[2014] UKPC 17
Privy Council Appeal No 0069 of 2012

JUDGMENT

Landmark Limited and another (Appellants) *v* American International Bank (In receivership) (Respondent)

From the Court of Appeal of Antigua and Barbuda

before

Lord Neuberger
Lord Clarke
Lord Sumption
Lord Toulson
Lord Hodge

JUDGMENT DELIVERED BY

Lord Hodge

ON

22 May 2014

Heard on 1 April 2014

Landmark Limited

Kim Franklin
Carlo Taczalski
(Instructed by
HowardKennedyFsi LLP)

American International Bank
Hugh C Marshall Jnr

(Instructed by Marshall & Co)

LORD HODGE:

1. This dispute is between a company ("Landmark") which provided electricity and other services to the Woods Centre, which is a shopping and commercial centre ("the centre") in St John's, Antigua, and a bank in receivership ("AIB") which was the sub-tenant of premises in that centre. The principal issues in this appeal are (i) whether AIB entered into a contract with Landmark to pay it for the electricity and other services which it supplied, and (ii) if so, whether Landmark transacted as the agent of Woods Development Ltd ("WDL") or on its own behalf.

2. WDL developed the centre which comprised twenty two units and was completed in about February 1996. AIB provided funding to WDL for the development of the centre. During its construction, WDL sold units in the centre to commercial enterprises which entered into agreements with it to manage the centre on its behalf ("management agreements"). One such enterprise was Epicurean Limited ("Epicurean"), which purchased the largest unit (originally parcel no. 998) to create a 25,000 square foot supermarket which became the anchor unit of the development.

3. Epicurean entered into a management agreement with WDL on 9 November 1994. In that agreement Epicurean undertook responsibility to meet the cost of insurance, maintenance and upkeep of the unit and for all public services, utilities and other expenses charged or supplied to the unit (clause 9). Epicurean appointed WDL as its manager to manage the centre and to act on its behalf in performing its duties (clause 1). One of those duties was the payment of electricity charges for the shops to the Antigua Public Utilities Authority ("APUA") and the running of a standby generator (clause 7). In return Epicurean undertook to pay service charges to WDL (Clause 5) and to pay WDL monthly for the electricity supplied to its unit (clause 7). WDL was empowered to engage any suitably qualified person, firm or corporation to "do any work or perform any services … within the scope of the Manager's duties under [the management] agreement, without being in breach of any fiduciary relationship with [Epicurean]" (clause 3).

4. On 11 November 1994 Epicurean granted AIB a 99-year lease of the mezzanine level of its unit. AIB sub-let units within the mezzanine floor to offshore internet gaming enterprises which required a twenty-four hour electricity supply. In the lease Epicurean undertook to AIB to enforce WDL's undertakings in the management agreement for the benefit of the demised premises and AIB undertook to pay Epicurean a monthly service charge and accepted the restrictions on the use of the unit and the common parts of the centre which were set out in clause 12 of the management agreement. The lease did not expressly address responsibility for payment of invoices for utilities provided to the demised premises. In a separate arrangement Epicurean and AIB agreed to share the costs of the provision of electricity to the air conditioning in

the supermarket unit in the ratio of 2:1. The Board infers that AIB undertook responsibility to meet the charges for electricity and water to the mezzanine unit as each of the units within the centre had its own meters for electricity and water and was billed separately for the provision of those utilities.

5. On 15 June 1997 AIB entered into a management agreement with WDL in relation to a building to be erected on parcel No 1135 in the centre. That agreement, which was the only written contract between WDL and AIB produced in this appeal, is not relevant. It did not affect the contractual relationships between WDL and Epicurean and between Epicurean and AIB in relation to the leased mezzanine floor in the supermarket unit.

6. There appears to have been close and informal commercial relations between the parties when the centre was being developed. Harris J in para 33 of his judgment dated 22 December 2009 recorded evidence that AIB, Epicurean and WDL had one or more directors in common in the 1990s. Mr Jean Beaulieu was a director of each of those companies and also later a shareholder and director of Landmark. A Mr William Cooper also appears to have been a director of both AIB and the companies involved in developing the centre. AIB went into receivership in July 1998 at the instigation of the regulatory authority. Later the enforceability of AIB's loan agreements to fund the development was successfully challenged in legal proceedings. See paras 15 and 16 below.

