REPUBLIC OF TRINIDAD AND TOBAGO

Civil Appeal No: P139 of 2014

IN THE COURT OF APPEAL

BETWEEN

STEVE JAIPERSAD

Appellant

AND

SHIRAZE AHAMAD
(ALSO CALLED SHIRAZ AHAMAD)

Respondent

PANEL: **A. Mendonça, J.A.**
N. Bereaux, J.A.
R. Narine, J.A.

Appearances: **For the Appellant Mr. S. Sharma**
For the Respondent Mr. R. Nanga

Date delivered: **February 24th, 2015**

I agree with the judgment of Mendonca J.A. and have nothing to add.

N. Bereaux,
Justice of Appeal

I too agree.

R. Narine
Justice of Appeal

JUDGMENT

Delivered by A. Mendonça, J.A.

1. In these proceedings, which were commenced on August 20th 2013, the Claimant/Respondent claims certain declaratory relief in respect of a parcel of land. The Claimant also claims relief in respect of monies allegedly paid by him on behalf of and for the benefit of the Appellant/Defendant (hereafter referred to as the money claim). This appeal concerns the money claim and therefore I will say no more of the claim in relation to the parcel of land.

2. In the statement of case the Claimant alleges that the Defendant was his childhood friend and that he has known him for over two decades. During the period 2004 to 2007 the parties agreed to pursue investments together and became partners in many investments. The Claimant alleges that there was never any formal agreement between them and he entered into the investments based on the trust that he placed in the Defendant, which had developed over two decades. Given this trust the Claimant loaned to and paid on behalf of the Defendant substantial sums without any written agreement. The Claimant avers that at all times there was a mutual understanding that the Defendant would reimburse him for monies had and received from the Claimant for the Defendant's use and benefit and expended by the Claimant in implementing the Defendant's requests or instructions with respect to any particular matter.

3. The Claimant sets out the particulars of the various transactions in which he alleges that the monies were paid for and on behalf of the Defendant and for his benefit. These are as follows:

1. In or about 2004 there was an oral agreement between the Claimant and the Defendant for the Claimant to purchase two thousand shares in Guardian Holdings Limited on the Defendant's behalf. The Claimant secured the shares through his broker and on informing the Defendant that the shares were obtained, the Claimant was instructed by the Defendant to pay for the shares and that he would repay him. On the basis of the trust the Claimant had in the Defendant he paid the sum of $67,049.25 for the shares in or about April 1st 2004. To date however the Defendant has failed to repay the sum;

2. On or about April 6th, 2004 the Claimant at the request of the Defendant and on the basis of the trust he had in him bought and paid for and on behalf of the Defendant a further ten thousand shares in the same company for the sum of $334,596.58 which sum the Defendant agreed to reimburse the Claimant but has failed to do so;

3. In or around the month of December 2002 the Claimant, at the request of the Defendant, retained attorneys-at-law to prepare a power of attorney in favour of the Claimant for the Defendant's convenience. The Claimant paid the attorney's fee of $679.00 for the preparation of the power of attorney. However despite requests for reimbursement of the sum the Defendant has failed or refused to repay it;

4. On or about January 20th 2004 the Claimant at the request of the Defendant paid the sum of $8,000.00 to a bank account in the Defendant's name for his use and benefit. The Claimant alleges that he paid the sum on the basis of the trust he had for the Defendant and the Defendant's reassurance that he would repay the sum;

5. In or about the year 2004 the Defendant requested the Claimant to purchase a cellular phone for him and the Defendant agreed to reimburse the Claimant for the cost of the phone. Again, on the basis of the trust that had been built up between the parties and the assurance that he would be repaid the Claimant on May 25th 2004 bought the phone for the Defendant at the cost $1,400.00 but the Defendant has not repaid the said amount;

6. During the period 2004 to 2008 the Defendant orally requested the Claimant to pay his cellular phone bills. On the basis of the Defendant's reassurance that he would be repaid and on the basis of the trust he had for the Defendant, the Claimant paid the Defendant's phone bills in the sum of $15,236.97. The Defendant has, however, failed to repay the said sum;

7. In April 2006 the Claimant paid to Bourse Securities Limited (Bourse) the sum of $151,328.22 being moneys owed by the Defendant to Bourse. The Claimant avers that the sum was paid to Bourse at the request of the Defendant who promised to repay the Claimant and on the basis of the trust he had in the Defendant and his assurance that he would be repaid he advanced the sum of money to Bourse on the Defendant's behalf. The Defendant in April 2006 paid the Claimant the sum of US$20,000 in partial settlement of the sum but has however failed to pay the balance;

8. On January 26th 2007 the Claimant advanced to the Defendant the sum of US$107,953.85. The sum was paid to the Defendant's bank account. The Claimant avers that this sum was loaned to the Defendant on the basis of the trust he had in and his friendship with the Defendant and on the assurance that he would be repaid. The Defendant has failed to repay the said sum;

9. On or about March 16th 2007 at the request of the Defendant, the Claimant paid a further sum of $175,265.42 to Bourse. This was moneys due by the Defendant to Bourse and was paid by the Claimant on the basis of a promise by the Defendant to repay the said sum to the Claimant. The Defendant has however failed to repay it;

10. In or about the month of May 2007 the Claimant agreed to loan to the Defendant the sum of US $100,000.00. The Defendant assured the Defendant that he would sell his shares and liquidate as much as possible to repay the Claimant. The sum was disbursed by the Claimant on or about May 25th 2007. The Defendant has not repaid the sum despite his assurance to do so. Again, the Claimant avers that he agreed to loan the sum to the Defendant on the basis of the trust he had in the Defendant, his friendship with the Defendant and the assurance by the Defendant that he would be repaid.

