[2019] JMCA Civ 4

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 63/2018

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE PUSEY JA (AG)

BETWEEN	**SHERRIE GRANT**	**APPELLANT**
AND	**CHARLES MCLAUGHLIN**	**1ST RESPONDENT**
AND	**COLLIN SMITH**	**2ND RESPONDENT**

Written submissions filed by Nea/Lex, attorneys-at-law for the appellant

Written submissions filed by Global Law, attorneys-at-law for the 1st respondent

22 February 2019

PROCEDURAL APPEAL
(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)

MORRISON P

[1] I have read, in draft, the judgment of Brooks JA. I agree with his reasoning and conclusion and have nothing to add.

BROOKS JA

[2] There was undoubtedly skulduggery afoot. The title to a motor vehicle was pledged as security for a loan in August 2005, and the certificate of title was handed over to the bank that extended the loan. By January 2006, a new certificate of title for the vehicle was secured from the government authority, based on a declaration that the original certificate had been lost. The vehicle, by then in a damaged state, was sold in February 2006, and the "replacement" certificate of title delivered to the innocent purchaser for value. The loan, however, had not been repaid. The purchaser repaired the vehicle at considerable cost and put it back into service. The bank located the vehicle in March 2012 and seized it in exercise of its powers contained in the bill of sale, by which the vehicle was pledged.

[3] The unwitting purchaser, and victim of that set of circumstances, is Mr Charles McLaughlin. It is unclear who is the dishonest party. Ms Sherrie Grant and Mr Collin Smith, the persons who were the registered owners of the vehicle in August 2005, both claim innocence. Each says that the other had full and sole control of the vehicle during the time leading up to its sale to Mr McLaughlin.

[4] Mr Smith asserts that he knew nothing about a loan, or of the vehicle being pledged to a bank as security. He denies having had anything to do with securing a replacement certificate of title or with the sale of the vehicle to Mr McLaughlin. In fact, Mr Smith asserts that he was outside of the island at the time of the purported

execution of the bill of sale. His version of the facts is that the vehicle was damaged while it was in Ms Grant's care and she later told him that she had sold it.

[5] Ms Grant's position is a little different. She accepts that a loan was taken from the bank and that the vehicle was pledged as security. She says, however, that the loan was for Mr Smith's sole benefit and that she only co-signed the documentation with him by virtue of her co-ownership of the vehicle. She says that by October 2005, Mr Smith told her that he had repaid the loan. In fact, she says, he produced the certificate of title for the vehicle. She, therefore, had no reason to disbelieve him. She accepted that she sold the vehicle to Mr McLaughlin, but asserted that she was entirely ignorant of any impropriety.

[6] There is little wonder, in those circumstances, that Batts J refused Ms Grant's application to strike out Mr McLaughlin's claim against her, and allowed Mr McLaughlin to rectify a procedural error that he had made in his claim against the bank, Ms Grant and Mr Smith. The error was that Mr McLaughlin had filed a further, further amended statement of case, in breach of the Civil Procedure Rules 2002 (the CPR). He filed the document without first having obtained permission from the court.

[7] Mr McLaughlin had first sued the bank alone. That was in 2013. It was after the bank had filed its defence, relying on the bill of sale, that Mr McLaughlin joined Ms Grant and Mr Smith as defendants to his claim. That was in 2017. It was in his further, further amended particulars of claim ("the impugned amendment"), which he filed in February 2018, that he later accused them of breach of contract, fraudulent

misrepresentation and unjust enrichment. He asserted that the seizure of the vehicle has cost him the purchase price of $300,000.00, the cost of repair of $763,000.00 and loss of use to the tune of millions of dollars.

[8] The impugned amendment included an explanation for the lapse of time between 2006 and 2011. He said that it took him that long to repair the vehicle. The registration of the change of ownership could not have been done, he says, while the vehicle was in a damaged state.

The appeal

[9] Ms Grant has appealed to this court to set aside Batts J's orders. In summary, she asserts that Batts J was in error in:

a. allowing Mr McLaughlin's amendment, without prior permission, of his particulars of claim, to stand; and

b. ignoring the fact that the amendment was done after the expiry of the relevant limitation period.