7. The courts in Antigua have held that since the mid-1990s there was a contract between AIB and WDL for the supply of electricity and other services to the leased mezzanine unit. It appears that the contract came into being by a course of conduct. In this appeal Landmark has not challenged the finding that there was a contract between AIB and WDL but submitted that it was replaced by a contract with Landmark after 1 February 2005.

8. In this action against Landmark and WDL, Mr Edward Smith, AIB's receiver and manager, has asserted that AIB paid sums due to WDL for the supply of electricity by offsetting them against its liability to AIB under an overdraft or loan to fund the development. Landmark and WDL have challenged AIB's entitlement to do this. For a number of years after the centre opened, AIB purported to meet its liability to WDL by this method.

9. In July 2003 APUA intimated to WDL that it would not be able to maintain continuity in the supply of electricity to the centre. As it was essential to the occupiers of the centre who stocked perishable goods, including Epicurean's supermarket, that they enjoyed continuity of electricity supply, WDL entered into an agreement with Landmark, which was incorporated to provide maintenance services, electricity, water and sewerage to the centre, to obtain those services. Mr John Carter, the managing agent of WDL, and Mr Jean Beaulieu raised the capital to fund Landmark and Mr Carter became its managing director. Landmark purchased equipment and diesel fuel to generate the needed electricity.

10. Before Landmark was incorporated, Mr John Carter, purporting to be Landmark's managing director, wrote on 31 January 2004 to the owners of units in the centre intimating that Landmark had been appointed to take responsibility for managing the centre, including the supply of electricity. He requested that the owners make their cheques payable to Landmark. On 7 February 2005, WDL wrote to the unit owners to confirm Landmark's appointment and to make the same request. None of the occupiers objected to the arrangement. Landmark was incorporated on 26 March 2004 and began providing services, including the supply of electricity, on 1 February 2005. Landmark sent invoices to the occupiers, including AIB, on a monthly basis. There was a dispute as to when Mr Edward Smith, AIB's receiver and manager, first learnt of Landmark's role. Harris J in his judgment of 22 December 2009 held that he had actual knowledge of the commencement of Landmark's services "in 2004 and in any event by the end of February 2005" (para 35 of his judgment). That finding has not been challenged.

11. Landmark continued to send AIB invoices which listed separate sums due for the provision of electricity, water and its service charge. It also sent AIB separate invoices for its share of the electricity used to operate the supermarket unit's air conditioning system. AIB did not pay any of them. When by letter dated 17 October 2005 Landmark demanded payment of arrears of EC $173,493.49 and threatened to cut off its supply of electricity, AIB asserted that it had no contract with Landmark. AIB obtained an interim injunction on 11 November 2005 restraining WDL and Woods Estates Holdings Co Ltd ("WEHL"), an associated offshore company, from withdrawing the supply of electricity and water and the provision of other services. Landmark was not a party to those proceedings which were adjourned until 28 November 2005.

12. There then occurred the events which are central to Landmark's appeal. Landmark asserts that on 28 November 2005, shortly before the scheduled court hearing on the interim injunction, an agreement was reached between Sir Gerald Watt QC, counsel for AIB, and Mr Dane Hamilton QC, counsel for Landmark, WEHL and WDL, that AIB would pay Landmark's monthly invoices for electricity and services from December 2005 and would pay off the arrears by instalments by about May 2006. As a result of that agreement Mr Hamilton did not seek recall of the injunction against WEHL and WDL and Landmark did not disconnect the electricity supply to AIB's premises.

13. On 3 January 2006 Mr Smith, acting as receiver and manager of AIB, wrote to Landmark about its claim for outstanding utility payments. He stated:

> "It should be noted that as Receiver/Manager, I need to substantiate the level of expenditure within the Bank. In the circumstances, while I will make every effort to settle any balances owed, these must be substantiated by the appropriate back up.

> We have received your internally generated invoices, but unfortunately no back up has accompanied these. We look forward to receiving that documentation so that together we may move the process forward. We also welcome the opportunity to discuss with you a payment plan to retire the arrears and are prepared to do so at the earliest."

Landmark replied on the following day pointing out that the charges for water and electricity were based on the monthly meter readings and the service charge was EC $0.25 per square foot. It renewed its threat to cut off supplies unless AIB paid as Landmark had proposed.