4. The Claimant avers that he wrote to the Defendant on several occasions demanding payment of the said sums but the Defendant has failed to repay him. The Claimant in those circumstances, pleads, inter alia:

> *"12. As a consequence of the Defendant's unconscionable conduct by virtue of the retention of moneys from the Claimant for the Defendant's sole benefit, the Defendant has been enriched at considerable expense to the Claimant, and if the Defendant is allowed to retain what he has received this would constitute unjust enrichment of the Defendant.*
>
> *13. By reason of the above, the Claimant claims a sum of TT$1,937,601.69 as money had and received by the Defendant and/or for his benefit and which is for and to the use of the Claimant."*

5. The Claimant claims in respect of the money claim:

> *"**Moneys had and received; unjust enrichment:***
>
> *(a) A Declaration that the Defendant has been unjustly enriched through sums paid either directly to him or on his behalf by the Claimant as delineated herein above.*
>
> *(b) A Declaration that the Defendant is holding a sum of TT$1,937,601.69, being moneys had and received from the Claimant and/or paid on his behalf and for his benefit as delineated hereinabove on trust for the Claimant.*
>
> *(c) Alternatively, an Order for Restitution of the sum of TT$1,937,601.69 being moneys had and received by the Defendant from the Claimant and/or paid on his behalf and for his benefit and expended by the Defendant for his own use and benefit at the expense of the Claimant.*

(d) Payment of the said sum of TT$1,937,601.69."

6. The Defendant filed and served a defence in which he, inter alia; (i) states that the Claimant is barred from recovering against the Defendant the sum of money claimed or any part thereof by virtue of the provisions of the Limitation of Certain Actions Act, Chap. 7:09 (the Limitation Act); (ii) claims that the Claimant's claim as framed amounts to an abuse of process and (iii) denies any liability to the Claimant on certain factual bases which I need not set out. The Claimant also filed and served a reply, taking issue with the allegations made by the Defendant in his defence.

7. On February 17th 2014 the Defendant applied to the court for an order pursuant to rule 26.2(1)(b) and/or rule 26.2(1)(c) of the Civil Proceedings Rules 1998 (the CPR) and/or under the inherent jurisdiction of the court that the money claim of the Claimant be struck out. Rule 26.2 (1)(b) provides that the court may strike out a statement of case or part of it if it appears to the court that the statement of case or the part to be struck out is an abuse of the process of the court. Rule 26.2(1)(c) provides that the court may strike out a statement of case or part of it if it appears to the court that the statement of case or the part to be struck out discloses no grounds for bringing or defending the claim. It was not suggested that the inherent jurisdiction of the court would give any greater power than exists under the rules of court. If the Defendant could not succeed under the rules, resort to the inherent jurisdiction could not improve his position.

8. The grounds on which the application was made may be summarized as follows:

1. The money claim is an amalgamation of a series of transactions all of which are founded in contract or quasi-contract. Section 3(1)(a) of the Limitation Act provides that no action founded on contract or quasi-contract shall be brought after the expiry of four years from the date on which the cause of action accrued. All the transactions which comprise the money claim give rise to a cause of action which accrued in excess of four years prior to the commencement of the action. Consequently the money claim is statute barred pursuant to section 3(1)(a) of the Limitation Act and ought to be struck out under rule 26.2(1)(c);

2. Insofar as there might be a claim in equity in relation to the money claim, the court ought to act in accordance with the doctrine of analogy and apply the same limitation period under section 3(1)(a) of the Limitation Act and strike it out under rule 26.2(1)(c);

3. Further an order for restitution, on the assumption that same is claimed in equity, is an attempt by the Claimant to circumvent the operation of section 3(1)(a) of the Limitation Act by removing the money claim which is an action founded on contract or quasi-contract into a court of equity. This constitutes an abuse of process and accordingly the money claim ought to be struck out under rule 26.1(1)(b).

9. Jones J. dismissed the Defendant's application. She stated that it was clear from the facts pleaded in the statement of case that the money claim is based on an unjust enrichment and in those circumstances the Claimant seeks restitution. The Judge was satisfied that what was sought by the Claimant was in fact equitable relief. The Judge referred to the doctrine of analogy which she stated provided that where there is a remedy in law and *"a correspondent remedy in equity and, by way of statutory provision, the legal remedy is subject to a limit as to time, in the absence of any statutory provision with respect to the corresponding equitable remedy a court of equity would act by analogy to the statute and impose on the equitable remedy the same limit as to time"*. The Judge however referred to section 3(3) of the Limitation Act. This section provides as follows:

> *"3(3) This section shall not apply to any -*
>
> *(a) claim for specific performance of a contract or for an injunction or for other equitable relief;"*

The Judge was of the view that the doctrine of analogy was excluded by that section. The Judge therefore concluded that as the Claimant's claim is for equitable relief and the doctrine of analogy was excluded by the Limitation Act, there was no applicable limitation period. The claim was therefore not barred by the Limitation Act.

