

THE EASTERN CARIBBEAN SUPREME COURT  
GRENADA

IN THE HIGH COURT OF JUSTICE

Claim No. GDAHCV2014/0465

Between:

MERRIT JONES

Claimant

And

ELIZABETH JONES

Defendant

Before:

Master Fidela Corbin Lincoln

**On Written Submission:**

Mr. Ruggles Ferguson of counsel for the Claimant

Ms. Kim George of counsel for the Defendant

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2015: October 15

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***Summary Judgment – Claim for a declaration of an interest or an order for sale of property following judgment in ancillary relief proceeding after failure to fully comply with order - Unjust Enrichment***

**JUDGMENT**

[1] **CORBIN LINCOLN M:** These proceedings are a continuum of the legal wrangling between the claimant and the defendant that commenced in 2010 when the claimant petitioned for divorce.

## Background

[2] On 23<sup>rd</sup> February 2011 the claimant filed an application for ancillary relief (“the ancillary relief proceedings”). The background facts are set out in the judgment of the learned trial judge in the ancillary relief proceedings.

[3] In summary, the properties which formed the pool of assets to be divided included property located at Carriacou, land located at Frequente and land located at Mt. Fann. The Carriacou property is where the matrimonial home was built. It is subject to a 20 year mortgage obtained around 2005 from the Grenada Cooperative Bank. The monthly mortgage payment of \$1,349.59 was being paid solely by the claimant by way of a salary deduction.

[4] In the ancillary relief proceeding the claimant (the petitioner in those proceedings) sought, inter alia, the following orders:

(1) An order that the defendant (respondent in those proceedings) be awarded the Carriacou property and take over the mortgage payments;

(2) An order that he be given the Frequente property and continue to pay the mortgage on the said property ;

(3) An order that the Mt. Mann property be sold and the proceeds divided equally between the parties.

[5] The defendant, in her affidavit in reply in those proceedings asked the court to order that:

(1) The claimant retain both the Mt. Fann and Frequente properties;

(2) The Carriacou property be retained by her for her benefit and that of the children of the family ; and

(3) In consideration for the foregoing the claimant should cause the Carriacou property to be released as security for a loan obtained from the Grenada Co-operative Bank while the defendant would cause the release of the Mt. Fann property, which is secured against a loan obtained by the defendant.

[6] On 22<sup>nd</sup> March 2013 the learned trial judge ordered that:

(1) The Carriacou property remains in the possession of and under the ownership of the Respondent.

(2) The Respondent assumes liability for the payment of the balance of the mortgage loan secured by that property.

(3) The Frequente and Mt. Fann properties remain in the possession of and under the ownership of the Petitioner.

(4) The Petitioner assumes liability for the payment of the balance of the mortgage loan from the Community Co-operative Credit Union secured by the Mt. Fann property.

(5) The Petitioner will continue making the payment for the mortgage loan secured by the Frequente property.

[7] Pursuant to this order the defendant (respondent in those proceedings) was required to assume liability for the payment of the mortgage for the Carriacou property.

[8] On 18<sup>th</sup> December 2013 the claimant issued a summons for sale which requested the court to order, *inter alia*, (a) the sale of the Carriacou property; (b) that the proceeds of the sale be used to satisfy the outstanding mortgage to Grenada Co-operative Bank; and (c) that he be reimbursed all monies deducted from his salary towards the mortgage payment subsequent to 22<sup>nd</sup> March 2013 together with interest.

[9] On 29<sup>th</sup> May 2014 the learned trial judge dismissed the application on the ground that there was no evidence from the ancillary relief judgment that *“there is a quantified sum of money which is owed to the Husband by the Wife.”* The learned trial judge stated:

*“In my view, the aforesaid paragraphs in the judgment do not create any relationship between the Husband and Wife such as judgment creditor and judgment debtor respectively to ground an application by the Husband in a summons for sale application. Accordingly, no relief can be ordered under this application.”*

[10] The defendant thereafter still did not assume liability for the mortgage payments for the Carriacou property as ordered in the ancillary relief proceedings.