14. On 13 January 2006 Mr Smith wrote to Landmark to suggest that the balance due was EC $118,058.87 because the invoices relating to the air conditioning and the service charge should have been directed to Epicurean. He stated that AIB could not pay that sum immediately but enclosed a draft for EC $10,000 to be applied to AIB's account. He also stated that additional sums would be paid monthly and that he expected to receive a payment in the coming months with which AIB could liquidate the arrears. Landmark's counsel, Mr Hamilton replied on the same day accusing AIB of departing from the agreement reached on 28 November and renewing Landmark's threat to disconnect the supply of electricity to AIB.

The legal proceedings

15. Before addressing the legal proceedings involving the parties to this appeal, it is necessary to record other proceedings which provide the context of this dispute. In 2002 AIB raised legal proceedings (claim ANUHCV 2002/0074) in the High Court against WEHL, the offshore company, and WDL for payment of US $7,183,819.96 in respect of a loan which it had made to WEHL to fund WDL's development of the centre. On 17 October 2005 Thomas J dismissed the claim on the ground that the loan from WEHL to WDC was illegal. This was because WEHL, a corporation incorporated under the International Business Corporation Act, was not authorised to carry on business activity in Antigua and Barbuda which was not necessary or incidental to the international trade or business for which the corporation was licensed. AIB appealed this judgment but it is not clear, and the parties could not agree, whether the appeal is still live or has been struck out for want of prosecution. Landmark's letter demanding payment and threatening disconnection (para 11 above) was sent on the same day as this judgment. In the present action Landmark and WDL submit that AIB had no right to set off sums due to WDL as any loan to WEHL or WDL was unenforceable.

16. It appears from an affidavit of Mr Jean Beaulieu which was lodged in court on 25 November 2005 in AIB's appeal in its action against WEHL and WDL that AIB also raised an action (claim ANUHCV 2002/0073) in the High Court against WEHL and Epicurean claiming a debt of US $4,019,313.93. He affirmed that the claim was struck

out on 9 December 2002 and an appeal against the striking out order was dismissed by the Court of Appeal on 4 February 2003.

17. Prima facie therefore, AIB is not owed sums by either WDL or Epicurean which would support its claim to set off sums which it owes for the supply of electricity, water and other services.

18. On 1 February 2006 Landmark switched off the electricity supply to AIB's premises in the centre after AIB failed to pay any further sums to it. On the following day AIB started the current proceedings when it obtained an order against Landmark and WDL requiring the restoration of electricity to its premises and restraining them from withholding the supply of electricity, water and other services. The injunction was discharged for non-disclosure on 8 February 2006. On 16 February 2006 AIB commenced substantive proceedings against Landmark and WDL. AIB sought declarations that it had no contract with Landmark for the supply of utility services and that its contract was with WDL. It sought a declaration that it had paid EC $10,000 under economic duress and it sought an injunction against Landmark prohibiting the withholding of utility and other services. Landmark counterclaimed for payment of the arrears of its charges to AIB.

19. The case went to trial and Harris J gave judgment on 22 December 2009. He dismissed AIB's claims, including the assertions of duress and of its entitlement to set off its liability against debts allegedly owed to it by WDL and Epicurean. He accepted the evidence of Mr John Carter about the agreement between counsel on 28 November 2005 and the subsequent correspondence. He held (in para 45 of his judgment) that there was an implied contract between AIB and the defendants for the provision of electricity and the payment by AIB on a monthly basis. He held (in para 60) that there was a continuing contract between AIB and WDL (thereby upholding one of AIB's claims) and also that there was a contract between AIB and Landmark acting as WDL's agent. He gave judgment against AIB to pay EC $1,734,378.93 for the supply of electricity and other services between 1 February 2005 and 31 March 2008 and to pay the continuing electricity charges thereafter.

20. Both sides appealed. In a judgment dated 4 July 2011 the Court of Appeal by majority (Pereira and Baptiste JJA) allowed AIB's appeal and refused Landmark's cross-appeal which sought to reverse the trial judge's finding that it was the agent of WDL. They held that the trial judge's orders could not stand as they contradicted his finding, which they endorsed, that Landmark was acting as agent of WDL. Thomas JA dissented. He founded his decision on the correspondence between AIB and Landmark in January 2006 and held that AIB had accepted a contract with Landmark acting as a principal for the supply of electricity.

