THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA
(CIVIL)

CLAIM NO: ANUHCV 2006/0082

BETWEEN:

CARIBBEAN STAR AIRLINES Claimant

And

RICARDO SEALY Defendant

Appearances:
Mr. Hugh Marshall & Mrs. Cherissa Thomas- Roberts for the Claimant
Dr. David Dorsett of Watt & Associates for the Defendant

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2007: October 11
2008: September 04
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JUDGMENT

[1] **Harris J:** This is a claim for, breach of an employment agreement and, monies had and received for the benefit of the Claimant and, a counterclaim for outstanding employment vacation pay.

[2] The Claimant was an Airline carrier based in Antigua and Barbuda, now no longer operational. The Defendant was employed with the Claimant as a pilot and worked with the Claimant from October 2001 to January 2005.

[3] It is common ground that the employment relationship between the Claimant and Defendant for our purposes here was primarily governed by the **Antigua and Barbuda Labour Code** Cap. 27 (“the Labour Code”). It is common ground also that the services of the Defendant were terminated by letter dated 31st January, 2005[1].

[4] Upon termination, the Defendant was paid the sum of $104,408.00 in terminal benefits. The Claimant company undertook to forward to the Defendant *“Any outstanding vacation*

[1] See letter exhibited at pp 99 of the Trial Bundle

or overtime entitlement …"[1]. In fact, the Claimant acknowledges in para. 10 and 12 of its "Defence to Counterclaim of the Defendant", the sum of $785.00[2] owing to the Defendant for vacation leave from 1st January, 2005 for 2.3 days.

[5] The Claimant's case and supporting submissions is, firstly, that upon termination of the services of the Defendant, it paid off the Defendant pursuant to the Antigua and Barbuda Labour Code. The amount of $104,408.00 represented the Defendants, **"**equity**"** in the company, one (1) months pay in lieu of notice, three (3) months future loss. This "equity", avers the Claimant, was calculated as one (1) months salary for every year or major fraction thereof. The case for the Claimant as pursued, is that due to a mistake of fact the Defendant was overpaid by EC$41,508.00. The Claimant alleges that the payment should have been calculated in the manner set out in the Claimant's "Particular of Claimant's Loss"[3].

[6] The said calculation is now set out here for convenience:

"Amount paid to employee -		**$104,408.00**
Employee's entitlement		
(a) Equity (Basic Salary)	**$ 7,400.00**	
	x 4.5	
	$33,300.00	
(b) Payment in lieu of Notice	**$ 7,400.00**	
(c) Three months Future Loss	**$22,200.00**	
Subtotal		**$ 62,900.00**
Total Loss		**$ 41,508.00"**

[7] The Claimant claims the $41,508.00 overpayment as Damages for monies had and received. It is the Claimant's position that in calculating the 'equity', it used the Defendant's 'gross wages' of EC$12,400.00 instead of his 'basic wage' of $7,400.00, thereby resulting in the overpayment.

[8] There is no dispute that in calculating the *severance* pay of an employee under the Labour Act, the "basic wage" is to be used. If there is a dispute over this, then **the finding**

[1] See letter of 31st January, 2005
[2] See pp 26 of the Trial Bundle
[3] Statement of Claim, pp 9 of the Trial Bundle

of this court is that the 'basic wage' is the appropriate wage to use to calculate[1] *severance* pay.

[9] From the Claimants revised calculation of the severance pay set out above, the Defendant would have been paid the sum of $69,900.00 and not the $104,408.00 actually paid to the Defendant. It is not disputed that the Defendant did receive the sum of $104,408.00. The case for the Claimant is that the *mistake of fact* that it made in calculating the sum paid to the Defendant, was in applying the higher "*gross wages"* instead of the lower *"basic wages*".

[10] Secondly, submits the claimant, the Statement of Case of the Defendant is that he did not declare the difference between his 'basic wages' and his 'gross earnings' a sum of $5,000.00 so as to deny certain *statutory deductions* on that $5,000.00 portion of what the Defendant asserts was his "basic salary" – the $12,400.00. I am unable to find this allegation or denial by the Defendant or any averment from which this can be inferred.