10. With respect to the abuse of process ground the Judge was of the opinion that the claim in unjust enrichment was available to the Claimant. The Claimant has pleaded the necessary elements to maintain a claim in unjust enrichment and it was not an abuse of process for the Claimant to pursue that claim.

11. The Judge therefore dismissed the Defendant's application.

12. The Defendant now appeals from the Judge's dismissal of his application. Counsel for the Defendant submitted, as he had before the Judge, that the Claimant's money claim was founded in contract or in quasi-contract. Section 3(1)(a) of the Limitation Act was therefore applicable. This section provides as follows:

> *"3.(1) The following actions shall not be brought after the expiry of four years from the date on which the cause of action accrued, that is to say;*
>
> *(a) actions founded on contract (other than a contract made by deed) on quasi-contract or in tort;"*

He further submitted that the cause of action accrued from the date the payments were made by the Claimant for and on behalf of the Defendant; all of which were in excess of four years prior to the commencement of the action. Accordingly the money claim was statute barred. Counsel for the Defendant further contended that the relief sought by the Claimant is not equitable relief but a common law remedy. The Judge therefore erred in concluding that section (3)(3) of the Limitation Act was relevant. Alternatively the Defendant submitted that even if the relief claimed was equitable relief, section 3(3) does not exclude the doctrine of analogy and by the application of that doctrine the claim would be time barred since the court would apply the same time limit as in section 3(1)(a).

13. Counsel for the Claimant supported the Judge's conclusion. He submitted that the claim is one for equitable relief based on unjust enrichment. In those circumstances section 3(3) of the Limitation Act is relevant. That section excluded the application of section 3(1)(a). The Judge was also correct to conclude that the doctrine of analogy was excluded by section 3(3). Had the doctrine of analogy been applicable the time limit in section 3(1)(a) may have been relevant and could be applied to the money claim by the Court in the exercise of its equitable jurisdiction. However as the doctrine was not applicable and as the claim was one for equitable relief, it followed that there is no limitation period that is applicable to the money claim. Counsel further submitted that if the claim is of the type to which section 3(1)(a) applied, time did not begin to run until a formal demand was made on the Defendant for the reimbursement of the moneys paid by the Claimant on his behalf. Such a demand was made less than four years prior to the commencement of these proceedings. As a consequence the claim was not statute barred.

14. The essence of the Defendant's submissions is therefore that the money claim is founded on contract or quasi-contract and is therefore barred by section 3(1)(a) of the Limitation Act. Further that is not a claim for equitable relief but even if it were, the doctrine of analogy has not been abolished by the Limitation Act, it is applicable and a Court of equity would apply by analogy the same time period in section 3(1)(a) to the money claim.

15. The effect of the Claimant's submissions was to treat with the money claim as one for restitution for unjust enrichment. He supported the Judge's conclusion that this is a claim in equity to which section 3(1)(a) was not applicable. He agreed with the Judge that the doctrine of analogy was abolished by the Limitation Act and consequently there was no applicable limitation period. In contending as he did, Counsel for the Claimant accepted the Judge's view of the claim that it is one

for restitution based on unjust enrichment. This would seem to ignore the claim for a declaration that the Defendant holds the sum claimed *"in trust"* for the Claimant. I think that the Claimant is correct to do so, because as pointed out by the Defendant, on the facts as pleaded the monies were paid to third parties specifically for the use and benefit of the Defendant. In those circumstances it is not tenable to allege that there is a constructive or resulting trust whereby the Appellant holds the moneys on trust for the Claimant.

16. In my view the Judge was entitled to regard the Claimant's claim as one for restitution on the basis of unjust enrichment. Counsel for the Defendant in his written submissions contended that the facts as pleaded disclosed simple contracts of loan and in those circumstances there is no room for a claim in unjust enrichment because, he submitted, that where parties are in a contractual relationship the contract regulates the rights and liabilities until such time as the contract is discharged or set aside. In other words, where there is a subsisting contract a claim in unjust enrichment cannot be maintained. This point was however not really pursued in oral argument and indeed it seems that a claim in unjust enrichment will not be excluded simply on the basis that there is a subsisting contract between the parties. In **Goff and Jones, The law of Unjust Enrichment** (8th Ed.) at paras 3-13 to 3-22 there is a discussion of this issue. It is stated that the general principle is that where there is a subsisting contract between the parties relating to the benefit transferred to the defendant, a claim in unjust enrichment will not lie. The editors point out that the principle is today justifiable on the basis that it emphasizes the parties' allocation of risk and valuation as expressed in the contract. Where there is a subsisting contract that requires payment to be made for services and those services have been performed, a party cannot go outside of the contract and claim in unjust enrichment a greater sum for the services rendered (Re **Richmond Gate Property Co. Ltd**. [1965] 1WLR 335). They argue, however, that where a claim in unjust enrichment does not undermine the contractual risks, then in principle such a claim should be allowed. They recognize that such a claim might be preferred for procedural or evidential reasons. On that basis, since the money claim does not seek to do any more than recover monies paid by the Claimant on behalf of the Defendant, which it is alleged were paid on the basis that they would be repaid, it does not involve any reallocation of the risks the parties assumed, if the allegations of the Claimant are true. In these circumstances a claim in unjust enrichment should be allowed. However, this point was really not pursued in this appeal and I turn now to consider what was the real focus of this appeal and that is whether the Claimant's claim in unjust enrichment is statute barred. In doing so I must proceed on the basis of the facts pleaded by the Claimant in his statement of case.

