IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. CL 1994/J181

BETWEEN	**JACITAR (JAMAICA) LTD.**	**CLAIMANT**
AND	**URBAN DEVOLPMENT CORPORATION**	**1ST DEFENDANT**
AND	**PROTECTION AND SECURITY LTD.**	**2ND DEFENDANT**

Ms. Diana Harrison for Claimant

Ms. Sasha Vaccianna of Vacianna & Whittingham for 1st Defendant.

Heard: 18th and 19th July 2007 and 17th December, 2010.

Campbell, J.

(1) On the 1st February 1990, the Claimant entered into a Lease Agreement with the First Defendant, who controlled shops 51 and 52 (the leased premises) on the ground floor of a building contained in a strata plan No. 79 registered at Volume 1128 Folio 658 of the Register Book of Titles. The lease was for a period of five years from the 1st January 1990.

(2) The Claimant, pursuant to that Lease Agreement, paid a maintenance charge of $2,123.33 per month, among other services, 'for safe, efficient and orderly use, maintenance and upkeep of all parts of the building including the provisions of twenty-four hour security at the building.

(3) The Claimant alleges that on the 23rd of May, 1993 the leased premises were broken into by persons unknown. It was further alleged that access was gained without forced entry by recourse to an entrance/corridor leading to the said leased premises which was an area under the control of security guards provided by the Second Defendant, who was the servant and agent of the First Defendant the negligence alleged were similarly particularized against both Defendants.

(4) The First Defendant alleged in its defence, an agreement between Urban Maintenance (1997) Ltd. (the company) and the Second Defendant for the purpose of maintaining security systems, for the leased premises. Accordingly, security guards employed by the Second Defendant are not the servants of the First Defendant, and would be independent contractors to the Second Defendant. It was further alleged that the Lease Agreement provides that the First Defendant will not be liable for theft, other than by its agents or servants. Its servants and agents were not responsible for the thefts or removal of property, so there was no breach of contract.

(5) The 1st Defendant contended that if there was any negligence, it was that of the Second Defendant. The Second Defendant's negligence was particularized as follows by the First Defendant:

(a) Failing to provide adequate security and/or adequate and or efficient security guards so as to prevent unauthorized entry to the building and the breaking in of the said leased premises.

(b) Failing to provide an adequate, safe and efficient system for the security of the said leased premises.

(c) Failing to prevent the breaking in of the said leased premises or to prevent or deny access to the said building to unauthorized persons.

(d) Failing to adequately secure the entrance and/or the corridor of the said building leading to inter alia, the leased premises.

(6) On the 16th May 1995, judgment was entered against the Second Defendant. The First Defendant by Notice dated on the 16th November 1995 claimed:

(a) An indemnity or a contribution against the second defendant to such extent as the court thinks fit.

(b) Judgment for any amount that may be found due from the first Defendant to the Claimant.

On the 11th February 1998 the Court ordered that the matter proceed to Assessment of Damages against the Second Defendant. Appearance was entered for the Second Defendant by Dunn, Cox and Orret.

(7) The Second Defendant sought to set aside the Interlocutory Judgment and attached a defence in which it was alleged, inter alia, at paragraph 6.

> "Further, the Second Defendant denies that the entrance or corridor by which access was obtained to the premises as alleged was or should have been under the control of the security guards it provided either at the material time or at all.
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> Further, and in the alternative, the Second Defendant will say that if the entrance or corridor referred to was under its control, which is denied, such control was limited and did not involve the provision of security guards on stationary duty at the entrance or corridor referred to in the Statement of Claim. In the premises, the Second Defendant will say that it carried out its duty with due care and in accordance with the terms of the Agreement between itself and the First Defendant for the provision of security services by the Second Defendant. This Defendant will

> say that at all material times, the number of guards stationed at the premises was the decision of the First Defendant and the scope and nature of their duty was determined by the said First Defendant."

(8) The Second Defendant summons to set aside judgment was dismissed, and leave granted to appeal. On the 28th March 2001 the Court of Appeal allowed the appeal and set aside the default judgment. On the 24th February 2004, Dunn, Cox and Orrett, had its name removed from the Records. On the 25th June 2004, Earl Witter, of Counsel, entered appearance for the 2nd Defendant. On the 22nd May 2007, the Master ordered that judgment be entered against the Second Defendant with damages to be assessed at the trial of the matter.

(9) The First Defendant, in its pre-trial memorandum, has admitted that the claimant was obliged to pay a maintenance charge, in order to facilitate the Lessor in maintaining and managing the building as a first class office building. It was admitted that among the obligations of the First Defendant, in the Third Schedule of the Lease Agreement, was the orderly use, maintenance and upkeep of all parts of the building including the "provision of twenty-four hour security at the leased premises. The First Defendant admits that pursuant to the Third Schedule (j) of the said Lease the company entered into an Agreement with the Second Defendant, whereby the Second Defendant agreed to maintain security systems for the leased premises."