[11] This the Claimant submits, is illegal, a criminal offence and that the Defendant cannot then obtain, or enforce any rights resulting to him from his own crime[2]. This allegation, contained only in the claimant's submissions (and not in its pleadings), is ill conceived.

[12] Finally, the Claimant contends that the Defendant's counterclaim for vacation leave accrued during the year 2004 is without merit, he having been paid all his vacation leave save for the 2.3 days acknowledged in the pleadings. Further, says the Claimant, the Defendant has claimed the said vacation leave in the Industrial Court in an action filed on the 17th September, 2007. The Claimant submits that this 'double' claim as it were, is an abuse of the process of the court in that the Claimant has to fight the same claim twice.

[13] The Defendant on the other hand submits that the action for money had and received is an equitable action and will succeed only when the Defendant is obliged by the ties of natural justice and equity to refund the money[3].

[14] The Claimant paid the disputed portion of the monies to the Defendant gratuitously and not as a legal requirement avers the Defendant. In any event the defendant contends that

[1] See Antigua and Barbuda Labour Code Cap 27, C40 and C41
[2] Chitty's on Contract 26th edit. para. 1260
[3] See para 12 of the Defendant's submissions filed in this matter on October 18th 2007.

his "basic" wage is not the $7,400.00 as contended by the claimant but $12,400.00[1] the same figure that the claimant used initially to calculate the disputed sum. The Labour Codes definition for "basic wage" includes the **"***total remuneration for services received in money, in kind and in privileges or allowances, including gratuities and premium pay.***"** In the instant case there is no evidence of the defendant being remunerated in *'kind'* or *'privileges'* or being remunerated with '*gratuities'* or '*premium pay'* **(**which is defined as time and a half pay**)**. The only allowances as reflected in the letter of appointment of the Defendant - at pp 70 of the Trial Bundle - is the meal allowance and the allowance for managerial responsibilities, all to a total of $2,300.00. The management allowance was not raised in the testimony of any of the witnesses in this matter as a *management allowance.* In any event it appears from the evidence in cross examination of the defendant, the basic wage calculation is not a straight forward one in the peculiar circumstances of the airline industry.

[15] The Defendant submits further that the payment, whether actuated by mistake or not, was a payment due to the Defendant in **"***point of honour and conscience***"** [2] resulting from his unfair dismissal.

[16] Further, submits the Defendant, the unfair dismissal being an unfair act precludes the Claimant from obtaining an equitable remedy-restitution.

[17] The Defendant submits further, that in any event the 'over payment', by the admission of Mrs. Surjusingh, a witness for the Claimant, was that the payment to the Defendant was an *ex-gratia* payment[3]. It was a gift, avers the Defendant, and the Claimant cannot now seek to take it back. Mrs. Surjusingh in her evidence stated that a decision had been taken in the Claimant Company to make a gratuitous payment to the Defendant and it did so.

[18] The Defendant further submits that the Claimant owed the Defendant a duty of care to be accurate in calculating the payments to the Defendant and not to misrepresent it. That the employer/Claimant cannot in these circumstances recover based on its own misrepresentations. The decision to pay and the quantum of the gratuitous terminal

[1] On the evidence, including the defendant's appointment letter at pp 70 of the trial bundle, the balance of probabilities favours the claimant's contention on this specific point.
[2] Lord Mansfield [1558-1774] All ER Rep 581 at 585g-i
[3] In cross examination: *"The company did not have an obligation to make the payment. The company made a decision to do so...The payment was an ex-gratia gift. The company had no obligation; they chose to do it and they did it."*

payment was in the discretion[1] of the Claimants, the formula for which was peculiarly within their knowledge.