[11] On 13<sup>th</sup> October 2014 the claimant commenced this claim seeking the following:

- (1) A declaration that pursuant to the ancillary relief order dated 22<sup>nd</sup> March, 2013 in the related matrimonial matter, the Defendant had the responsibility to service the mortgage from March 2013, or some reasonable time thereafter.
- (2) A declaration that sums of money paid by the Claimant since March 2013 to service the mortgage obtained from the Grenada Co-operative Bank Limited by parties in or about June 2005 (“the mortgage”) and secured by the former matrimonial home of the parties (“the Carriacou property”, represent part of the owners’ equity in the Carriacou property.
- (3) A declaration that the Claimant is the owner of an undivided share in the Carriacou property commensurate with the sums paid by him to service the mortgage of the said Carriacou property since March 2013 or from some reasonable time thereafter.
- (4) An Order for sale of the Carriacou property and that the proceeds of sale be distributed in the following order:

- (a) Payment of cost and expenses reasonably incurred as an incidence to the sale;
- (b) Satisfaction of the outstanding mortgage sum;
- (c) Payment to Claimant and Defendant in proportion to their undivided shares.

[12] The defendant filed a defence. The defence avers that the Carriacou property was obtained through her sole efforts and denies that the claimant made any contribution to same and is entitled to any interest therein. Further, the extent of the parties' contribution to the acquisition of the property and of their interests therein was conclusively determined in the ancillary relief proceedings and the defendant relies on the judgment for its full force and effect.

[13] The defence avers that the court is *funtus officio* with respect to hearing and determining any rights to the said property and orders concerning disposal of same. Further, the defendant had not deliberately flouted the order in the ancillary relief proceedings but for practical reasons outside her control she has been unable to comply with the order "*since it did not appear to take the mortgagee bank's interest, as legal owner of the property, into consideration*". The "*mortgagee bank has refused to effectively engage her with respect to taking over the said mortgage due to her limited financial means and "as a matter of fact and of law, she has been and would be unable to compel the said mortgage bank to deal with [sic] in respect of the said mortgage."*

[14] It is further averred that the mortgage payment was made and continues to be made by the claimant "*in consequence of his deliberate decision to apply for and accept the proceeds of the mortgage, apply the same for his own personal benefit and arises out of a legally binding obligation on his part to repay.*"

[15] The claimant thereafter filed an application for summary judgment. The parties were referred to mediation but were unable to settle the matter. The application for summary judgment now comes up for consideration. The parties filed affidavit evidence.

## CPR 15 – Summary Judgment

[16] The Civil Procedure Rules 2000 (“CPR”) Part 15 states:

*“The court may give summary judgment on the claim or on a particular issue if it considers that the –*

*(a) claimant has no real prospect of succeeding on the claim or the issue; or*

*(b) defendant has no real prospect of successfully defending the claim or the issue. “*

[17] In **Swain v Hillman**<sup>1</sup> Lord Woolf MR, in discussing Rule 24.2 of the UK CPR rules - equivalent to the CPR 15.2 – stated:<sup>2</sup>

*‘It is important that a judge in appropriate cases should make use of the powers contained in Part 24. In doing so he or she gives effect to the overriding objectives contained in Part 1. It saves expense; it achieves expedition; it avoids the court's resources being used up on cases where this serves no purpose, and, I would add, generally, that it is in the interests of justice. If a claimant has a case, which is bound to fail, then it is in the claimant's interests to know as soon as possible that that is the position. Likewise, if a claim is bound to succeed, a claimant should know this as soon as possible....*

*"Useful though the power is under Part 24, it is important that it is kept to its proper role. It is not meant to dispense with the need for a trial where there are issues which should be investigated at the trial. As Mr. Bidder put it in his submissions, the proper disposal of an issue under Part 24 does not involve the judge conducting a mini trial, that is not the object of the provisions; it is to enable cases, where there is no real prospect of success either way, to be disposed of summarily."*

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<sup>1</sup> [2001] 1 All ER 91

<sup>2</sup> *ibid* page 94-95

[18] **Swain v Hillman** was cited with approval in **Three Rivers District Council v. Governor and Company and Bank of England No. 3**<sup>3</sup>, where Lord Hope explained the rule thus:

