[2017] JMCA Civ 1

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 10/2011

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE P WILLIAMS JA

BETWEEN	**URBAN DEVELOPMENT CORPORATION**	**APPELLANT**
AND	**JACITAR (JA) LIMITED**	**RESPONDENT**

John Givans and Miss Carissa Bryan instructed by Vacianna & Whittingham for the appellant

Dr Randolph Williams and William Hines for the respondent

7 October 2016 and 27 January 2017

MORRISON P

[1] I have read the draft reasons for judgment of my brother F Williams JA. I agree with his reasoning and have nothing useful to add.

F WILLIAMS JA

[2] On 7 October 2016, having heard this appeal, we made the following orders:

"(i) The appeal is allowed;

(ii) Costs to the appellant to be agreed or taxed;

(iii) The court orders that the sum of $1,772,098.89, together with any accrued interest thereon, now being held in the account in the joint names of the respective attorneys-at-law for the parties at the Cross Roads Branch of the National Commercial Bank, pursuant to the order of the court made on 5 July 2011, be released to the attorneys-at-law for the appellant."

[3] We now seek to fulfil our promise made then to put our reasons in writing.

Background

[4] Pursuant to a five-year lease agreement made on 1 February 1990, the respondent leased from the appellant, commercial space (that is, shops 51 and 52 on the ground floor of a building in downtown, Kingston). The building is a part of strata plan number 79, and is registered at volume 1128, folio 658 of the Register Book of Titles. From those shops the respondent, a wholesaler of fabric, operated a warehouse.

[5] Between 22 and 25 May 1993, the respondent's said warehouse was broken into and a fairly-large quantity of fabric stolen.

[6] By writ of summons and statement of claim dated 18 May 1994, the respondent sued the appellant for damages for breach of contract; and, in the alternative, negligence. By the same suit, the respondent also sued in negligence Protection and Security Limited (the security company). That company had been engaged to provide 24-hour security for the building in which the respondent's warehouse was located. The security company was the 2nd defendant in the suit in the court below. The claim was for the sum of $1,148,620.00 for special damages, general damages and costs.

[7] Pursuant to the said lease agreement (the lease), the respondent paid, as was required, a monthly sum of $2,123.33 for maintenance. The purpose of the payment of this sum was described in clause (h) of the third schedule to the lease as being for the "...safe, efficient and orderly use, maintenance and upkeep of all parts of the Building... including... the provision of twenty-four hour security at the building".

[8] As it turns out, the security services were not in fact provided by the appellant itself. Instead, the contract for the provision of the said services was one dated 20 June 1990, executed between a company known as Urban Maintenance (1977) Ltd (UML), (a subsidiary of the appellant); and the security company.

The defence in the court below

[9] In its written defence dated 3 June 1994 and filed in the court below, the appellant advanced a defence that was a denial of both the alleged negligence and breach of contract. It also contended that if any of the defendants was negligent, it would have been the security company, which, it averred, failed to provide adequate security services for the building. In relation to the allegation that it, the appellant, was in breach of its contract with the respondent, the appellant asserted that the said security company was not its servant or agent; but an independent contractor. The appellant sought to rely on a provision in the lease (clause 7(2)) which stipulates that the lessor would not be liable for theft or removal of any property from the leased premises other than that done by its servants or agents.

[10] The security company failed to enter an appearance or to file a defence. As a result, a default judgment was entered against it on 16 May 1995. That default judgment was subsequently set aside and then re-entered on about 22 May 2007, when the court ordered that damages be assessed against the security company at the trial of the matter against the appellant.

[11] The appellant had also sought an indemnity or contribution against the security company. This it did by filing a notice dated 16 November 1995.

[12] The matter came on for trial on 18 and 19 July 2007 and, in a written judgment dated 17 December 2010, the court made these orders:

> "(i) Judgment for the Claimant on the claim for breach of contract against the 1st Defendant in the sum of $1,772,098.89.
>
> (ii) Judgment for the Claimant in negligence against the Second Defendant, in the sum of $1,772,098.89. Interest at 6% from the 18th May 1994 to 16th December, 2010.
>
> (iii) The 1st Defendant's claim for an indemnity and contribution is dismissed.
>
> Costs to the Claimant to be agreed or taxed."