The Law & Findings – mistake of fact

[19] I accept the law in relation to the Claimants action - "money had and received - being money paid under a mistake" to be captured in Halsbury's Laws of England 3rd edit., para. 1711: *"Where money is paid voluntarily under a mistake on the part of the payer, as to a material fact, it may as a general rule be recovered in an action for money had and received to the use of the plaintiff".* The authority for this proposition does not stop here, but is supported and articulated with greater detail in other authorities. In Kelly v Solari (1841) 9 M&W. 54 Parke B [2] stated the principle in the following terms at pp58 – 59 :

> *"I Think that where money is paid to another under the influence of a Mistake, that is, upon the supposition that a specific fact is true, which Would entitle the other to the money, but which fact is untrue ,and the Money would not have paid if it had been known to the payer that the fact was untrue, an action would lie to recover it back, and it is against conscience to retain it;... If, indeed, the money is intentionally paid, without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it, and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it; but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been, in omitting to use diligence to inquire into the fact."* ***(emphasis mine)***

[20] Rolfe B in the ***Solari*** case referred to above said further at pp 59 **"...***wherever [money] is paid under a mistake of fact, and the party would not have paid it if the fact had been known to him, it cannot be otherwise than unconsciencious to retain it"*[3]**.**

[21] In order to succeed in an action to recover money on the ground that it had been paid under a mistake of fact the payer has to identify **(a)** payment made to a payee **(b**) a specific & fundamental fact as to which the payer was mistaken in making the payment and **(c)** a casual relationship between that mistake of fact and the payment[4].

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[1] See para.5 - para.7 of the amended Defence and Counterclaim.
[2] This case is discussed and described by Robert Goff J as one of the first cases which provided the basis of the modern law on this topic, in Barclays Bank v W.J. Simms Ltd. [1980] 1Q.B.677 at 682 and 687.
[3] Quoted in Barclays Bank v W.J.Simms Ltd. Per Robert Goff J at pp 689
[4] Dextra Bank & Trust Company Ltd v Bank of Jamaica (2001) 59 WIR 432 P.C.

[22] The basis for the action; 'money had and received' is that it lies only for money that the law compelled him to pay or to pay[1].

[23] The Defendant's submissions are that he did receive the amount of $104,408.00 but that **(i)** The '*over-payment'* was a gift, an ex-gratia payment of an amount that the Claimant was not bound in law to pay **(ii)** That the dismissal of the Defendant from the employ of the Claimant was unlawful and therefore precludes the Claimant from pursuing his equitable action of money had and received **(iii)** That the 'mistake' in payment as alleged by the Claimant was not in fact a fundamental or basic mistake as required in law **(iv)** That the Claimant as an employer and in the circumstances of their relationship owed the Defendant a duty to determine his entitlement and not to misrepresent it. This failure estopps the Claimant from arguing that the Defendant was not eligible to receive the allowance **(v)** That this claim is an abuse of process. The Defendant contends that this issue being a "trade dispute" as defined by section A5 of the Labour Code should have been put before the Industrial Court as the proper forum (s.7 and s.9 of the Industrial Court Act) **(vi)** That the Claimant has not put a proper defence to the Claimants counter claim as required by CPR 2000 r. 10.5 (4) and (5), thereby not refuting the counterclaim for 42 days paid vacation leave.

[24] **Ex-gratia payment**: I accept as the Law **(**see Halsbury's Laws 3rd edit. para 1711**)** that **"**where money is paid voluntarily under a mistake on the part of the payer, as to a material fact, it may be as a general rule be recovered in an action for money had and received to the use of the **[**claimant**]."** The Defendant submits a proviso to this general position and cites Lord Mansfield statement in the celebrated cases of **Moses v Macferlan (1760) 2 Burr 1005, [1558-1774] All ER Rep 581 at 585 G-I:** ***"****This kind of equitable action to recover back money which ought not in justice to be kept is very beneficial and, therefore much encouraged. It lies only for money paid ex aequo et bono the defendant ought to refund. It does not lie for money paid by the plaintiff which is claimed of him as payable in point of honour and honesty, although it could not have been recovered from him by any course of Law. In one word the gist of this action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."*

[25] The Defendant contends that in **"**point of honour and honesty**"** the Claimant cannot recover the money back from the Defendant. In support of this proposition the Defendant contends that **(i)** the Defendant was unfairly dismissed and as a result entitled to

[1] [1558 - 1774] ALL ER Rep 581 at 585 G-I

damages **(ii)** That the payment can be properly regarded as payment due in *honour and conscience.*

[26] The Defendant relies on the evidence of Mrs. Surjusingh, the Claimant's witness, that the payment to the Defendant was a gratuitous payment, a payment which the Claimant was under no legal obligation to pay.