[10] She filed nine grounds of appeal covering the complaints about the learned judge's decision:

> "a. The learned judge erred in law and/or wrongly exercised his discretion when he invited the 1st Respondent to orally apply for an extension of time and thereafter allowed his Further, Further Amended Claim Form and Particulars of Claim to stand as filed in circumstances where:
>
> (i) an extension of time was not the appropriate application since there was

no timeline attached to an application under Rule 20.4(2) of the Civil Procedure Rule. The application ought to have been for permission to file the Further, Further Amended Claim Form and Particulars of Claim which required different considerations;

(ii) the application for extension of time was made and granted in the face of the Appellant's application to strike out the said further, further amended pleadings as being invalid and of no effect; they having been filed after more than two case management conferences without the prior permission of the Court; and

(iii) the 1st Respondent did not see the need to apply for the Court's permission to further amend his claim being of the erroneous view that since the matter was transferred to the Commercial Division and there had not yet been a case management conference in that division, but was nevertheless invited by the court to apply for extension of time, which was, in any event, the wrong application.

b. The learned judge erred in law and/or wrongly exercised his discretion in allowing the 1st Respondent's further, further amendments which consist of entirely new claims, to wit, breach of contract, fraudulent misrepresentation and unjust enrichment to stand in circumstances where:

(i) these claims were never pleaded against the Appellant within the relevant limitation period;

(ii) the 1st Respondent had not set out any breach of a contract in his claim before the amendments that are now sought to be impugned;

(iii) the 1st Respondent became aware of the facts that could ground his new claims more than six (6) years prior to the date when he was orally permitted to apply for an extension of time to allow the further, further amendments to stand; and

(iv) the 1st Respondent attended two (2) prior case management conferences and failed to seek permission to further amend his claim.

c. The learned judge erred in law in finding that Rules 26.9(1),(2),(3) and (4) of the Civil Procedure Rules were relevant. He failed to appreciate that Rule 26.9 is inapplicable for the following reasons:

(i) Rule 26.9(1) applies where the consequence of failure to comply with a rule has not been specified by any rule, order or practice direction. The consequence for failure to comply with Rule 20.4(2), however, is implicit in the said Rule, that is, the failure to obtain permission will result in no amendment being granted and any amendment made without permission would be disallowed.

(ii) Rule 26.9(2) speaks to steps taken not being invalidated where there is an error of procedure or failure to comply with a rule, order or practice direction. However, there is a distinction between failing to apply for permission (complying with the rule) and being granted permission (effect of complying with the rule), which permission is required before taking the step of amending the claim. Therefore, the further, further amendments were invalid at the time they were filed and

could not thereafter be validated by an extension of time.

(iii) Rule 26.9(3) and (4) empowers the court to put matters right with or without an application. This does not apply to Rule 20.4(2) as it would mean that the said Rule could be flouted and the Court can give permission to amend even where no permission is sought.

(iv) There was no error of procedure or [sic] but a deliberate failure to comply with Rule 20.4(2) which is couched in mandatory language.

d. The learned judge misdirected himself on the law when he held that fraudulent misrepresentation and unjust enrichment are equitable claims and therefore could only be barred by laches and not by the Limitation of Actions Act. In so holding, the learned judge failed to appreciate that those claims are common law claims for the fact that:

(i) misrepresentation, when made fraudulently, becomes tort of deceit and therefore an action on the case; and

(ii) unjust enrichment is categorized under the law of obligation which, in any event, arose from an alleged breach of contract;

both of which are subject to the Limitation of Actions Act 1881.

e. The learned judge, having correctly identified that the issue of time bar carries the ancillary question of when the cause of action accrues in particular for breach of contract, erred in law in finding the answer to such question depends on factual determinations such as when [a] Claimant became aware of breach of contract, or when the loss suffered.

f. The learned judge erred in law and/or wrongly exercised his discretion in allowing the 1st Respondent's Further, Further Amended Claim Form and Particulars of Claim to stand as filed thereby relating the amendments back to when they were filed and not when permission was granted. In so doing, the learned judge erred in depriving the Appellant of the unassailable limitation defence that she would have acquired but for the amendment being related back to when the further, further amended pleadings were filed.

g. The learned judge erred in law when he found that the Appellant can plead and have litigated any limitation defence at the trial. In so finding, the learned judge failed to appreciate that his allowing the 1st Respondent's further, further amendments to stand as filed related the amendments back to when they were filed thereby depriving the Appellant of the opportunity of pleading the limitation defence.

h. The learned judge erred in law in finding that the allegations of fraud are not entirely new in the context of the case as a whole and so the Appellant was not taken by surprise since the bank in its Ancillary Claim alleged fraud against the Appellant from the outset. The learned judge failed to appreciate that the bank did not plead and particularize any fraud against the Appellant and in any event, it would be for the 1st Respondent to specifically plead and particularize fraud in his claim within the relevant limitation period.

i. The learned judge erred in law in failing to appreciate that prejudice is a consideration as to whether to grant amendments after a case management conference, and that the Appellant has been prejudiced by the 1st Respondent's belated amendments having been deprived of the opportunity to plead the defence of limitation.