17. Before addressing that question it is appropriate to refer to the purpose of a statute of limitation and the approach of the courts in its construction. This was succinctly set out in the judgment of Lord Millett in **Cave v Robinson Jarvis and Rolf (a firm)** [2002] UKHL 18 [at paras 5-6] where he said:

> *"5. The limitation of actions is entirely statutory. The first statute was the Limitation Act 1623…. For almost four centuries, therefore, it has been the policy of the legislature that legal proceedings should be brought, if at all, within a prescribed period from the accrual of the cause of action. The statutes of limitation have been described as "statutes of peace". They are regarded as beneficial enactments and are to be construed liberally.*
>
> *6. The underlying policy to which they give effect is that a defendant should be spared the injustice of having to face a stale claim, that is to say one which he never expected to have to deal; see* ***Donovan v Gwentoys Limited*** *[1990] 1 WLR 472,479 A per Lord Griffiths. As Best, C.J, observed nearly two hundred years ago, long dormant claims have often more of cruelty than of justice in them: see* ***A'Court v Cross*** *(1825) 3 Bing 329,332-333. With the passage of time cases become more difficult to try and the evidence which might have enabled the defendant to rebut the claim may no longer be available. It is in the public interest that a person with a good cause of action should pursue it within a reasonable period."*

18. Section 3(1)(a) of the Limitation Act does not refer specifically to claims in unjust enrichment and there is indeed no provision in the Limitation Act that does so. This is likely due to the fact that at the time the Limitation Act was passed in 1997 the law had not developed a free standing claim for unjust enrichment. This still remains the position as is apparent from the authorities to which reference is made below.

19. In **Uren v First National Home Finance Limited** [2005] EWHC 2529, Mann, J. after reviewing the authorities said (at para 16):

> *"16. Having considered the wide ranging material put to me…, it seems to me that it has not been established that the authorities have yet moved to a position in which it can be said that there is a freestanding claim of unjust enrichment in the sense that a Claimant can get away with pleading facts which he says leads to an enrichment which he says is unjust. The authorities, and at least some academic opinion, still support the view that on the present state of the authorities, the law has not yet got that far. It seems to me to be clear that that is the present state of the law. Were it necessary to decide the case on this basis, I would be likely to decide that despite the undeniable fact that the law of restitution is still developing, it has not developed and is unlikely to develop (at least in the foreseeable future) to that extent. A Claimant still has to establish that his facts bring him within one of the hitherto established categories of unjust enrichment, or some justifiable extension thereof. Were it otherwise, then why did the Claimant in the* ***Westdeutsche*** *case have to go to such lengths to*

establish that their facts fell within one of the then established categories or recovery bases (by extension)? The same is true of ***Kleinwort Benson v Lincoln City Council*** *[1999] 1 AC 349. That case established that it was no longer true to say that a payment made under a mistake of law was irrecoverable. I think that if there had been a general ground of recovery based on "unjust enrichment" which it could invoke by pleading facts and alleging injustice, then the speeches in that case would have taken a rather different form."*

20. In **Deutsche Morgan Grenfell Group plc v Her Majesty's Commissioners of Inland Revenue** [2006] UKHL 49 Lord Hoffman acknowledged that English law had not yet developed a free standing claim of unjust enrichment and that it was necessary for a claimant to prove that the circumstances in which payment was made came within one of the established categories that the law recognizes as sufficient to make retention of the monies paid unjust. He stated (at paras 20-21):

"20. The next question is whether the money was paid by mistake. This might seem at first sight to be a simple question but the division of opinion in the ***Kleinwort Benson*** *case [1999] 2 AC 349 and the academic literature show that it can lead one into deep waters. One might start by asking why it matters. The effect of the decision in* ***Metalegesellschaft*** *[2001] Ch. 620 was that the Inland Revenue had not been entitled to the money. Nor could the Revenue have thought that DMG was intending to make an interest-free loan to the British government or that there was any proper ground on which they had been entitled to retain it. Why, then, is it necessary to investigate the precise state of mind (of which the Revenue would have known nothing) with which DMG made the payment?*

21. *The answer, at any rate for the moment, is that unlike civilian systems, English law has no general principle that to retain money paid without any legal basis (such as debt, gift, compromise, etc.) is unjust enrichment. In the* ***Woolwich*** *case [1993] AC 70,172 Lord Goff said that English law might have developed so as to recognize such a general principle - the condictio indebiti of civilian law - but had not done so. In England, the Claimant has to prove that the circumstances in which the payment was made come within one of the categories which the law recognizes as sufficient to make retention by the recipient unjust…"*

21. Similarly in **FJ Chalke Limited and anor. v Revenue and Customs Commissioners: re VAT Interest Cars Group Litigation** [2009] EWHC 952 the Judge (Henderson J) stated [at para 127]:

"[127] As I pointed out in FII Chancery (see [2009] STC 254 at [245]], English law has not yet recognized a single unifying principle in the law of restitution for unjust enrichment, and a number of different causes of action exist, each with their own separate requirements;… In the present context, two causes of action are potentially relevant: the ***Woolwich*** *cause of action for the restitution of tax which has been unlawfully demanded (see* ***Woolwich Equitable Building Society v IRC*** *[1992] STC 657, [1993] AC 70), and the cause of action for restitution of tax wrongly paid under a mistake of law which was recognized by the House of Lords in DMG. However the Claimants rely on the second of these causes of action:…"*