*“The rule... is designed to deal with cases which are not fit for trial at all; the test of ‘no real prospect of succeeding’ requires the judge to undertake an exercise of judgment; he must decide whether to exercise the power to decide the case without a trial and give summary judgment; it is a discretionary power; he must then carry out the necessary exercise of assessing the prospects of success of the relevant party; the judge is making an assessment not conducting a trial or a fact-finding exercise; it is the assessment of the case as a whole which must be looked at; accordingly, the criterion which the judge has to apply under CPR Pt 24 is not one of probability; it is the absence of reality.”*

## ANALYSIS

[19] Having regard to the principles of law I must now consider whether this is an appropriate case for summary judgment. I will address each relief sought by the claimant.

**RELIEF 1 - A declaration that pursuant to the ancillary relief order dated 22<sup>nd</sup> March, 2013 in the related matrimonial matter, the Defendant had the responsibility to service the mortgage from March 2013, or some reasonable time thereafter.**

[20] In the ancillary relief proceedings, with respect to the Carriacou property, the learned trial judge ordered that “ ***the Respondent assumes liability for the payment of the balance of the mortgage loan secured by that property.***”

[21] It is clear that by virtue of the order made in the ancillary relief proceedings the defendant was required to assume liability for payment of the mortgage of the Carriacou property.

[22] While the learned trial judge did not expressly state the date from which the defendant should assume liability for payment of the mortgage, a judgment takes effect from the day it is given unless the court specifies that it is to take effect on a different date.<sup>4</sup> In the

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<sup>3</sup> [2001] UKHL 16

<sup>5</sup> paragraph 2 of defence

absence of the learned trial judge giving a different date from which the defendant should assume liability for the mortgage, in my view the defendant was required to assume liability for the mortgage from 22<sup>nd</sup> March 2013, the date of the judgment.

[23] The defendant's defence does not in my view disclose any reasonable prospect of the defending the claim for this relief. I therefore grant summary judgment to the claimant on this issue.

**RELIEF 2 - A declaration that sums of money paid by the Claimant since March 2013 to service the mortgage obtained from the Grenada Co-operative Bank Limited by parties in or about June 2005 ("the mortgage") and secured by the former matrimonial home of the parties ("the Carriacou property"), represent part of the owners' equity in the Carriacou property**

[24] The claimant's only submission on this issue is that *"this issue is straightforward. It states the obvious, namely that as the mortgage is paid the owner's equity increases. The defendant therefore has no realistic prospect of resisting this declaration."*

[25] The defence avers that the parties' interest in the Carriacou property was conclusively determined by the judgment in the ancillary relief proceedings.<sup>5</sup> The defendant avers further that the court is *functus officio* with respect to the hearing and determination of any rights to the said property.

[26] The claimant is seeking a declaration that his payment of the mortgage since March 2013 represents part of the *"owners' equity"* in the Carriacou property. I do not understand the claimant to be asserting that his payment of the mortgage since March 2013 puts him in the category of *'an owner'* and represents part of *his increasing equity* in the property. I do not take this to be the claimant's contention since by virtue of the order made in the ancillary relief proceedings the defendant was awarded the Carriacou property and she is therefore the sole owner of the property. I am fortified in this view by the fact that the

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<sup>5</sup> paragraph 2 of defence



defendant's reply avers that *"the Defendant's equity in the property is being increased proportionately by each payment that the claimant makes pursuant to his agreement with the Bank."*

[27] It cannot be disputed that as mortgage payments are made it is the defendant – as owner- whose equity continues to increase. In my view, this remains the case notwithstanding the fact that the mortgage payments are in fact being made by the claimant.

[28] It is clear to me that all mortgage payments, which continue to be made by the claimant, represent part of the defendant's equity in the property. I do not find that the issue of res judicata is relevant to a determination of this issue. I find that the defendant has no real prospect of defending the claim that the mortgage payments being made represent part of the owner's (the defendant's ) equity in the property and accordingly would grant the claimant summary judgment on this issue.