[27] The Defendant's position is perhaps somewhat contradictory here. If, as the Claimant contends, the Claimant was wrongfully dismissed, then the Defendant was under a legal obligation to pay compensation to the Claimant under the usual heads[1] of damage. The "overpayment" then, may no longer be a gift[2] and would then be recoverable by the Claimant once all other legal requirements are met. But, it is the case for the claimant that the payment was a gratuitous payment, albeit a miscalculated one.

[28] However, the claimant has not alleged any **legal basis for the dismissal** of the Defendant nor do the pleadings or the evidence in this matter raise any of the statutory bases for the dismissal of an employee. For the courts part, on the balance of probabilities the evidence of the Defendant (the only evidence on the issue) supports the wrongful dismissal of the Defendant. In the fullness of time the issue of the wrongful dismissal of the Defendant **(**if that is what it was**)** for purposes of claiming damages and other appropriate remedies [3] will be dealt with in the Industrial Court if the parties so desire. In this matter before the High Court, the issue is a pleadings issue, in that the claimant has decided or otherwise failed to properly address this allegation in their pleadings and evidence. In the documents trial bundle there is no document from the Claimant /employer that provides a discernable ***assigned reason*** for the Defendant's/employee dismissal and the ***factual basis*** thereto, both as required by the said Labour Code. The Defendant has raised the issue of the lawfulness of his dismissal for the narrow purpose of raising his defence that the extra payment was due to him in ***"in point of honour and conscience"*** [4] and not to establish the quantum of his loss and damage.

[29] **The mistake not a fundamental or basic mistake**: The Defendant contends that in order for a Claimant to succeed in an action to recover money on the ground that it has been paid under a mistake of fact, the payer has to identify **(i)** a payment made to the recipient,

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[1] See Linda Richardson v Deep Bay Co. Ltd. Ref. No. 7 of 1989 Antigua and Barbuda Industrial Court ; Antigua Condo Corporation v Jennifer Watt Civil Appeal No. 6 of 1992 C.A. per Sir Vincent Floissac, C.J.
[2] Depending on the quantum of the award
[3] See the para 14 of the "EMPLOYEES MEMORANDUM" to the reference 23 of 2005, between Ricardo Sealy and Caribbean Star Airlines Ltd at pp 114 of the Trial Bundle for the other remedies.
[4] See para. 15 above for meaning of this phrase

(ii) a specific fact as to which the payer was mistaken in making the payment, and **(iii)** a casual relationship between that mistake of fact and the payment (see Dextra Bank & Trust Company Ltd v Bank of Jamaica (2001) 59 WIR 432 P.C.

[30] In support of its contention that the "mistake" if that is what it is – is, in this case not of the type that would found a successful restitutionary claim such as the present, the Claimant sites **Morgan v Ashcroft [1937] 3 All ER 92; Marwich Union Fire Insurance Society Ltd v William H. Price Ltd [1934] All ER Rep 352** per Lord Wright . Morgan and Ashcroft is distinguishable from this case in that the decision of that court was influenced by the fact that to hold in favour of the Claimant in that case would be tantamount to **"***enforcing claims for gaming debts and transgressing the Gaming Act, 1845 ...***"**

[31] In the instant case the Claimant intended to pay a gratuitous payment to the Defendant and did so. The arithmetical error – if that is what it is – is not the fundamental or basic mistake. It is the decision to pay the gratuitous payment that is the fundamental and basic fact here over which there was no mistake. It was clear to the claimant's what they considered the defendant's entitlements were and what was the gratuitous portion of the payment. Mrs. Surjusingh, the witness for the claimant in cross examination said [1] that out of the total payment, the sum of $54,508.00 ***"was a payment to assist him and wish him well".*** If the 'Basic wage' was used to calculate the figures in *footnote* 3 below, the extra payment would be larger. It is not the misapplication of the basic wage and gross wage differential that caused the *ex gratia* payment to be made, although the claimant's case taken at its highest, it affected the quantum. It is not contended by the Claimant that it did not intend to make an ex gratia payment nor is it contended that it was under any duty in law or otherwise[2] to do so nor has it contended that it was under any duty to rely upon a particular formula for calculating the gratuitous payment. Indeed ,the authorities relied upon in this matter suggest that that the relevant facts over which a mistake is made are facts with legal significance, facts which if corrected, render the claimant duty bound in law to pay the monies. In the instant case, whether we use the base wage or gross pay neither rendered the claimant obliged to pay the disputed sum initially.