22. In **Goff and Jones, The Law of Unjust Enrichment** (8th edition) the position is put similarly in these terms (at para 1-18):

> *"The law must say when an enrichment at another's expense is an unjust enrichment. As we have noted already, civilian and mixed legal systems commonly approach this question by asking whether there is a legal ground for the transfer from claimant to defendant: if not, then the defendant's enrichment is unjustified and restitution will follow. English law approaches the task differently, by identifying specific grounds for restitution, sometimes referred to as "unjust factors" because they are legally recognized factors that make the defendants enrichment unjust. For example, in the case of a mistaken payment, the payment is the enrichment of the defendant at the claimant's expense, and the mistake is the ground for restitution or unjust factor."*

23. The above references demonstrate that English law, which the parties agree is the law applicable in this context to this jurisdiction, at its present stage of development, has not recognized a single general principle of unjust enrichment. The law identifies specific grounds for restitution sometimes referred to as unjust factors. These factors are the trigger for the restitutionary remedy on the ground that it is unjust to retain the benefit.

24. In **Chief Constable of the Greater Manchester Police v Wigan Athletic AFC Ltd.** [2008] EWCA 1449 the English Court of Appeal referred with approval to the case of **Rowe v Vale of White Horse** [2003] EWHC 388 where the Court identified four essential ingredients in a claim for restitution on the basis of unjust enrichment namely:

> *"(i) a benefit must have been gained by the Defendant;*
>
> *(ii) the benefit must have been obtained at the Claimant's expense;*
>
> *(iii) it must be legally unjust that is to say there must exist a factor (referred to as an unjust factor) rendering it unjust for the Defendant to retain the benefit;*
>
> *(iv) there must be no defence available to extinguish or reduce the Defendant's liability to make restitution."*

It is relevant to note at (iii) that there must exist an unjust factor that renders the retention of the benefit by the defendant unjust. An example of an unjust factor may be seen from the following statement in **Kleinwort Benson Limited v Lincoln CC** [1999] 2 AC 349,363 (per Lord Brown Wilkinson):

> *"In holding that money paid under a mistake of law is recoverable, an essential fact is that the retention of the money so paid would constitute an unjust enrichment of the payee. What constitutes the unjust factor is the mistake made by the payer at the date of payment."*

25. In the circumstances under the general description of a claim for restitution on the basis of unjust enrichment, there may be several different causes of action each with their own requirements, as was said in the **Chalke** case. An essential ingredient is the presence of an unjust factor or, in other words, the presence of circumstances that would make it legally unjust for the defendant to retain the benefit. Where a claimant claims restitution on the basis of unjust enrichment, therefore, the cause of action is not complete unless there is an unjust factor. This may result in there being different causes of action for what can generally be referred to as claims in unjust enrichment.

26. However in **Goff and Jones**, **The Law of Unjust Enrichment**, supra, (at para 33-08) it is stated that:

> *"It seems that common law claims in unjust enrichment are generally barred after six years."*

This is an acknowledgment that for the purposes of limitation, common law claims in unjust enrichment are generally treated as founded on quasi-contract which would apply to claims for monies had and received. In England the limitation period for claims in a quasi-contract is six years. The relevant section is section 5 of the Limitation Act 1980 (UK). It provides that actions founded in simple contract are barred after six years. The reference to "simple contract" has been interpreted to include claims in quasi-contracts, (see **Kleinwort Benson Limited v Sandwell BC** [1994] 4 ALL ER 890). Of course section 3(1)(a) of the Limitation Act refers not only to causes of action founded in contract but also makes specific reference to causes of action founded in quasi-contract. Section 3(1)(a) therefore applies specifically also to claims in quasi-contract. It may, therefore, be said that generally common law claims in unjust enrichment in this jurisdiction are barred after four years from the date of the accrual of the cause of action.

27. In Martin Canny**, Limitation of Actions in England and Wales** (2013) (at para 9.02) the author sets out a four-part test which he states should be of assistance in ascertaining the limitation period that applies to an action seeking restitution for unjust enrichment. These are:

> *"1. First, one must ask whether the action is governed by LA 1980 [i.e. the Limitation Act 1980] or whether it falls outside the Act and is instead governed by the equitable defences of laches and acquiescence.*
>
> *2. Secondly, if action is governed by the LA 1980, one must determine whether the unjust factor giving rise to the claim is subject to the six-year limitation period for*

"an action founded on simple contract", which has been given an expansive interpretation [to include claims in quasi-contract]… or whether it is governed by a different statutory limitation period.

3. *Thirdly, one must then ascertain when the cause of action accrued to the claimant, i.e. the date from which the limitation period runs.*

4. *Fourthly, one must determine whether any reason exists to extend or postpone the limitation period, such as disability, part payment and acknowledgment, fraud, deliberate concealment or mistake…"*

In my judgment these are appropriate guidelines in this jurisdiction as well. Applying those guidelines to this case what then is the position?

28. The first consideration is whether the claim is governed by the Limitation Act or falls outside of it. The Claimant in his statement of case alleges that he paid monies for and on behalf of the Defendant. The complaint is founded on the basis that the Defendant has been enriched by the retention of those monies which have been paid by the Claimant for the Defendant's sole use and benefit. The monies were not a gift but were paid on the understanding or basis that they would be repaid. It seems to me that that brings the claims within a cause of action founded on quasi-contract, namely a claim for monies had and received.