**RELIEF 3 - A declaration that the Claimant is the owner of an undivided share in the Carriacou property commensurate with the sums paid by him to service the mortgage of the said Carriacou property since March 2013 or from some reasonable time thereafter.**

**RELIEF 4 - An Order for sale of the Carriacou property**

[29] It is appropriate to deal with these issues together since the claimant relies on the principle of unjust enrichment to support the claim for both reliefs.

[30] The claimant submits that to prove unjust enrichment it is necessary to establish that:

- (1) There was a benefit conferred;
- (2) The benefit conferred on the defendant was at the claimant's expense; and
- (3) It is unjust for the defendant to retain the benefit. The claimant submits that it must be shown that the benefit was not transferred pursuant to a valid contract between the

parties or based on a disposition of law such as a requirement by statute or court order requiring the claimant to transfer the benefit or a gift.

[31] The claimant submits further that: (a) the defendant has been conferred with a benefit in that the payment of the mortgage by the claimant has resulted in an increased equity for the defendant in the Carriacou property; (b) this benefit was and is being conferred on the defendant at the claimant's expense; and (c) it is unjust for the defendant to retain the benefit .

[32] The claimant submits further that since the defendant has been unjustly enriched by his continuing payment of the mortgage *"the restoration of the benefit to which he is entitled can only be achieved through the combined effect of a declaration of his entitlement and the sale of the property which would allow the mortgage to be paid off so as to release him from having to unjustly confer future benefits on the defendant and realize past benefits conferred."*

[33] The defendant denies that she was unjustly enriched by the claimant's continuing payment of the mortgage. She contends that in any event: (a) a claimant cannot recover in unjust enrichment if the benefits were conferred on the defendant while discharging an obligation which the claimant owed to a third party; (b) unjust enrichment is an equitable remedy and the claimant has not come to equity with clean hands; and (c) whether the defendant has been unjustly enriched, hinges on what the mortgage monies were used for - which has never been disclosed by the claimant.

[34] The defendant submits further that :

*"The issue of sale of the former matrimonial home was determined in claim **GDHMT2010/0138**, wherein His Lordship held inter alia," that any other decision in respect of this property (referring to the former matrimonial home) including its sale would, invariably, put the Respondent and the children of the family at a major disadvantage'.<sup>6</sup>*

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<sup>6</sup> Paragraph 11 of judgment of Justice Rhudd-GDAHMT2010/0138

*It is submitted that Summary Judgment being granted without the proper determination of the issues at trial would render the Defendant and the parties minor child homeless and displaced.”*

### **Was the Issue of the Sale of the Carriacou property determined?**

[35] Before addressing the issue of unjust enrichment, I will first address the defendant’s submission that the issue of the *sale* of the Carriacou property was determined in the ancillary proceedings judgment. The inference is that this issue is *res judicata*. Neither of the parties sought an order for the sale of the Carriacou property. The learned trial judge in the course of his decision stated “ *I note that in the Petitioner’s original application he had sought an order that the Respondent be given the matrimonial home provided she takes over the mortgage payment associated with the property. In the circumstance, I think that would be fair and equitable. Any other decision in respect of this property, including its sale, would, invariably, put the Respondent and the children of the family at a major disadvantage”*

[36] This is the extent to which the learned trial judge considered “sale’ of the Carriacou property. The court decided to award the Carriacou property to the defendant and also ordered that she assume the monthly mortgage payments.

[37] In my view, the learned trial judge’s decision to award the Carriacou property to the defendant rather than order its sale in the ancillary relief proceedings (which neither party sought) does not mean that the court is barred from considering a sale of the property at any time in the future if the court deems it just. I am therefore not of the view that the issue of the sale of the Carriacou property is *res judicata*.

### **Unjust Enrichment**

[38] The claimant contends that the defendant has been unjustly enriched and seeks an order for sale of the Carriacou property.

[39] The issues which arise in a claim for unjust enrichment are :<sup>7</sup>

- (1) Has the defendant been enriched?
- (2) Has the enrichment been gained at the claimant's expense?;
- (3) Was the enrichment unjust?
- (4) Are there any defences?

Has the Defendant Been Enriched? Is it at the Expense of the Claimant?