[11] In his written submissions on behalf of Ms Grant, Mr Neale arranged his arguments so that his submissions grouped the grounds thus:

1. a, b, h and i;
2. c;
3. d and e;
4. f and g.

[12] Despite that categorisation, the grounds will be analysed under two headings, namely, the amendment point and the limitation of actions point.

The amendment point

[13] The basis of Ms Grant's complaint about the impugned amendment is rule 20.4(2) of the CPR. The rule prohibits amendments to statements of case, after the first case management conference, unless made with the prior permission of the court. The rule states:

> "Statements of case may only be amended after a case management conference with the permission of the court."

[14] Mr Neale submitted that Mr McLaughlin made the impugned amendment after a case management conference. He argued that, in the absence of prior permission, the amendment was invalid, and Batts J ought to have struck it out. Learned counsel contended that the error was irremediable. He submitted that rule 20.4(2) of the CPR implies a sanction for disobedience and therefore the court's power under rule 26.9 to correct procedural errors cannot avail a party who has breached rule 20.4(2).

[15] He submitted that, in those circumstances, the learned judge was wrong to have allowed Mr McLaughlin to rectify the status of the impugned amendment. Learned counsel cited a number of cases, in support of his submissions on these points. These included **Cropper v Smith** [1884] 26 Ch D 700, **Christofi v Barclays Bank PLC** [2000] 1 WLR 937 and **Evanscourt Estate Company Limited v National Commercial Bank Jamaica Limited** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 109/2007, App No 166/2007, judgment delivered 26 September 2008.

[16] In response, Mr Sterling, on behalf of Mr McLaughlin, argued that the learned judge was empowered to allow the impugned amendment to stand as properly filed, and correctly exercised his discretion so to do. In respect of the learned judge's authority, learned counsel relied on rules 20.2(1), 26.2 and 26.9 of the CPR.

[17] Rule 20.2, learned counsel argued, specifically addressed the court's power to disallow an amendment, which has been made without permission. The clear implication being, on learned counsel's submission, that it was within Batts J's discretion to disallow the impugned amendment, or to rectify its status.

[18] Rule 26.9, Mr Sterling argued, allowed the court to correct a situation that had been created by a party's failure to comply with a rule, such as had occurred in this case. Rule 26.2, learned counsel submitted, permitted the court to do so on its own initiative, as Batts J did at the hearing. The parties were both present at the time and

had an opportunity to make submissions to the learned judge in respect of his proposal. There was, therefore, according to Mr Sterling, full compliance with the conditions associated with an exercise of the discretion given to the learned judge by rule 26.9.

The analysis

[19] Rule 20.2(1), on which Mr Sterling relies, states:

> "Where a party has amended a statement of case where permission is not required, the court may disallow the amendment with or without an application."

It must first be said that Mr Sterling's reliance on this rule is misconceived. It does not apply to this case. The rule does speak about disallowing amendments. It does not address, however, improperly filed amendments. The rule comes immediately after rule 20.1, which allows amendments to statements of case, without permission. Those amendments, however, must have been made in specific circumstances, namely, "at any time before the case management conference" and where relevant limitation periods have not yet expired.

[20] Learned counsel is, however, correct that rules 26.2 and 26.9 of the CPR do apply. Rule 20.4(2) of the CPR, quoted above, does not specify a penalty or consequence of a breach of its provisions. The absence of a consequence allows the application of rule 26.9. The latter rule allows the court to rectify matters where there has been a procedural error. Rule 26.9 states:

> "(1) This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.

(2) An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.

(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.

(4) The court may make such an order on or without an application by a party."