The appeal

[13] The appellant filed an appeal against the judgment on 31 January 2011 and filed an amended notice of appeal dated 7 February 2011. It also sought and obtained on 6 July 2011 a stay of execution of the judgment, pending appeal. A condition of the grant

of the stay was an order that the amount of the judgment be paid into an interest-bearing account in the joint names of the attorneys-at-law for the parties.

The grounds of the appeal

[14] These were the grounds of the appeal:

> "(i) The Learned Trial Judge fell into error in holding that the First Defendant had breached the said Lease Agreement. There was no evidence of the alleged breach and the ruling that there was, put the Appellant in the position of an insurer of the Claimant's goods.
>
> (ii) No proper evidence was adduced to support the said sum of $1,148,620.00 awarded as the value of the goods, and the sum of $574,310.00 awarded as the mark-up. Further the said sum of $574,310.00 was not pleaded.
>
> (iii) The Learned Trial Judge failed to properly construe and apply Clause 7(2) of the Lease which stipulated that-
>
> > "The Lessor shall not be liable for the theft or removal of any property from the leased premises other than by its servants or agents".
>
> No evidence was adduced showing that the alleged theft and/or removal of the Claimant's goods was done or committed by the First Defendant's servants or agents.
>
> (iv) The Trial Judge defeated the purpose of the filing of Witness Statements by allowing the Claimant's/Respondent's Witness Frank Weir to give extensive viva voce evidence much of it properly inadmissible, under the guise of amplification, rendering the filing and serving of the said Witness Statement of little use to the Appellant."

The hearing of the appeal

The appellant's submissions

[15] Before us, Mr Givans for the appellant presented oral arguments for what he referred to as his most cogent grounds of appeal, whilst relying on his written submissions for advancing the other grounds. He argued: (a) the ground relating to the interpretation of clause 7(2) of the lease (that is, ground (iii)); and (b) the matter of damages awarded – in particular the mark-up on the special damages, (that is, ground (ii)).

[16] In relation to clause 7(2) of the lease and the evidence that was led in the court below, Mr Givans submitted that it was crystal clear that nowhere in the court below was any evidence led to support the respondent's contention that its goods were taken by anyone connected with the appellant. He argued that there were no primary or secondary facts adduced to show who stole the goods.

[17] Mr Givans further submitted that the learned trial judge failed to address his mind to clause 7(2) at all. Additionally, he submitted that, apart from referring to the clause on page 4 of the judgment, the learned trial judge paid no further attention to it.

[18] In relation to the damages awarded by the learned trial judge, it was Mr Givans' submission that there was, in a nutshell, an insufficiency of evidence to prove special damages. All that existed and the only matter on which the award was based, he argued, was a list of items lost that was prepared by Mr Frank Weir, one of the respondent's principals. Mr Givans also submitted that, given the quantum of the

alleged loss, there needed to have been some documentary proof of it – whether in the form of a purchase order; a contract between the respondent and its suppliers or a tax return or other similar document. The mark-up, it was further submitted, had to be regarded as special damages; yet it was not pleaded or proven (referring to **MacNamee v Kasnet Online Communications** RMCA No 15/2008, judgment delivered 30 July 2009.)

The respondent's submissions

[19] Dr Williams, who argued the appeal on behalf of the respondent, agreed with Mr Givans that the central question both in the court below and on appeal was whether the respondent's goods were stolen by the servants or agents of the appellant.

[20] Although the issue might not have been dealt with fully and explicitly by the learned trial judge, Dr Williams submitted, it can clearly be seen to have formed a part of the consideration and ultimate decision of the court below.

[21] Dr Williams further submitted that the security guards were the only persons who were supposed to have been at the premises at the material time and that there was no sign of forced entry through the respondent's door. It was, therefore, he contended, almost an inescapable inference to say that the security guards must have been the ones to have stolen the goods.