29. The second consideration is the unjust factor. This according to the Claimant is the failure by the Defendant to repay the monies. As I mentioned above the Claimant's case is that the monies were not paid as a gift to the Defendant but were paid to him on the understanding that they would be repaid. This is within the ambit of section 3(1)(a) of the Limitation Act.

30. The third consideration is the date of the accrual of the cause of action. This is of course material to determining when the limitation period began to run and whether it has expired. I will come to this later in this judgment.

31. With respect to the fourth consideration that is to say whether there is any reason to extend or postpone the limitation period, nothing of this kind was argued in this matter nor is anything set out in the pleadings to this effect. There is therefore no basis on which it can be contended, that the limitation period may be postponed or extended pursuant to the provisions of the Limitation Act.

32. In the circumstances, assuming this is a common law claim, and not a claim for equitable relief, it is one to which section 3(1)(a) applies. This section, as I have mentioned earlier, provides

that the claim shall not be brought after the expiration of four years from the date on which the cause of action accrued. This raises the question as to when did the cause or causes of action accrue in this case. I will discuss this later in this judgment but I will first consider the Claimant's submission, which is the ground that found favour with the Judge, that section 3(1)(a) is excluded by section 3(3) of the Limitation Act on the basis that the relief sought by the Claimant is equitable relief.

33. There is no doubt that restitution is available in equity. But it is also a common law remedy. I think this is made clear in the case of **Sempra Metals Limited v IRC** [2008] 1 AC 561. In that case the question before the House of Lords was whether Sempra Metals was entitled to claim compound interest on payments of advance corporation tax which were made by Sempra Metals to the Inland Revenue under a mistake in respect of dividends paid to its German parent company. It was held that a court had jurisdiction to award compound interest where a claimant was seeking restitution of money paid under a mistake. The majority of the Law Lords (Lord Hope, Lord Nicholls, and Lord Scott) held that such an award could be made in the exercise of the court's common law restitutionary jurisdiction. The minority was of the opinion that the award could be made in the exercise of the court's discretionary equitable jurisdiction.

34. The following excerpts from the speeches of the Law Lords in the majority demonstrate the point that a claim in restitution on the basis of unjust enrichment is available at common law.

35. Lord Hope in his speech stated (at paras 22-23):

> *22. "In **Kleinwort Benson Limited v Lincoln City Council** [1999] 2 AC 49, 372 G-373 B Lord Goff of Chievely referred to the development of a coherent law of restitution, a doctrine first recognized by this House in **Lipkin Gorman v Karpnale Ltd.** [1991] 2 AC 548, 577-578. He said there was a general right of recovery of money paid under a mistake and that it was founded upon the principle of unjust enrichment. He said, at p 373 C, that a blanket rule of non-recovery on the ground of a mistake of law could not survive in a rubric of the law based on that principle. This led him to conclude that there was "a general right" to recover money paid under a mistake, whether of fact or law, subject to the defences available in the law of restitution… He said, at p 377 C, that the common law should now recognize that restitution may be granted in respect of money paid under a mistake of law. He said, at p 379 H, that, subject to any applicable defences, the payer was "entitled" to recover the money paid under a mistake. Throughout his speech he was addressing a common law remedy, not one that was available in equity. I think it can now be taken as settled that under the **Kleinwort Benson** principle, a cause of action at common law is available for money under a mistake of law…*

23. Recognition that restitution is a common law remedy raises questions about the limits that must be set to it which would not arise if it was available only in equity."

36. Lord Nicholls after reviewing the authorities on the jurisdiction of the court to award interest stated: (at para 111-112):

"111. In these unusual circumstances I consider it is open to your Lordships' House on this appeal to re-examine the basic point of law conceded and not argued on the ***Westdeutsche*** *appeal, namely, whether interest may be awarded by the courts in exercise of the common law jurisdiction to grant personal restitutionary relief…*

112. …Nobody has suggested a good reason why, in a case like the present, an award of compound interest should be denied to a claimant. An award of compound interest is necessary to achieve full restitution and, hence, a just result. I would hold that, in the exercise of its common law restitutionary jurisdiction, the court has power to make such an award."

37. Finally Lord Scott was also of the view that the power to order restitution in the circumstances of the **Sempra Metals** case could be found in the exercise of the court's common law jurisdiction. He stated [at para 153]:

"Lord Mance has made clear in his opinion that recovery in a claim in restitution for money had and received of interest on the sum of money in question should be 'contingent upon proof of actual benefit acquired by the recipient'. I respectfully agree, but I am unable to agree that the recovery should be regarded as discretionary. The recovery is, under established common law rules, subject to change of position defences."

38. These passages from the speeches of the Law Lords in the majority in the **Sempra Metals** case clearly demonstrate that restitution on the basis of unjust enrichment is available at common law. Although there are instances where equity may come to the aid of a right enforceable at common law and grant relief that a common law court could not grant, that is not the case here because, if the Claimant were to succeed, the remedy of restitution of the moneys paid by him on behalf of the Defendant is available at common law. As Lord Goff stated in **Lipkin Gorman (a firm) v Karpnale Limited** [1991] 2 AC 548, 578:

"I accept that the solicitors' claim in the present case is founded upon the unjust enrichment of the club, and can only succeed if, in accordance with the principles of the law restitution the club was indeed unjustly enriched at the expense of the solicitors. The claim for money had and received is not, as I have previously mentioned, founded upon any wrong committed by the club against the solicitors. But it does not in my opinion, follow that the court has carte blanche to reject the solicitors' claim simply because it thinks it unfair or unjust in the circumstances to grant recovery. The recovery of money in restitution is not, as a general rule, a matter of discretion for the court. A claim to recover money at common law is made

as a matter of right; and even though the underlying principle of recovery is the principle of unjust enrichment, nevertheless, where recovery is denied it is denied on the basis of legal principle.