[21] Rule 26.2 of the CPR authorised the learned judge to exercise, on his own initiative, the discretion granted to him by rule 26.9. Rule 26.2 states:

"(1) Except where a rule or other enactment provides otherwise, the court may exercise its powers on an application or of its own initiative.

(2) Where the court proposes to make an order of its own initiative it must give any party likely to be affected a reasonable opportunity to make representations.

(3) Such opportunity may be to make representations orally, in writing, telephonically or by such other means as the court considers reasonable.

(4) Where the court proposes –

(a) to make an order of its own initiative; and

(b) to hold a hearing to decide whether to do so,

the registry must give each party likely to be affected by the order at least 7 days notice of the date, time and place of the hearing."

[22] Mr Neale is, therefore, not on good ground with his submissions on this issue. The issue of whether the learned judge ought to have allowed the amendment to stand, in the light of the protest about the deprivation of a limitation of actions defence, will be discussed in the analysis of the limitation of actions point.

The limitation of actions point

The submissions

[23] The genesis of the complaint, giving rise to the limitation point, is the learned judge's finding that Mr McLaughlin's claim was based in equity and therefore the limitation of actions bar did not affect it. In refusing to strike out the impugned amendment, he found that there were several issues, raised by the circumstances of the case, which required a trial. He said at paragraphs [15] and [16] of his judgment:

> [15] I asked, but neither [counsel appearing before him] could provide, the statutory basis for a six (6) year limitation on fraud. I have not found it; whether it exists or not, however, it is clear that the amended plea is for fraudulent misrepresentation and unjust enrichment. These are equitable claims. If barred, it would be by reason of laches. Jamaica's Limitation of Actions Act was enacted in 1881. It does not speak to a limitation bar for torts, generally, as does the English Act of 1939. Negligence has a time bar of six (6) years because it is an action 'on the case', see **Lance Melbourne v Christina Wan (1985) 22 JLR 131**. It seems to me, as at presently advised, that the equitable claims of unjust enrichment and fraudulent misrepresentation here in Jamaica, have no statutory time bar. The time bar on a simple contract is to be found in section 46 of the Limitation of Actions Act which adopts and applies an English statute which is some 400 years old that is, 21 James I Cap 16. Judges in this Supreme Court and Court of

> Appeal have repeatedly, and apparently in vain, called for its revision.
>
> [16] In any event, the issue of a time bar often carries with it the ancillary question: 'When did the cause of action accrue?' The answer to which often depends on factual determinations such as: When did the fraud or breach of contract occur, or, when did [Mr McLaughlin] become aware of the fraud or breach of contract, or, when was the loss suffered. These matters are often best left for determination at a trial. This is particularly so in a case such as the present, where a person entered into a transaction in which several others are making competing allegations, and that innocent person has no real way of knowing when how or why things have gone awry. Similarly when laches is to be considered a court of equity considers all the circumstances. It is best in this case that the question of limitation and/or laches be dealt with at trial." (Bold and underlining as in original)

[24] Mr Neale argued that a limitation period of six years applies to Mr McLaughlin's causes of action in this case. The limitation period, according to Mr Neale, commenced in February 2006 when the vehicle was sold. It had already run, he submitted, when the impugned amendment was filed in 2017. Learned counsel contended that Mr McLaughlin's causes of action, in the impugned amendment, were founded in common law principles. He argued that the learned judge was, therefore, wrong in finding that the time, within which the impugned amendment could be properly filed, could be extended by relying on principles founded in equity.

[25] According to learned counsel's submission, the impugned amendment introduced an entirely new case and occurred after the expiry of the six-year limitation period for torts of this nature. Mr Neale pointed out that the CPR, generally speaking, precludes

amendments, which would deprive a defendant of a defence created by the Limitation of Actions Act.

[26] Learned counsel argued that a court could not properly allow the impugned amendment because there was no previous pleading, which, it could be said, that the impugned amendment expanded upon. He submitted that Mr McLaughlin "chose to wait, at his peril, until the end of the relevant limitation period", before making the new assertions against Ms Grant, and did so, in breach of the CPR, without permission. He relied, in part, for his submissions on **Derry v Peek** (1889) LR 14 App Cas 337, **Bevad Limited v Oman Limited** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 133/2005, judgment delivered 18 July 2008 and **Div Deep Limited and Others v Topaz Jewellers Ltd and another** [2017] JMCC Comm 26.