[40] The defendant states that the claimant used the mortgage monies for his own private purposes and she has *"not been enriched at all due to the mortgage and the Claimant's payment of same. As a matter of fact, I have found myself in a far worse position that I would have been if I had listened to my gut instinct and refused to use it as security for the loan"*.<sup>8</sup>

[41] The defendant avers that the claimant's payment of the mortgage *"was made and continues to be made by him in consequence of his deliberate decision to apply for and accept the proceeds of the mortgage, apply the same for his own personal benefit and arises out of a legally binding obligation on his part to repay"*<sup>9</sup> It is submitted by the defendant that the issue of whether the defendant has been unjustly enriched *"hinges on what the mortgage monies were used"* for

[42] In my view , it is not relevant at this stage what the mortgage monies were used for since all these matters were considered by the learned trial judge in the course of determining what property adjustment order should be made. In any event, contrary to the assertion of the defendant, the learned trial judge stated during the course of the ancillary relief judgment that the mortgage was taken primarily to pay off an earlier loan obtained from Communal Co-operative Credit Union for the purpose of completing the construction of the

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<sup>7</sup> Featherwood Trading Limited v Fraunteld Management Limited BVIHCVAP2012/0020. Banque Financière de la Cité v Parc (Battersea) Ltd [1999] AC 221

<sup>8</sup> paragraph 11 of the defendant's affidavit

<sup>9</sup> paragraph 12 of defence

matrimonial home.<sup>10</sup>

[43] The defendant, by virtue of the ancillary relief judgment was awarded sole ownership of the property. The court concurrently ordered the defendant to assume liability for the mortgage payments. The defendant has failed to do so. She states has not assumed liability for the mortgage because the mortgagee *“has refused to effectively engage her with respect to taking over the said mortgage due to her limited financial means and “as a matter of fact and of law, she has been and would be unable to compel the said mortgage bank to deal with [sic] in respect of the said mortgage.”*

[44] The monthly mortgage payment is \$1349.50 and the payment continues to be financed by an automatic deduction from the claimant’s salary. The claimant continues to have the burden of paying the mortgage notwithstanding the order that the defendant assume liability for same. As the claimant continues to make these payments towards a property he has no interest in, the defendant, as owner, continues to acquire more equity in the property.

[45] At the time of the ancillary relief proceedings the defendant was self-employed as a childcare provider. In the ancillary relief proceedings the learned trial judge stated:

*“The Respondent will have to make the necessary arrangements to take over the payment. Those arrangements may involve re-financing using the said Carriacou property as security. The Respondent is only 42 years of age. She is, in my estimate, still a young person, although unskilled. She has untapped earning potential. It is in her interest to find some way to continue making the payments so that she and the children can be assured of a place to live.”*

[46] The learned trial judge was therefore cognizant of the fact that the property was subject to a mortgage and stated that the defendant must find a way to make the mortgage payments.

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<sup>10</sup> paragraph 11 of judgment

[47] Whatever may be the reasons for the mortgagee's refusal to release the claimant from his payment arrangement with them and making new payment arrangements with the defendant, the fact remains that there is an order of the court directing the defendant to "assume liability" for the mortgage payments. While the learned trial judge noted that the order to "assume liability" *may* involve making new arrangements with the mortgagee in my view even if the mortgagee has refused to engage the defendant to refinance the spirit and intent of the order requiring her to assume liability for the mortgage could equally have been achieved by the defendant reimbursing the claimant for the mortgage payments which he continues to pay.

[48] Further, in my view whatever difficulties the defendant may be encountering with the mortgagee regarding refinancing, the fact is that as the claimant continues to make the mortgage payments the defendant's equity in the property increases.

[49] In my view the defendant has been enriched in the form of an increasing equity in the property. Her increasing equity is being obtained at the continuing expense of the claimant.

#### Was the Enrichment Unjust?

[50] The claimant, relying on the case of **Caribbean Development (Antigua) Limited v Electronic Technology International (Antigua) Ltd.**<sup>11</sup> submits that it would be unjust for the claimant to retain the benefit as there is no juristic basis for the retention of the benefit by the defendant.