[32] **Unlawful dismissal**: The Defendant contends in its Defence that the dismissal of the Claimant was unlawful. When one looks at Division C of the Labour Code, particularly sections **C10 and C56 – C58**, it is not difficult to accept the Defendant's contention on the evidence before the court. As pointed out above in para 21, the Claimant has not

[1] She said also that "*his total gross for three months would be $37,200.00...I agree that one month salary plus the $37,200.00 adds up to $49,600.00"*
[2] See para 17 above for evidence in support of this contention.

addressed this point and arguably is estopped in any event from doing so pursuant to C10 (4). In any event the claimant has not alleged in its statement of case that the defendant's dismissal was as a result of a redundancy or for any other reason. It is simply not pleaded nor disclosed in the documents or claimant's evidence before the court.

[33] Further, the termination letter[1] does not refer to a redundancy situation or provide any circumstance that supports a redundancy situation or indeed any other statutory or other substantial basis that would entitle a reasonable employer to dismiss the Defendant. The first two paragraphs of the letter attempt to describe a very amorphous state of affairs concerning the Claimant/Airline, stopping short of amounting to a discernable basis for dismissal or of assigning the 'state of affairs' as a reason for the dismissal of the Defendant. The Labour Code does not provide the formula for calculating the payment to the Defendant upon his lawful dismissal, outside of a redundancy/severance situation, or any other situation contemplated by C58 and C59, save for payment in lieu of notice of termination. Section C.41 of the Labour Code provides that; **"***severance pay shall consist of at least one days pay at the employee's latest basic wage, for each month or major fraction thereof of his term of employment with his employer and any predecessor – employee* **."**

[34] No where else have the parties provided the court with any authority or statutory or contractual provision which provides support for the computation employed by the Claimant in this case i.e. 1 month's salary per every year or part thereof worked by the Defendant. Counsel for the claimant cites the reference; Jennifer Watt v Antigua Condo Corporation Ref. 19 of 1991 as support for this calculation. Firstly, it is relevant to note that this reference went on appeal before the ECSC Court of Appeal before Sir Vincent Floissac C.J.[2] Simply, this case is not an authority for the claimant's contention. In that case the employer had simply used its own formula to calculate a gratuitous payment for the employee. The court did not attempt to interfere with that formula/payment **-** and it appears neither did it have any lawful basis to **-** but dealt with the alleged inadequacy of certain other established heads of damage that do not directly concern us here**. Section C43** of the labour code provides for one (1) days pay for every month worked. This calculates to 12 days per year or less than half of what the claimant used in its calculations. But this was not a point taken by the claimant.

[35] The chronology of critical events in this matter are that **(i)** the Defendant was terminated and paid the disputed terminal benefits on the 31st January 2005; **(ii)** the defendant's

[1] Letter dated 31 Jan. 2005 at pp 99 of the Trial Bundle and relied upon at trial.
[2] Civil Appeal No. 6 of 1992

lawyer wrote to the claimant by letter dated the 17th February, 2005 alleging unfair dismissal ,breach of the defendant's constitutional right to associate and a monetary settlement in respect of the above; **(iii)** By letter dated 24th February 2005 the claimant wrote to the defendant indicating that the previous payment was miscalculated and seeking to recover the sum of $41,508.00. From this chronology and the other facts lead in this matter[1] concerning the relationship between the claimant and Defendant towards the end of their relationship, it appears the claimant's letter of the 24th January 2005 was a punitive response to the content of the letter of the 17th January 2005 from the defendant and not a response to the realization of a mistake of fact as alleged. The claimant may well have been of the view that the defendant, in receipt of the gratuitous payment would have walked away so to speak. But, this belief would not give rise to the cause of action alleged.