[27] Mr Sterling submitted that no statutory limitations existed under the Limitation of Actions Act in respect of fraudulent misrepresentation or unjust enrichment. Consequently, he submitted, the learned judge was correct in deciding that those two causes of action were grounded in equity, and were triable issues.

[28] Mr Sterling disagreed with Mr Neale as to whether the impugned amendment was an expansion of previously existing averments in Mr McLaughlin's statement of case. Their disagreement concerned the import of the previous paragraph 7 of the further amended particulars of claim, which states:

> "[Ms Grant and Mr Smith] sold the said motor vehicle whilst a Bill of Sale was registered to the [bank] and whilst sums were allegedly owing to the [bank]."

[29] Whereas, Mr Neale argued that that averment could not allow for claims of breach of contract, fraud and unjust enrichment, to be properly added after the expiry of the limitation period, Mr Sterling contended that paragraph 7, quoted above, did foreshadow the impugned amendment, which was therefore allowable. It was within the discretion of the learned judge, Mr Sterling argued, to allow that amendment. He submitted that this court should reject the invitation to disturb the learned judge's decision. He relied, in part, on **Keith Anderson v Norma Jean Dodd and Others** (unreported) Supreme Court, Jamaica, Claim No CL 2002/A001, judgment delivered 18 August 2006 and **Lance Melbourne v Christina Wan** (1985) 22 JLR 131.

The analysis

[30] It is well established in this jurisdiction that actions grounded in tort and in contract are time barred after the expiry of six years. The authority usually cited for that principle, in the case of tort, is **Melbourne v Wan** (at page 135 F). This court also discussed the principle in **Bartholomew Brown and Another v Jamaica National Building Society** [2010] JMCA Civ 7, and explained that the limitation period for both contract and tort is six years. K Harrison JA, in delivering the judgment of the court stated, in part at paragraph [40] that:

> "…actions based on contract and tort (the latter falling within the category of 'actions on the case') are barred by section III, subsections (1) and (2) respectively of the [English Limitation of Actions Act 1623 (21 Jac I Cap XVI), which has been received into Jamaican law] after six years (see **Muir v Morris** (1979) 16 JLR 398, 399, per Rowe JA)."

[31] Section 3 of the Limitation Act of 1623 is important for this analysis. It states:

> "And be it further enacted, That all actions of trespass *quare clausum fregit,* all actions of trespass, detinue, action for trover, and replevin for taking away of goods and cattle, all actions of account, and upon the case, other than such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty; all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding and imprisonment, or any of them which shall be sued or brought at any time after the end of this present session of parliament, shall be commenced and sued within the time and limitation hereafter expressed, and not after (that is to say) (2) **the said actions upon the case (other than for slander) and the said actions for account, and the said actions for trespass, debt, detinue and replevin for goods or cattle, and the said action of trespass, *quare clausum fregit,* within three years next after the end of this present session of parliament, or within six years next after the cause of such actions or suit, and not after**; (3) and the said actions of trespass, of assault, battery, wounding, imprisonment or any of them, within one year next after the end of this present session of parliament, or within four years next after the cause of such actions or suit, and not after, (4) and the said actions upon the case for words, within one year after the end of this present session of parliament, or within two years next after the words spoken, and not after." (Emphasis supplied)

[32] The claim for restitution based on unjust enrichment is made at common law and is similar in status to that of a claim for monies had and received (see **Lipkin Gorman (a firm) v Karpnale Ltd** [1991] 2 AC 548, [1992] 4 All ER 512). The learned editors of Halsbury's Laws of England Vol 88 (2012) at paragraph 401 explain the roots of the principle:

> **"The path to recognition.**
> The law of restitution is that part of the law which is concerned with reversing a defendant's unjust enrichment at the claimant's expense. English law was slow to recognise the existence of an independent law of restitution. For many years the rules which today are recognised as component parts of the law of restitution were either labelled as quasi-contract, and thus treated as an appendage of the law of contract, or they were scattered around the textbooks on equity. This was to change in 1991 when the House of Lords stated [in **Lipkin Gorman (a firm) v Karpnale Ltd**] that the law of restitution was not based upon implied contract and recognised the existence of an independent law of restitution based upon the principle that unjust enrichments must be reversed. The independence of the law of restitution and its foundation in the principle that unjust enrichments must be reversed is now clearly established and has been repeatedly affirmed in the appellate courts. The need to distinguish clearly between the law of contract and the law of restitution has been affirmed by the judiciary."