That passage too I think clearly supports the view that restitution on the basis of unjust enrichment is a remedy that the common law can grant.

39. In the circumstances I think that the Judge erred in regarding the relief sought in this claim as one for equitable relief. In those circumstances section 3(3) of the Limitation Act is not relevant and therefore does not operate so as to exclude the application of section 3(1)(a) to this case.

40. As I have mentioned, the Judge having held that the claim was one for equitable relief then went on to decide that the Limitation Act did not apply by analogy. She came to that conclusion on the basis that section 3(3) abolished or abrogated the doctrine of analogy. Having come to the conclusion that the relief claimed by the Claimant is not equitable relief, it is not strictly necessary to decide whether the Judge came to a correct conclusion on whether the doctrine of analogy is still applicable in this jurisdiction. The point is however an important one and I would not want to leave it without making some comment on the issue. I am doubtful that the effect of section 3(3) is to disapply the application of the Limitation Act by way of analogy.

41. The doctrine of analogy refers to a case where a court of equity would act by analogy to the statutes of limitation. The best description of the circumstances in which a court of equity acted by analogy can be found in **Knox v Gye** [1872] LR 5 HL 656 at 674-675 where it is said:

"The general principle was laid down as early as the case of ***Lockey v Lockey*** *(1719) Prec Ch. 518), where it was held that where a Court of Equity assumes a concurrent jurisdiction with Courts of Law no account will be given after the legal limit of six years, if the statute be pleaded. If it could be doubted whether the executor of a deceased partner can, at Common Law have an action of account against the surviving partner, the result will still be the same, because a Court of Equity, in affording such a remedy and giving such an account, would act by analogy to the Statute of Limitations. For where the remedy in Equity is correspondent to the remedy at Law, and the later is subject to a limit in point of time by the Statute of Limitations, a Court of Equity acts by analogy to the statute and imposes on the remedy it affords the same limitation. This is the meaning of the common phase, that a Court of Equity acts by analogy to the Statute of Limitations, the meaning being, that where the suit in equity corresponds with an action at law which is included in the words of the statute, a Court of Equity adopts the enactment of the statute as its own rule of procedure. But if any proceeding in Equity be included within the words of the statute, there a Court of Equity, like a court of law, acts in obedience to the statute… Where a Court of Equity frames its remedy upon the basis of the Common Law, and supplements the Common Law by extending the remedy to parties who cannot have an action at Common Law, there the Court of Equity*

acts in analogy to the statute; that is, it adopts the statute as the rule of procedure regulating the remedy it affords."

42. The above passage was referred to in **Coulthard v Disco Mix Club Limited and others** [1999] 2 All ER 457. The Judge stated (at p.478) that two things emerged from that passage:

> *"First, where the court of equity was simply exercising a concurrent jurisdiction giving the same relief as was available in a court of law the statute of limitation would be applied. But secondly, even if the relief afforded by the court of equity was wider than that available at law the court of equity would apply the statute by analogy where there was 'correspondence between the remedies available at law or in equity."*

43. The **Coulthard** case was approved by the English Court of Appeal in **Companhia De Seguros Imperio v Heath (REBX) Limited and others** 3 ITELR 134. In that case the court referred with approval to a passage in **Spry on Equitable Remedies** (5th Ed.) (at p 419) which similarly described the circumstances in which a court of equity would apply the limitation statutes by analogy. The relevant part of the passage for present purposes is as follows:

> *"…it must be seen first whether there is a special statutory provision that affects directly, whether expressly or by implication, the particular equitable right in question. But if there is no such provision, the court may decide that the material equitable right is so similar to legal rights to which a limitation provision is applicable that that limitation period should be applied to it also. In this latter case the limitation period is said to be applied by analogy, and the principles that govern cases of this kind are that if there is a similarity between the exclusive equitable right in question and legal rights to which the statutory provision applies a court of equity will ordinarily act upon it by analogy but that it will so act only if there is nothing in the particular circumstances of the case that renders it unjust to do so…"*

A court of equity may therefore act by analogy to the limitation statutes where the equitable right in question is similar to a legal right to which a limitation period is applicable or in other words where there is "a correspondence" between the remedies available at law and in equity and there are no circumstances that render it unjust to do so.

44. The doctrine of analogy has been recognized as being part of the law of this jurisdiction; see for example Civil Appeal 6 of 1989. **Peter Chan Singh and others v Vishnu Kallicharan**. This was a case decided under the Limitation of Personal Actions Ordinance which has been repealed by the Limitation Act.