[22] On behalf of the respondent, Dr Williams also placed heavy reliance on the case of **Roe v Ministry of Health; Woolley v Ministry of Health** [1954] EWCA Civ 7, dealing with the issue of vicarious liability.

[23] In relation to Mr Givans' submissions on damages, Dr Williams submitted that the award for damages should not be interfered with by this court - neither in relation to the sum accepted as actually lost, nor the mark-up, the latter of which was accepted by the learned trial judge as reasonable (citing the case of **Benmax v Austin Motors Co Ltd** [1955] 1 All ER 326).

[24] Dr Williams also urged the court, in the event it was of the view that the appeal should be allowed in respect of the breach of contract that the court below found had been proven, to affirm the decision on the basis of the negligence of the appellant, which, he submitted, the evidence before the court had established.

Discussion and analysis

[25] As previously indicated, there was agreement between counsel for the appellant and respondent that the central issue concerns the determination of the question of whether the security guards were servants or agents of the appellant. With this agreement, the issues for this court's determination were significantly narrowed. In light of the agreement, it will be very important to have especial regard to clause 7(2) of the lease. That clause reads as follows:

> "7(2) Theft
>
> The Lessor shall not be liable for the theft or removal of any property from the leased premises other than by its servants or agents."

[26] It will be useful also to have regard again to the exact terms of subclause (h) of the Third Schedule; as well as to consider the terms of subclause (j) of the said schedule. That schedule sets out the "EXPENSES AND OUTLAYS COVERED BY MAINTENANCE".

[27] This is how the relevant parts of subclause (h) read:

> "All other charges and expenses of any nature whatsoever incurred by the Lessor for the safe, efficient and orderly use, maintenance and upkeep of all parts of the Building and the said land and in respect of the amenities, equipment, services, facilities and systems therein provided by the Lessor from time to time pursuant to this lease, including garbage disposal and if the Lessor shall so require the provision of twenty-four hour security at the building." (Emphasis added).

[28] The following is the wording of subclause (j):

> "(j) Independent Contractors
>
> The Lessor shall be entitled to employ agents or contractors and such other persons as the Lessor may from time to time consider necessary or convenient for the performance and provision of all or any of such service [sic] and systems."

[29] The most noteworthy point in relation to subclause (h) for the purposes of this discussion is that the provision of 24-hour security services by the lessor is not an absolute requirement of the lease or a responsibility unconditionally imposed on the lessor. Rather, it is an option which the lessor, in its discretion, may decide to exercise. However, in the instant case, this clause does not assume that much significance, as it

is clear that the lessor regarded the provision of such services as necessary or convenient and did in fact take steps to engage such services.

[30] Subclause (j) is fairly self-explanatory. Headed "Independent Contractors", it permits the lessor to employ a wide category of persons listed as: "...agents or contractors and such other persons as the Lessor may from time to time consider necessary or convenient..."

[31] Before giving special consideration to clause 7(2), it is important to have regard to the exact arrangement pursuant to which the security company was engaged. Having regard to the provisions of section 4 of the Urban Development Corporation Act, which sets out the functions of the appellant, it might hardly have been expected that the appellant would itself have sought to provide the security services for the building. Its functions concern development of land and similar pursuits as section 4 of its governing Act indicates:

> "4. (1) Subject to the provisions of this Act the Corporation shall have power to carry out or secure the laying out and development of areas designated under section 14.
>
> (2) Subject to the provisions of this Act, the Corporation may for the purpose of performing any of its functions under this Act, do anything and enter into any transaction which, in the opinion of the Corporation, is necessary to ensure the proper performance of its functions.
>
> (3) In particular and without prejudice to the generality of the provisions of subsections (1) and (2) the Corporation may –

(a) acquire, manage and dispose of land whether within or outside any designated area;

(b) lay out, construct and maintain roads, construct and maintain buildings and carry out such other building and engineering operations as may appear to it to be necessary or desirable in, on, over or under land within any designated area;

(c) provide and maintain car parks, piers, public parks, public gardens and other public amenities within any designated area;

(d) carry on any business or undertaking for the development of any designated area;

(e) contribute to local authorities and statutory undertakers sums in respect of expenditure incurred by such authorities and undertakers in respect of their functions in connection with the development of any designated area;

(f) engage in any other activity designated to promote the development of any designated area.