The First Defendant maintains that security was provided at the building on a 24-hour basis and that the Second Defendant was not its agent and/or servant but was an independent contractor. The Third Schedule (j) provides:

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 and system.

(10) Both sides identified the main issue inter alia as follows:

(a) The First Defendant breached the lease Agreement, which provided for "safe efficient and orderly use, maintenance and upkeep of all parts of the building including the "provision of twenty four hour security of the building.

(b) Whether the Second Defendant, in carrying out its duties, was acting as an independent contractor or servant and/or agent of the First Defendant.

(11) The First Defendant's submission was concentrated on the distinction between "a servant" and "an independent contractor." Further, that the Second Defendant, in carrying out its duties, was acting as an independent contractor and not as an agent or servant of the First Defendant. The level of control that the First Defendant exerted over the Second Defendant was an important factor in the determination. It was also submitted that the security guards employed by the Second Defendant were not servants or agents of the First Defendant, because of the lack of control over the day to day workings of the security company's duties. Control was not the only factor, the totality of the relationship between the Defendants was also important. The First Defendant relied on the cases of ***Collins v Hertfordshire***, CC(1974) KB598, P615; ***Harris v Hall*** (1997) SCCA31/1993, ***Sevenson Jordon and Harrison v MacDonald Evans Ltd.*** **(1952) 1TLR 101 P11.**

(12) Did the First Defendant, breach the Lease Agreement? I think it did. The essence of the First Defendant's argument is a delegation of its contractual liabilities to a third party, the Second Defendant. The First Defendant admits that it was obliged to provide security for the leased premises on a twenty-four hour basis. Neither is there an issue that there was a breaking-in. The provision of security was an obligation that the First Defendant had undertaken. The First Defendant now seeks to place the breach of its contract with the Claimant at the feet of the Second Defendant. This the First Defendant cannot do. The learned authors of "The Law of Contract - Twelfth Edition, Cheshire, Fifoot & Furmstron, at page 522, states:

> "The question that arises here is whether B can assign the obligation that rests upon him by virtue of his contract with A to a Third person so that the contractual liability is effectively transferred from him to C. Can he substitute someone else for himself as obligor? English Law has unhesitatingly answered this question in the negative. In the words of Collins MR;
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> > "It is I think quite clear that neither at law nor in equity could the burden of a contract be shifted off the shoulders of a contractor on to those of another without the consent of the contractee. A debtor cannot relieve himself of his liability to his creditor by assigning the burden of he obligation to somebody else, this can only be brought about by the consent of all three, and involves the release of the original debtor."

(13) The question came up for determination in the High Court of Australia, ***Lumbers v. W Cook Builders Pty Ltd.*** (in liquidation) [2008] 4 LRC 683, in relation to a building contract. The contract was between A, defendant property owner and B, a building

company for the construction of a house. The construction work was carried out by the Plaintiff company C, under a separate contract with B, A was unaware of the arrangements between Plaintiff and the building company with whom he had contracted. The Plaintiff company complained he had not been fully paid for work he had done. The court considered whether the Defendant obtained a benefit at the expense of the Plaintiff. At the trial, the judge dismissed the Plaintiff's claim against the Defendants, on the grounds that the Plaintiff was not an equitable assignee of the building contract and the Defendants were not under any obligation to make restitution to the plaintiff. An appeal to the Full Court of the Supreme Court of Australia was allowed on the basis that the Defendants had acquired a benefit which it would be unconscionable for them to keep without paying a reasonable sum for the services. The Defendants appealed. Per Gleeson CJ;

> "…..The bare fact of conferral of a benefit or provision of a service by the third party did not suffice to establish its entitlement to recovery, **since the contractual relations between the property owner and the builder effected a certain allocation of risks which could not be disregarded or put to one side as an inconvenient distraction. If the third party claim against the property owner were allowed it would redistribute, not only the risks but also the rights and obligations provided for in the contract between the property owner and the builder.** Since the plaintiffs services
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> were not performed at the request of the defendants, but pursuant to the contract between Cook & Sons Ltd. and the plaintiff, and since there was no acquiescence by the defendants in the provision of services by the plaintiff, the plaintiff could not claim for work and labour done …" (emphasis mine)

(14) The answer of the First Defendant to the claim is that by employing the Second Defendant, the Claimant was obliged to look to the Second Defendant for the recovery of damages. Even if the First Defendant did employ the Second Defendant as alleged, and I find that it did not, the defence raised is seeking to reallocate the risk that the Claimant undertook in engaging the services of the First Defendant. Further, it shifts the right that the Claimant agreed in its contract of having the First Defendant responsible for the delivery of "twenty four hour security" onto the shoulders of the Second Defendant. In similar vein, a stranger to the contract between the Claimant and the First Defendant, bears the burden of obligations to which it was not party. As Gleeson CJ said, to accept the First Defendant's submission, would have the effect of putting aside the allocation of risk between the Claimant and the First Defendant as an inconvenient distraction.