45. Section 3(3) of the Limitation Act is similar to section 36(1) of the Limitation Act 1980 of England in that section 36(1) also provides that the time limits for actions founded in tort and contract (which includes quasi-contracts) shall not apply to any claim for specific performance or

for an injunction or for other equitable relief. Section 36(1) however provides that the time limits shall not apply *"except insofar as any such time limit maybe applied by analogy in like manner as the corresponding time limit under any enactment repealed by the Limitation Act 1939 was applied before 1st July 1940"*. The Limitation Act does not contain those or any similar words. The omission might appear significant and to support the view that section 3(3) was intended to exclude any application of the limitation period to claims for equitable relief whether directly or by analogy. I however do not think that the omission has that effect. There is, in my view, a material difference between saying that the section does not apply and saying that a court of equity shall not apply the section by analogy. The doctrine of analogy was well established in this jurisdiction prior to the enactment of the Limitation Act. I would think if it were the intention to abolish the doctrine, clear words would have been necessary but such words do not appear in section 3(3) of the Limitation Act.

46. If it were necessary for me to decide whether section 3(3) of the Limitation Act abrogates the doctrine of analogy I would have favoured the view that it does not do so. Therefore, even if what was claimed here were equitable relief, because of the similarity or correspondence to remedies available at law the time limit in section 3(1)(a) would be applied by analogy. In any event, as I have mentioned the relief claimed is not equitable relief and section 3(3) is therefore not applicable.

47. It follows from what I have said above that the claim in this matter for restitution on the basis of unjust enrichment would be time barred after four years from the date of the accrual of the cause of action. The question that must now be addressed is when did the cause of action accrue.

48. *"*Cause of action*"* is not defined in the Limitation Act. The widely accepted definition of the term however may be found in **Read v Brown** (1888) 22 QBD 128 where Lord Esher MR said at (p 131):

> *"…every fact which it would be necessary for the claimant to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."*

49. An essential fact that needs to be established in a claim for unjust enrichment, as I have mentioned above, is, of course, the unjust factor. It is the unjust factor that triggers the restitutionary remedy and the cause of action would therefore not be complete until the unjust factor arises.

50. In Martin Canny, **Limitation of Actions in England and Wales,** supra**,** the author states the following proposition (at para 9.05) which I think, because of the necessity for the presence of the unjust factor, is correct in law:

> *"The cause of action in unjust enrichment accrues at the date when the enrichment is received or the date of the "unjust factor" (such as a total failure of consideration), whichever is later."*

51. In **Goff and Jones, The Law of Unjust Enrichment** (8th Ed.) at para 33-11 et seq. when the cause of action in unjust enrichment accrues is discussed. I think what is stated there although expressed differently than in **The Limitation of Actions in England and Wales** is to the same effect.

52. In **Goff and Jones** it is stated that the general rule is that a cause of action in unjust enrichment accrues at a date when the defendant receives a benefit from the claimant. Among the examples given where the rule applies are where the claimant has transferred the benefit on a basis that immediately fails, or where the claimant has paid tax that is not due. In each case the unjust factor exists at the date of payment. However, it is further stated that the rule does not apply where the benefit is transferred on a basis which subsequently fails. In such a case the action is not complete until the failure of basis occurs and this most probably is when time starts to run. It would seem to me that when the basis on which moneys have been paid fails, that is the time that the unjust factor arises and when the cause of action accrues.

53. Counsel for the Defendant referred to **Chitty on Contracts** (31st Ed.) Volume 1 at 1787 where the common law position in relation to the accrual of a cause of action for money lent where no time for a repayment was specified is set out. In such a case time runs from the date the loan was made. Counsel submitted that in this case where the moneys were paid on the assurance that they would be repaid and no time was stated, time should run from the date the moneys were paid on behalf of the Claimant. I however do not think that in view of what I have said above that the common law position in relation to money lent is appropriate to a claim for restitution on the basis of unjust enrichment since it does not give consideration to the time when the unjust factor arises.

54. In this case the monies were paid on behalf of the Defendant by the Claimant at various times, all of which were more than four years prior to the commencement of these proceedings. However, on each occasion the moneys were paid, according to the pleadings, they were paid on the

basis that the moneys would be repaid. The enrichment it seems to me only became unjust when the basis on which the moneys were paid by the Claimant failed. In other words that is when the unjust factor arose. In those circumstances the cause of action would not have accrued on the payment of the moneys by the Claimant but at a later date, namely when the Defendant failed to repay the money in accordance with the assurances given. According to the Claimant's pleading no time was agreed when the money would be repaid. I think in those circumstances the law would imply that the moneys should have been repaid within a reasonable time. What is a reasonable time must be determined having regard to all the circumstances of the case. That is a question that should be determined when the facts are found and it is a question best left for the trial Judge.

55. I do not accept the submissions of the Respondent that time for the purposes of a claim for restitution with the basis of unjust enrichment would only run from the date a demand was made on the Defendant by the Claimant for the payment of the moneys (see in this regard **Baker v Courage and Co.** [1910] 1 KB 56 and **Fuller v Happy Shopper Markets Limited** [2001] EWHC 702).

56. In view of the above it follows that I cannot at this stage come to a determination that the claim is time barred. The matter would depend on when a reasonable time for the repayment of the monies expired. If the Claimant's allegations are correct and the monies were paid pursuant to different requests made at different times, it is possible that there may be different repayment dates in respect of each occasion the monies were paid. As I mentioned that should be determined having regard to all the circumstances of the case and is a determination that should be made when the facts are found and is a question therefore that is best left for the trial Judge.

57. In the circumstances I would dismiss the appeal and hear the parties on the question of costs.

A. Mendonça,
Justice of Appeal