondent. From this it follows that the 1st respondent is entitled to the Orders sought being:

1. Judgment on the counterclaim in respect of the electricity supplied and consumed by the appellant in the amount of $1,734,378.93[17] plus such further or other sums as and when the same became due between 1st April 2008 and the date of this judgment.

2. That the appellant pay and discharge the judgment debt to the 1st respondent.

3. That there is a subsisting contract between the appellant and the 1st respondent.

4. That the respondent is entitled to cots in the court below and in this court in accordance with Part 65 of CPR 2000.

Costs

[34] Having regard to the fact that the appellant's appeal is dismissed and the 1st respondent's appeal succeeds; the appellant must pay the 1st respondent's costs in the court below and in this court in accordance with Part 65.5 and Part 65.13 of CPR 2000.

[17] This figure was determined by the Learned Trial Judge as the amount owed.

Result

[35] The appellant's appeal is dismissed and the 1st respondent's cross appeal is allowed. The appellant must pay the 1st respondent costs in accordance with Part 65.5 and 65.13 of CPR 2000.

ORDER

IT IS HEREBY ORDERED AND DECLARED as follows:

1. The appellant's appeal is dismissed because:
    a) There exists a contract between the appellant and the 1st respondent;

    b) There is no contract between the appellant and the 2nd respondent, by virtue of the 1st respondent being the agent of Woods Development;

    c) There can be no set off by the 1st respondent so as to settle any debt owed by the 2nd respondent to the appellant as the 1st respondent has not been shown to be a party to any such debt.

2. The 1st respondent's cross appeal is allowed based on the determination that a subsisting implied contract exists between the appellant and the 1st respondent and as such the 1st respondent is entitled to the Orders sought namely:
    (i) Judgment on the counterclaim in the amount of $1,734,378.93 plus such other and further sums as and when the same become due and payable during the period 1st April 2008 and the date of this judgment in respect of electricity supplied and consumed by the appellant;

    (ii) That the appellant pay and discharge the judgment debt to the 1st respondent;

(iii) That the 1st respondent is entitled to costs in the court below and in this court in accordance with Part 65 of CPR 2000.

Errol Thomas
Justice of Appeal [Ag.]