(4) The Corporation shall, in performing any of its functions under this Act, take such action as may be necessary and practicable to ensure the preservation of sites and objects of architectural or historic interest."

The security contract

[32] The arrangements that led to the engagement of the security company are set out in the witness statements of the two witnesses for the appellant in the court below. In the witness statement of Glenton Rose, former estate manager of the appellant, filed

18 December 2006, the relevant paragraphs are paragraphs 10-12, which state as follows:

> "10. On the 20th day of June, 1990, the Urban Maintenance Limited, pursuant to the Third Schedule (J) of the said Lease entered into an Agreement with the Second Defendant, whereby the Second Defendant as independent contractor agreed to maintain security systems in respect of 8-12 Ocean Boulevard, Kingston which included the Claimant's Shops.
>
> 11. Urban Maintenance (1977) Limited is a subsidiary of the First Defendant which was incorporated in 1977 to provide property maintenance on behalf of the First Defendant in the Kingston Waterfront area. The provision of maintenance included security for properties owned by the First Defendant in that area.
>
> 12. Accordingly, Protection & Security Limited was employed by Urban Maintenance Limited to maintain security services in respect to 8-12 Ocean Boulevard, Kingston Mall, Kingston which included the Claimant's shop."

[33] In respect of the witness statement of the other witness for the appellant: Donald Lee, Director of Technical Services for UML, filed 11 October 2006, the relevant paragraphs are paragraphs 2-8. The contents of those paragraphs are as follows:

> "2. Urban Maintenance (1977) Limited as a subsidiary of the First Defendant was incorporated in 1977 to provide property maintenance on behalf of the First Defendant in the Kingston Waterfront area. The provision of maintenance included security for properties owned by the First Defendant in that area.
>
> 3. At the time of the relevant incident, I was acting General Manager of Urban Maintenance Limited. As Acting General manager I had knowledge of the Agreement dated the 20th day of June, 1990 between Urban Maintenance Limited and Protection & Security Limited for the provision of security services.

4. The original Agreement between Urban Maintenance Limited and Protection & Security Limited was made in 1983 with provision for renewals.

5. The need to employ Protection & Security Limited arose as a result of the provisions of Lease dated the 1st day of January, 1990 between the First Defendant and the Claimant whereby it was agreed that the Lessor if so required would provide security for the building at 8-12 Ocean Boulevard, Kingston Mall, Kingston.

6. Accordingly, Protection & Security Limited was employed by Urban Maintenance Limited to maintain security services in respect to 8-12 Ocean Boulevard, Kingston Mall, Kingston which included the Claimant's shop.

7. During the period of time Protection and Security Limited was responsible for securing the premises there were no frequent break-ins in the mall area.

8. Pursuant to the abovementioned Agreement of June, 1990, Protection & Security Limited were employed as independent contractors and were not agents of Urban Maintenance Limited."

[34] In these preceding paragraphs of the witness statements, the witnesses seek to disavow any suggestion that the security company was the agent or servant of UML. If that was so (that is, that there was no relationship of agency or master and servant between UML and the security company), then the appellant's defence in the court below would have been even stronger. That would have been so, based on elementary company law principles (see, for example, the House of Lords decision of **Salomon v Salomon & Co Ltd** [1897] AC 22). In **Salomon v Salomon & Co Ltd**, it was the observation of Lord Herschell at page 42 that:

> "It is to be observed that both Courts treated the company as a legal entity distinct from Salomon and the then

> members who composed it, and therefore as a validly constituted corporation. This is, indeed, necessarily involved in the judgment which declared that the company was entitled to certain rights as against Salomon. Under these circumstances, I am at a loss to understand what is meant by saying that A. Salomon & Co., Limited, is but an 'alias' for A. Salomon. It is not another name for the same person; the company is ex hypothesi a distinct legal persona." (Emphasis added)

[35] Similarly, at page 51 of the judgment, Lord Macnaghten observed that:

> "The company is at law a different person altogether from the subscribers to the memorandum..."