[51] In **Caribbean Development** Gordon JA adopted the phrase "juristic reason" from the Canadian case of **Pacific National Investments Ltd v Corporation of the City of Victoria**<sup>12</sup> where Justice Binnie referred to the absence of a "juristic reason" for the enrichment as one of the elements of unjust enrichment.

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<sup>11</sup> ANUHCVAP2005/0013

<sup>12</sup> 2004) 3 S.C.R. 575 cited by Gordon JA in Caribbean Caribbean Development (Antigua) Limited v Electronic Technology International<sup>12</sup> where Justice Binnie referred to the absence of a "juristic reason" for the enrichment as one of the elements of unjust enrichment. ANUHCVAP2005/0013

[52] The learned authors **Goff and Jones**<sup>13</sup> on the other hand state that the enrichment must not be ‘unjust’. Similarly Mitchell J.A referred to the enrichment not being “unjust” in **Featherwood Trading Limited v Fraunteld Management Limited**<sup>14</sup> and in **Banque Financière de la Cité v Parc (Battersea) Ltd** <sup>15</sup> the House of Lord also stated that the enrichment must not be ‘unjust’. The difference in the terms ‘unjust’ and the requirement that there be an absence of “juristic reason” is said to be apparent rather than substantive.

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[53] Whether termed ‘unjust’ or ‘absence of juristic reason’ the essence appears to be that there must be some legal or other valid reason for the enrichment for the court to permit the benefit to be retained. Some of the established categories of reasons, which would deny a claimant recovery, include the existence of a contract, disposition of law, donative intent, or some other valid common law, equitable or statutory obligation. <sup>17</sup>

[54] The claimant submits that there is no juristic reason for the defendant’s enrichment.

[55] The defendant on the other hand avers that the claimant’s continued payment of the mortgage arises from “*a legal obligation for the claimant to continue to pay the mortgage*”<sup>18</sup>. Apart from citing a paragraph from Goff and Jones – *a copy of which was not provided* – the defendant provided no legal authorities to the court on this point. The defendant neither pleaded nor led any evidence of what gave rise to the alleged legal obligation on the part of the claimant to continue to pay the mortgage for the Carriacou property notwithstanding the order in the ancillary relief proceedings.

[56] The claimant in his reply avers that the “*defendant cannot rely on the agreement between the Bank and the claimant to deny unjust enrichment.*”<sup>19</sup> The claimant’s evidence is that he has to pay the mortgagee \$1,349.59 by way of a standing order. From the claimant’s pleadings and evidence I glean that the claimant has an agreement with the mortgagee

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<sup>13</sup> Goff and Jones, *The Law of Restitution*, 5<sup>th</sup> ed, page 15 cited by Gordon JA in *Caribbean Development (Antigua) Limited v Electronic Technology International (Antigua) Ltd.* ANUHCVP2005/0013

<sup>14</sup> BVIHCVAP2012/0020

<sup>15</sup> 1999] AC 221

<sup>16</sup> Per Gordon JA in *Caribbean Development (Antigua) Limited v Electronic Technology International (Antigua) Ltd.* ANUHCVP2005/0013, paragraph 16

<sup>17</sup> Justice Binnie in *Pacific National Investments Ltd v Corporation of the City of Victoria* 2004) 3 S.C.R. 575

<sup>18</sup> Paragraph 12 of the defence

<sup>19</sup> Paragraph 1 (iii) of the reply

- with respect to the mortgage payments, which said agreement causes the mortgage payments to be deducted from his salary.
- [57] The issue is whether the agreement between the mortgagee and the claimant, which results in the claimant's salary being deducted, amounts to a valid reason for the defendant's enrichment at the expense of the claimant.
- [58] A claim in unjust enrichment may be disallowed if it would contradict the terms of a contract between the parties.<sup>20</sup> The contract may or may not have a clause expressly excluding the application of unjust enrichment to their relationship.<sup>21</sup>
- [59] In this case there is no evidence of a contract between the claimant and the defendant which either expressly or impliedly excludes the application of the principle of unjust enrichment.
- [60] A defendant may be conferred with a benefit because the claimant owes a third party a contractual duty to do so. In these circumstances it must be determined whether allowing a claim in unjust enrichment would be *inconsistent with the agreement between the parties* or, put another way, whether "*the unjust enrichment claim ...would undermine the contractual arrangements between the parties*"<sup>22</sup> i.e. the claimant and the third party.
- [61] In this case the claimant states he has an agreement with the mortgagee. The result of this agreement is that the mortgage payments are deducted from his salary.
- [62] The issue of whether allowing a claim in unjust enrichment would be inconsistent with the parties' arrangements (the claimant and the mortgagee) can only be properly determined by examining and interpreting the terms of the agreement between the claimant and the mortgagee.
- [63] A copy of the agreement between the claimant and the mortgagee is not before the court and there is no evidence of the terms of the agreement. In the absence of the agreement I