[36] Using the "severance" computation formula in the Act and applying it to the 4yrs and 5mths (53months) that the Claimant worked for the Defendant the computation would be less than what even the Claimant is suggesting. The contention that it made a mistake in the computation would carry more weight if the Claimant alleged, argued and proved that the corrected computation was that set out in C-41 or some other relevant section or statute which also provided a legally binding formulae. The Defendant's entitlement under C-41 of the Labour Code is approximately 2 months only (53 days to be exact, but the section provides for treating a major fraction of a month as a whole month). This is in my view, and I believe, an inescapable conclusion, is support for the view that the 'extra payment' was an entirely *ex gratia* payment if there ever was one. Indeed the termination letter and the letter of the 24th January 2005 reclaiming the extra payment squarely sets out the scheme of the payment"[2]. Again, the 'C 43' computation is not applicable to a gratuitous payment.

[37] The Claimant's case that the gross wage as opposed to the basic wage was used contrary to their intention, no longer has a statutory rationale; the suggested computation (see pleadings) in any event is not in accordance with C-41, the contract of employment between the Claimant and Defendant[3] or the Labour Code generally.

[38] **The Claimant/Employer has a duty to calculate entitlement correctly:** The Defendant contends that the Claimant as an employer, owed a duty of accuracy to the Defendant, and accordingly, cannot seek to penalize the Defendant for its breach for which the

[1] Including the "List of Documents" in the trial bundle.
[2] This is not to be confused with 'severance' payments under the Labour Code.
[3] See Trial Bundle pp 70 – pp 77.

Defendant is entirely blameless. The Defendant relies on several authorities in support of this contention **(Skyring v Greenwood (1825) 107 ER 1064, [1824-34] All Rep 104; Mercantile Bank of India Ltd v Central Bank of India Ltd [1938] 1 All ER 52 PC; R.E. Jones Ltd v Waming & Gallow Ltd [1926] All ER Rep 36 H.L.**

[39] When you consider the Defendants perception that he was terminated unlawfully and the purport of the termination letter that he was being paid monies (other than the 1 months salary in lieu of notice which is provided for in the employment contract between the parties) to cover his loss and "equity",[1] the Defendant would understandably have been misled. After all, the payment was quite clearly expressed to be *ex gratia* and the payer taken to have known why and how much it intended to pay out. The one (1) month a year multiplier used by the claimant instead of the Twelve (12) days per year, in calculating the 'defendant's benefits, has not even been identified by the claimant as leading to an overpayment. There was no mistake here as to the calculation.

[40] Having represented to the Defendant the purpose and intent of the payment as being a gratuitous one and paid out what is stated in the letter of termination, the Defendant is entitled to consider the information as accurate. The computation and payment thereto being a gratuitous one was entirely within the peculiar knowledge of the Claimant. The Defendant could not be expected to have any basis for concluding that the computation was incorrect. In deed, relying on precedent awards for unlawful dismissals, the defendant could well come to the conclusion that he was entitled to a greater sum when one considers the various applicable heads of damage. When you add to this, that the claimant in the dismissal letter used terms such as "*salary* ", *"pay*" and *"equity"* nothing which suggests the distinction between *" basic wage*" and "*Gross wage*", coupled with the only reference to the word "pay" in the Labour Code being in "Premium Pay" the defendant was in my view entitled to conclude as he did.

[41] The argument here is that the Claimant is estopped from claiming the return of the monies.

[42] The authorities suggest that the Defendant has to satisfy three (3) conditions for estoppel to apply. **(i)** that the Claimant/employer was under a duty to give him accurate information of his receipts **(ii)** that the inaccurate information in fact misled him about the state of his receipts/entitlements and **(iii)** that because of his mistaken belief, he changed his position in a way that would make it inequitable to require him now to repay the money (see pp 658 Bullen and Leake & Jacobs Precedent of Pleadings 13 the edit).

[1] A somewhat nebulous concept under the Labour Code

[43] Whereas the Defendant has satisfied the court of the first two (2) conditions of estoppel set out in para. 41 above , the Defendant has not lead any evidence of his change of position, such as, for instance, spending the money or embarking on a course of action or lifestyle predicated upon the possession and right to that money or even evidence of a general nature that suggests that in the course of things the money was consumed.[1]

[44] In the absence of satisfying the third condition of estoppel this defence fails.

[45] The claimant's additional claim with respect to **Breach of the Agreement**[2] was not pursuedand in any event the agreement was not pleaded and proved and is hereby dismissed.