[36] The position is more pointedly addressed in relation to the facts of this appeal in the case of **Adams v Cape Industries Plc and another** [1991] 1 All ER 929. In that case it was held by the English Court of Appeal (per Slade LJ at page 1019) that :

> "...the court is not free to disregard the principle of *Salomon v Salomon & Co Ltd*... merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities." (emphasis added)

[37] So that, although it is a subsidiary company of the appellant, UML would be a separate legal entity and have a distinct legal persona from the appellant.

[38] Having regard to this principle of separate legal personality, it seems to me that, if the security company was a servant or agent of any entity, then that entity must have been UML, by which the security company was directly engaged; and not the appellant. And while there have been cases in which, as an exception to this general rule, courts

have seen it fit to remove or pierce the veils of incorporation of companies (for example, in cases of fraud), the circumstances that would warrant such action do not arise here.

[39] It might be argued that this conclusion (based on the principle of separate legal personality) is, in a sense, fortified by the learned trial judge's apparent basis for rejecting the appellant's claim for an indemnity or contribution. At paragraph (14) of the judgment, the learned trial judge, referring to the security company, stated that:

> "...a stranger to the contract between the Claimant and the First Defendant, bears the burden of obligations to which it was not a party."

[40] To my mind the learned trial judge's finding that the appellant should bear the responsibility for the respondent's loss, ignores several salient facts that are of some importance in this case. These are: (i) there was no express and definitive finding as to how the loss was occasioned - that is, there is nothing that can be identified as a finding that the respondent's goods had been stolen by a security guard. Such a finding would have been a required finding of a primary fact necessary to proceed to the next stage of determining whether that security guard would have been the servant or agent of the appellant. (ii) In interpreting subclause (j), the learned trial judge seemed to place some emphasis on the use of the word "employ" as conveying the meaning that reference was being made to an employer-employee relationship (see paragraph (16) of the judgment). This was the court's reasoning in relation to this subclause:

> "(16) The employment of the company was in purported exercise of the First Defendant [sic] entitlement expressed in

> the Third Schedule (j). It seems to me that what paragraph (j) does, is to permit the First Defendant to employ persons with the requisite skills to perform the technical services as are required in the Third Schedule. It expressly provides that the Lessor shall be entitled to **employ** agents etc. Paragraph j would not entitle the First Defendant to employ agents or contractors, who in turn would be entitled in their own right to employ the personnel to perform the services required pursuant to the Third Schedule." (Emphasis as in the original text)

[41] With respect, it is difficult to see how the conclusion is warranted by the premises of that discussion. The meaning and emphasis given to the use of the word "employ" by the learned trial judge, does not seem to be justified. In the Concise Oxford English Dictionary, 11th edition, "employ" is defined as meaning: "to give work to (someone) and pay them for it". That definition could be just as applicable to an employee as it could be to an agent and also an independent contractor. It is also of importance to note that the heading of the subclause itself is "Independent Contractors"; and, by that subclause, the lessor is permitted to engage "...agents or contractors and such other persons..." It seems to me, also, that it would be easier to conclude that, given the core functions of the appellant that are set out in its empowering Act, it would have been open to the appellant to engage a security company which would employ security guards whose role would be to see to the performance of the contract. However, in this case, it should also be remembered that there is no contract between the appellant and the security company: the contract exists between UML and the security company.

The case of Roe v Ministry of Health; Woolley v Ministry of Heath

[42] The case of **Roe v Ministry of Health; Woolley v Ministry of Health**, cited by Dr Williams, was accepted by Mr Givans as properly stating the applicable principles. Mr Givan's difficulty with the case, however, had to do with what he submitted was its inapplicability to the facts and circumstances of this case and to the fact that the learned trial judge did not give consideration to clause 7(2) of the lease.