(15) The contract for the provision of security system was entered between the company, a subsidiary of the First Defendant and the Second Defendant. There was no written contract before the court as to the terms of the arrangements between the First Defendant and "the Company." The agreement dated 20th June 1990 (Agreement 2) between "the Company" and the Second Defendant, makes no mention of the First Defendant and states that the Contractor (the Second Defendant) has agreed with "the Company" to maintain a security system for "the Company".

(16) The employment of the Company was in purported exercise of the First Defendant 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 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 Third Schedule. The Lessor is not relieved of his obligation to employ the staff he considers necessary or convenient for the provision of the services. Paragraph j reserves to the Claimant, the comfort of having the First Defendant, a statutory corporation, employ the technical staff, whether as agents, contractors etc., Agreement 2 purports to reallocate this obligation placed on the First Defendant by the Lease Agreement. There is no evidence of the First Defendant taking any steps towards fulfilling its obligation under the Lease Agreement, anything that was done was by the company.

(17) Even if I am wrong, in the construction placed on the Third Schedule paragraph (j) and its effect on Agreement 2, that will not relieve the primary obligor from liabilities for breach of the delegated performance. The learned authors of The Law of Contract, Twelfth Edition, says at page 523:

> "The essential fact to appreciate, in this case of delegated performance is that the debtor B, who has assign his liability to C, is not relieved from his obligation to ensure due performance of his contract with A, and C, cannot be sued by A, in contract for non performance or for defective performance."

I find for the Claimant on the claim for breach of Lease Agreement, dated 1st February 1990.

(18) **Damages**

The Court is guided by the principle laid down in the Court of Exchequer, in ***Hadley v Baxendale (1854) 9 Exchequer 341: [1843- 60] All E.R.*** Rep. 461 Alderson B, in delivering the judgment of the Court, said;

> "Where two parties have made a contract which one of them has broken the damages which the other party ought to receive I respect of such breach should be such as may fairly and reasonably be considered as either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable results of the breach of it. If special circumstances under which the contract was actually made was communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract which they would reasonably contemplate would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated. "

(19) The Claimant had, on the 5th May 1998, filed further and better particulars of special damages of the stock it lost as a result of the break-in of the warehouse. It had listed goods amounting to $1,148,620.00. I find that that loss has been proven. The Claimant claims also a mark-up of fifty per cent on the cost of the stock, it had warehoused. Would a mark-up on the goods have been reasonable in the contemplation of the parties at the time they made the contact as a probable result of the First Defendant's breach. I think so. The replacement cost of the stolen stock, would include transportation and insurance charges. They would have been aware that the Claimant could not possibly sell his stock at the cost at which he acquired it. They would have in their reasonable contemplation that it is from the "mark-up" which the expenses incurred in the purchase, warehousing and sale of the goods are obtained. As to the percentage mark-up, that fifty per cent was reasonable, in light of the cost of

money, and inflation. I would accordingly allow the mark-up of $574,310.00, for a total of $1,722,930.00.

I find some support for my finding in the principle enunciated in ***Victoria Laundry Ltd. Newman Industries Ltd. {1949] 2 K.B. 528,*** although the Court there found that the Defendants had no knowledge of the profits to be incurred in the particular contracts that the Claimants had undertaken, Asquith L.J. said,:

> "We also agree that they (the defendants) did not, in fact, know these things. It does not, however, follow that the plaintiffs are precluded from recovering some general (and perhaps conjectural) sum for loss of business in respect of dyeing contracts to be reasonably expected."

(20) The Claimant has also claimed the sum of $3,100,000.00 for the losses he sustained, having borrowed monies from the Bank of Nova Scotia for the purchase of the stock, and using his home as security for the loan. He said that he was unable to service the mortgage as a result of the theft, and his home was eventually put up for auction by the bank. This loss does not flow naturally from the theft, and without more, could not be deemed to have been in the reasonable contemplation of the parties. There was no evidence adduce before me to demonstrate that these circumstances were known or communicated to the First Defendant. This claim would fail. The claim for embarrassment also fails.

(21) **Claimants claim against the Second Defendant for Negligence**

It was ordered on the 22 May, 2007 that Damages be assessed against the 2nd Defendant in default of attendance. The Claimant had alleged negligence on the part of the 2nd Defendant for failure to adequately secure the said building and to deny access

to the said building containing the leased premises to unauthorized persons. I would make an award of $1,722,930.00.

(22) The 1st Defendant claim for indemnity against the 2nd Defendant is dismissed. The contract entered into between the Company and the 2nd Defendant does contain an indemnification clause, to which the 1st Defendant is not privy.

It is hereby ordered:

(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.