21. On 20 June 2012 the Court of Appeal granted Landmark final leave to appeal to the Board.

Discussion

22. There are several matters on which the Board has incomplete information. They include:

(i) whether AIB has a valid claim for repayment of any money advanced to either WEHL or WDL;

(ii) whether AIB has a valid claim for repayment of any money advanced to either WEHL or Epicurean; and

(iii) whether AIB had been entitled to set off claims under (i) and (ii) above against any obligations which it had to WDL or Epicurean.

It appears from the outcome of the court actions mentioned in paras 15 and 16 above that AIB may not have such claims and entitlement, but the Board does not need to reach a concluded view in order to determine this appeal.

23. The Board is prepared to assume that until Landmark commenced the supply of electricity and the provision of management services to the centre on 1 February 2005, AIB had a contract with WDL for the provision of such services which had come into existence by inference from the parties' conduct. AIB asserted a right to offset WDL's alleged indebtedness against its obligations to pay WDL for the electricity and the other services. It is not clear whether WDL or Epicurean invoiced AIB for the service charge due under the contract of lease with Epicurean or for its one-third share of the cost of the electricity for the supermarket unit's air conditioning system. But nothing turns on that.

24. In the Board's view, unless Epicurean otherwise agreed to the novation of the contract, Landmark acted as WDL's sub-contractor in performing its duties under the management agreement with Epicurean when it supplied electricity and other services to Epicurean after 1 February 2005. Clause 3 of that management agreement (para 3 above) did not authorise a partial novation of the management agreement. It merely allowed WDL to enter into a contract with another entity to perform its services to a unit owner without placing itself in breach of its fiduciary duty to that unit owner. There was no evidence of any other novation of the agreement between WDL and Epicurean. But that does not determine this appeal.

25. This is because the Board is persuaded that Landmark established its entitlement to payment by AIB of both the arrears on its prior invoices and its future monthly invoices from December 2005 in the agreement entered into by counsel for the parties on 28 November 2005 and confirmed in the correspondence between Mr Smith of AIB and Landmark in January 2006 (paras 12 – 14 above). The Board considers that that correspondence supports Landmark's assertion of the prior deal between the parties' legal representatives. The Board cannot construe it as evidence of an agreement to negotiate. This and the payment of EC $10,000 to account were, as Landmark must have intended and as AIB must have known, wholly inconsistent with any entitlement

on AIB's part to retain sums due under those invoices and set them off against the debts which it asserted were owing by WDL and by Epicurean. Thomas JA was correct in his analysis of the correspondence in January 2006 as evidence of a contract between AIB and Landmark acting as a principal.

26. For the avoidance of doubt, the Board is not persuaded that AIB's acceptance of the supplies and services from Landmark and its failure to respond to its monthly invoices would have been sufficient to establish a contract between Landmark and AIB. The Board does not infer an agreement to novate the management agreement from silence. But the actions of Landmark and the inaction of AIB in response provide the factual matrix of the agreement reached on 28 November 2005.

27. AIB failed in its assertion that it entered into the agreement to pay Landmark under duress. It has a contractual obligation to pay Landmark for the electricity which it consumed and other services which it received since February 2005. It is not entitled to set off its liability to pay for the electricity and services against any sums that it asserts are due by WEHL or WDL or Epicurean.

28. The Board is not able to determine the sums which AIB now owes to Landmark. Landmark continued to supply electricity which it generated to the centre until April 2007, when APUA resumed supply. Thereafter Landmark paid APUA for the electricity and billed the occupiers of the units. The sum which Harris J awarded was for the supply of electricity and other services, including AIB's share of the air conditioning in the supermarket unit, only until 31 March 2008. Further sums will have become due since then although AIB has ceased to occupy the mezzanine floor of the supermarket unit. In addition it is not known whether and if so how AIB accounted for its liability for the service charge and its share of the electricity charges for the air conditioning in the supermarket unit after 1 April 2008. The Board therefore considers it appropriate to remit the case back to the High Court to determine the sums due by AIB to Landmark.

29. Because the Board has found that there was a contract between Landmark acting as principal and AIB for the provision of electricity and other services, the issue whether AIB has been unjustly enriched by the electricity which it utilised does not arise.

Conclusion

30. The Board will humbly advise Her Majesty that the appeal should be allowed, that the orders of the High Court and the Court of Appeal be set aside, that it be declared that there was a contract between AIB and Landmark for the provision of electricity and other services from 1 February 2005 and that AIB is bound to pay the sums due under that contract, and that the case should be remitted to the High Court to determine the sums now due under that contract, together with interest and costs.