[43] In the case of **Roe v Ministry of Health; Woolley v Ministry of Health**, the two plaintiffs at first instance had become paralysed from the waist down after being injected with a spinal anaesthetic, nupercaine, in preparation for a relatively-minor operation. The anaesthetic had unknowingly become contaminated with a disinfecting substance called phenol, or carbolic acid. The contaminated substance had the effect of damaging the nerves in the spines of the plaintiffs, leading to their paralysis. The question that arose was whether a Dr Graham, the anaesthetist, had been negligent in administering the anaesthetic; and, if so, whether the hospital was thereby vicariously liable. The House of Lords held that the learned trial judge had been correct in finding that Dr Graham had not been negligent. Denning LJ said of the case: "When you stop to think of what happened in this case, you will realise that it was a most extraordinary chapter of accidents."

[44] I must agree with Mr Givans in his submission that the case of **Roe v Ministry of Health; Woolley v Ministry of Health**, because of its different facts and extraordinary circumstances, is inapplicable to the facts and circumstances of this case.

One such difference, for example, has to do with the relatively-direct engagement of Dr Graham by the hospital in that case, on the one hand; and the indirect engagement of the security guards through UML in the instant case, on the other.

[45] While not losing sight of the fact that the lease places primary responsibility for the provision of security services on the lessor, it must be acknowledged and factored into the outcome of any decision that: (i) the security service was not likely to have been provided by the appellant/lessor itself, given its statutorily-defined core functions; and (ii) the reality is that the engagement of the security company in the instant case was effected by another company (UML) with a separate and distinct legal persona that was not joined to the suit.

[46] I must also agree with Mr Givans that the court below did not give any or any sufficient consideration to these matters or to the effect of clause 7(2) itself, which clause, on the face of it, exempts the appellant from liability except in certain limited circumstances.

[47] Reference was made by counsel for the respondent to a statement made by the learned trial judge in paragraph (11) of the judgment. It was put forward in argument in an effort to demonstrate that the learned trial judge did give consideration to clause 7(2) and the question of whether the security guards were independent contractors. The statement was:

> "Control was not the only factor, the totality of the relationship between the Defendants was also important."

[48] However, when one looks at this sentence, not in isolation, but in the context of the entire paragraph, it becomes apparent that the statement was not part of any finding or analysis; but fell within a summary of what the appellant (then the first defendant) was contending. There appears in the judgment no discussion of the control test - one of the accepted tests for determining whether a contractual relationship falls to be considered as one of employer and employee or hirer and independent contractor. (See, for example, the case of **Market Investigations v Minister Of Social Security** [1968] 3 All ER 732.)

[49] In fact, as Scott J observed in the **Market Investigations** case at page 736 F:

> "I think it is fair to say that there was at one time a school of thought according to which the extent and degree of the control which B. was entitled to exercise over A. in the performance of the work would be a decisive factor."

[50] He further observed at page 738 A:

> "The most that can be said is that control will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor..."

[51] So that over the years various tests such as the "mixed test" (see, for example, the case of **Ready Mixed Concrete (South East), Ltd v Minister of Pensions and National Insurance** [1968] 1 All ER 433); the integration test; the economic reality test and so on, have been used by courts to determine whether a litigant was an employee or an independent contractor. But what is significant in all of this is that, from a perusal of the judgment, it is by no means apparent that any consideration was given to any of these tests in resolving the central question posed by clause 7(2) of the lease.

[52] But even had the learned trial judge considered the most basic of these - the control test - there would have been cause for concern about his ultimate finding of liability on the part of the appellant, based on the facts and circumstances of this case. McKenna J in the case of **Ready Mixed Concrete (South East), Ltd v Minister of Pensions and National Insurance** defined the concept of control thus (at page 440 C of the judgment):

> "Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when, and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted...To find where the right resides one must look first to the express terms of the contract..."

[53] The words with which this quotation ends immediately raise an issue: to which contract would one look to ascertain the terms? There is no contract between the appellant and the security company. The contract that exists is between UML and the security company and that document describes the obligations of both parties to that contract. That contract does not mention the appellant at all. And even looking at the control test itself, did the contractual arrangements in this case permit of a proper application of this test? Because of the absence of a contract between the appellant and the security company, the answer to this question must be "no".