[46] The Defendant contends that this action is an abuse of process in that section 7 of the Industrial Court Act founds jurisdiction in this matter in the Industrial court. Further, the defendant contends that the issue of the lawfulness of the claimant's dismissal has been put before the Industrial Court already. The claimant also contends that the defendant has put its claim (counterclaim) for its vacation pay before the Industrial Court and ought not to be allowed to pursue it here. At the onset let me say that these points would have been best taken at the interlocutory stage of the proceedings. The High Court's jurisdiction is not ousted by the Industrial Court Act, so the matter is properly before this court. With respect to the matter already being before the Industrial court , I have noted above, that this case does not deal with the issue of the lawfulness of the dismissal and damages thereto with any finality, that issue being raised here for the narrowly defined defence in this matter , a matter involving a claim and defence in equity. The evidence is that the reference before the Industrial Court with respect to the dismissal was filed before this action in the High Court was filed and the claim for the vacation pay was filed after the filing in the High Court and just prior to this trial. I hold that the counterclaim for outstanding vacation leave ,now before this court , a claim which features unmistakably in the pleadings is properly before this court and the abuse of process contention, best taken at the Industrial Court..

[47] The defendant counter claimed for unpaid vacation pay. He claims 28 days for the period up to and including 31st July 2004 amounting to $12,400.00 and 14 days for the period 1st August 2004 to 31st January 2005 amounting to $6,200.00. On this claim I am inclined to the claimant's contentions. Other than merely alleging this claim, not much in the way of

[1] See Everleigh LJ. In Avon County Council v Howlett [1983] 1 All ER 1073 (1078 d-e).
[2] See para 6 of the statement of claim.

evidence has been lead in support, by the defendant. Mrs. Surjusingh, witness for the claimant, in her response to cross examination said more to negative the contention of the defendant. She was the only witness that attempted, albeit under cross examination, to give some life to this otherwise sterile allegation by both parties. Much time was spent in cross examination of this witness on this issue. I accept the evidence on this point by Mrs. Surjusingh as inherently consistant, robust and truthful .And on this issue, on the balance, I find in favour of the claimant and hold that the only vacation sums outstanding were the 2.3 days alleged by the claimant amounting to $785.00.The defendant has not succeed on this point and ought not to have pursued it in light of the claimant's admissions and the paucity of the facts and evidence in support of the Defendant on this counterclaim.

[48] The Defendant further contends that the claimant did not satisfy the requirements of the CPR 2000 in relation the contents of the defence to the counter claim. The Defence to the counter claim might not be the most elegant and compliant of Defences; but to say that it is not in compliance so as to be subject to striking out is not correct. Paragraphs 10, 11 and 12 of the defence to the counter claim (at pp 26 of the bundle) set out the claimant's defence to the counter claim. In any event, if this pleading presented a difficulty to the defendant in preparing its case, it is a point that would have been properly taken in a number of ways, at the interlocutory stages of this matter.

[49] In the circumstances, the court finds that the claimant has not made out its case for *money had and received* there being no mistake of fact as defined by the law and the Court being satisfied that the Defendant was entitled to the money in *point of honour and conscience* and further, the claimant, at the time of payment intended that the defendant *shall have the money at all events.* Further, the claimant's conduct in relation to the Defendant in this matter leaves a lot to be desired and in effect does not come to the fountain of equity with *clean hands*

ORDER

[50] For the reasons provided above, it is Ordered that: **(i)** Judgment for the Defendant on the claim in the sum of $41,508.00[1], the claim against the Defendant is hereby dismissed. **(ii)** Judgment for the Defendant/counterclaimant in the admitted sum of $780.00. **(iii)** That

[1] Which sum is already in the hands of the Defendant as the disputed extra payment .The Prescribed costs shall be based on this sum as the sum being *ordered to be paid*.

cost to the Defendant /counterclaimant on the prescribed cost scale *(to be based on amount **ordered** to be paid*[1] **)** less 20%[2].

DAVID C. HARRIS
JUDGE
HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA

[1] See CPR 2000 Part 65.5(2)(a).
[2]Because of the divided success and the pursuance of admitted matters. Pursuant to CPR 2000 Part 64.6 . See also para. 46 above for one basis for the discounted costs.