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<sup>20</sup> Charles Russell, "Unjust Enrichment", All England Annual Review/2011/27

<sup>21</sup> Re Amble Assets LLP; Re Northumberland Foods Ltd [2011] EWHC 1943 (Ch); Quirkco Investments Ltd v Aspray Transport Ltd [2011] EWHC 3060 (Ch),

<sup>22</sup> Etherton LJ in MacDonald v Costello [2011] 3 WLR 1341



- am unable to determine at this stage whether allowing the claimant to recover in unjust enrichment would undermine the agreement which the claimant says he has with the mortgagee. I am therefore unable to determine whether the claimant's claim should be disallowed because of the agreement he has with the mortgagee. Consequently I am unable to find that the defendant has no prospect of defending the claim for reliefs 3 and 4.
- [64] However, in my view the issues which remain to be determined are not complex. There are two main bases upon which the defendant avers that the claimant should be denied recovery under the principle of unjust enrichment. The first is on the basis of his agreement with a third party. The second is on the basis of the defendant's financial circumstances.
- [65] The defendant states that unlike the claimant her financial circumstances are precarious. She is single, unemployed and does not own any other property. She states further that she lives in the property with the minor child of her union with the claimant. It will have to be determined whether the defendant's personal financial constraints are a valid reason for denying the claimant recovery.
- [66] If it is found that the claimant's agreement with the mortgagee would not be undermined by granting the claimant recovery and that the defendant's financial circumstances do not constitute a basis for denying the claimant recovery, the remaining issues would be :
- (a) Whether the defendant has any defences.
  - (b) If there are no defences available to the defendant then the claimant would be entitled to recover the benefit and the court must then determine how the benefit should be returned.
- [67] Having regard to the overriding objective of dealing with cases justly, in particular saving expense and dealing with cases in ways which are proportionate to the complexity of the issues and the financial position of the parties I propose to make an order of own initiative that this matter be dealt with by a summary hearing rather than proceed to a full trial.
- [68] The parties are at liberty to make representations with respect to this proposed order within 14 days.

### **Point in Limine**

[69] The defendants submit, as a 'point in limine' that the instant claim is a mortgage claim pursuant to **CPR 66** and should be brought by way of a Fixed Date Claim form. Further, since the claim must be by fixed date claim the court has no power to grant summary judgment on fixed date claim.

[70] **CPR 66** states:

"This Part deals with claims by a mortgagor or mortgagee for any of the following forms of relief –

- (a) foreclosure;
- (b) delivery of possession by the mortgagee;
- (c) payment of moneys secured by a mortgage;
- (d) possession of a mortgaged property;
- (e) reconveyance of the property or release from the mortgage;
- (f) redemption of a mortgage; and
- (g) sale of a mortgaged property.

[71] There is no evidence before me that the claimant is either the mortgagor or mortgagee of the Carriacou property and in the circumstance I find no basis for finding that this is a claim that falls under **CPR 66**.

[72] In summary:

- (1) The claimant is granted summary judgment with respect to reliefs 1 and 2.
- (2) The application for summary judgment with respect to reliefs 3 and 4 is refused.
- (3) The parties are at liberty to make representations with respect to the court's proposal to deal with this matter summarily rather than let the matter proceed to a

full trial.

[73] While the successful party is usually entitled to an award of costs, in this case the claimant's application was only partially successful. I therefore make no order as to costs.

**Fidela Corbin Lincoln**  
Master