[54] Considered from the perspective of agency, the matter is no less fraught with difficulty. In Bowstead & Reynolds on Agency, 17th edition, "agency" is described at page 1 as follows:

> "(1) Agency is the fiduciary relationship which exists between two persons, one of whom expressly or impliedly consents that the other should act on his behalf so as to affect his relations with third parties, and the other of whom similarly consents so to act or so acts. The one on whose behalf the act or acts are to be done is called the principal. The one who is to act is called the agent. Any person other than the principal and the agent may be referred to as a third party."

[55] Because of the particular facts and circumstances of this case, it would be difficult to fit the arrangements among the appellant, UML and the security company within the above definition. In these particular circumstances, it appears that the security company would have been the agent and UML the principal, with the appellant being the third party.

The case of Lumbers v Cook

[56] The authorities referred to by the learned judge in the judgment, in particular that of **Lumbers v Cook Builders Pty Ltd (in liquidation)** [2008] 4 LRC 683, were mentioned in an attempt at demonstrating the principle that there can be no assignment or novation of a contract without the consent of all the contracting parties. In that regard, the learned trial judge was of the view that the appellant could not delegate its liability under the lease to the security company.

[57] In **Lumbers v Cook Builders Pty Ltd (in liquidation)**, Cook Builders Property Limited (Builders) had sued Matthew and Warwick Lumbers (the Lumbers) for monies it claimed to be outstanding for building a house pursuant to an oral agreement between Builders and Cook & Sons (Sons). The construction work in question had originally been contracted by the Lumbers to Sons, which later contracted the work to Builders, without the knowledge or consent of the Lumbers.

[58] The High Court of Australia allowed the Lumbers' appeal from a ruling that they pay Builders. The High Court did so on the basis that, in the event of non-payment, Builders' remedy lay under its contract with Sons; as, in those circumstances, Builders' claim against the Lumbers, if allowed, would reallocate not only the risk but the rights and obligations provided for under the contract between the Lumbers and Sons. The High Court was of the view that each party must be made to recover under its respective contract. Further the mere conferral of a benefit is not sufficient to establish entitlement to recovery.

[59] In my view, however, the case of **Lumbers v Cook Builders Pty Ltd** has a limited application to the instant case. For example, unlike in the case of **Lumbers v Cook Builders Pty Ltd**, in this case, there was, at first instance, no pleading of novation; or an assignment by the appellant of any of the rights or responsibilities under the lease. Neither was there a claim based on the grounds of unjust enrichment. In **Lumbers v Cook Builders Pty Ltd**, the plaintiff (Builders) was seeking to gain the benefit of a contract to which it was not privy. In the instant case, however, it was possible for there to have been a finding of negligence against the third party, that is

the security company, independently; and whether or not it was privy to the lease between the appellant and the respondent.

[60] Further, the facts of the case of **Lumbers v Cook Builders Pty Ltd** did not have as a feature the twist of a clause such as clause 7(2) of the lease in the instant case. As previously observed, this clause and the appellant's attempt to rely on it, called for a specific finding on its meaning and import in the instant case. This the learned trial judge failed to do.

[61] In all the circumstances, therefore, it seems to me that the ground of appeal relating to the failure of the court below to consider the effect and significance of clause 7(2) of the lease, has been clearly made out.

[62] In relation to the submission made on behalf of the respondent that the judgment could be affirmed on the basis of negligence, that contention must also fail for two reasons: (i) no counter-notice has been filed as required by rule 2.3(3) of the Court of Appeal Rules, seeking affirmation of the judgment on a basis other than that on which the judgment was arrived at; and (ii) there is no evidence of negligence on the part of the appellant.

The submissions in relation to damages

[63] As I was of the view that the appeal ought to have been allowed on the basis of the challenge in respect of liability, that rendered unnecessary a consideration of the aspect of the appeal relating to damages.

[64] It was for these reasons that I concurred in the making of the orders set out in paragraph [2] of this judgment.

P WILLIAMS JA

[65] I have read in draft the reasons for judgment of my brother F Williams JA and agree with his reasoning.