The Caribbean Court of Justice in **SM Jaleel & Co Ltd and another v Co-operative Republic of Guyana** (2017) 91 WIR 276 impliedly recognised the common law nature of the claim for unjust enrichment. The court said at paragraph [34] of its judgment:

> "…In these circumstances, Guyana appears to have no legal basis whatsoever for retaining any of the ultra vires tax collected by it from the Claimants, affirmative answers having been given to **the standard common law unjust enrichment questions**: Was the defendant enriched? Was this at the expense of the claimants? Was the defendant's enrichment unjust?..." (Emphasis supplied)

[33] As a further indication that the claim is one founded on common law principles, it is important to note that the general view, derived from both academic writings and case law, is that claims for unjust enrichment should be subject to a limitation defence. That would not be a defence available to a claim in equity. The learned authors of the

fifth edition of The Law of Restitution, Goff and Jones, state that the 1623 Limitation Act provided a defence to such claims. They state at page 846:

> "The primary criterion for the application of statutes of limitation was originally procedural. All claims in *assumpsit* [literally translated 'he promised or undertook'] were deemed to fall within section 3 of the Limitation Act 1623…"

The learned editor of Osborn's Concise Law Dictionary state that *assumpsit* was a "common law action which grew out of the action of trespass on the case". Rowe P, in **Melbourne v Wan**, explained the connection between actions on the case and the modern law of tort and concluded that "[no] uniform period of limitation was prescribed for all forms of action…In respect of actions upon the case the primary rule was that a six year period of limitations is created …".

[34] The limitation period for claim based on unjust enrichment is, based on the analysis in **Melbourne v Wan**, therefore, six years. Edwards J (as she then was), in **Div Deep v Topaz Jewellers** asserted, at paragraph [32], that claims for restitution are subject to the six-year limitation period created by the 1623 Limitation Act. The learned author of The Law of Restitution, 2nd edition, Andrew Burrows, also suggests that the 1623 Limitation Act establishes the relevant limitation period. He states at pages 544-545:

> "Where there is no express statutory limitation period, what is the position? One extreme argument would be that, while equitable remedies (for example, rescission) are subject to the laches doctrine, there is no limitation defence for the common law restitutionary remedies. However this would be very unsatisfactory in terms of policy and, not surprisingly, the courts have sought to avoid that conclusion.

The 'escape route' favoured by the judiciary [in England] has been to force common law restitution into s 5 of the 1980 [Limitation Act of England] so as to give a six-year time period. Admittedly this requires distorting the statutory words particularly when the independence of unjust enrichment by subtraction – and the fictional nature of he implied contract theory – is fully appreciated. Nevertheless this was the approach approved by the Court of Appeal in dicta in **Re Diplock** [[1948] Ch 465;514]. Lord Greene MR thought that the expression 'founded on simple contract' must 'be taken to cover actions for money had and received, formerly actions on the case … though the words used cannot be regarded as felicitous.' **This is also supported by s 3 of the Limitation Act 1623, which, until the Limitation Act 1939, provided a six year limitation period for all assumpsit claims**. Although not mentioned in the judgments, that provision was presumably the basis in **Maskell v Horner** [[1915] 3 KB 106] for restriction restitution of payments under duress to those payments made in the six years before the writ was issued." (Emphasis supplied.)

[35] In The Law of Restitution, at pages 846-847, Messrs Goff and Jones indicate that the 1623 English Act comes closest, of all the Limitation Acts in England, to providing a definitive assertion that the limitation period, applicable to restitution, is six years. In relation to the statutory position in England, the learned authors state:

"The old law of limitations, and to some extent the equitable doctrine of laches, have been profoundly affected by the Limitation Acts 1939 and 1965, now consolidated in the Limitation Act 1980. These statutes, however, do not solve a significant number of the limitation problems to which restitutionary claims give rise. **Indeed, there is not even a general section, akin to section 3 of the Act of 1623, which previously governed all *assumpsit* claims**…." (Emphasis supplied)

[36] **Brown and Another v Jamaica National Building Society** is important for another principle, which is relevant to this case. At paragraph [43] of his judgment, Harrison JA pointed out that the equitable doctrine of fraudulent concealment does not apply to extend the limitation period in respect of actions in tort and contract. He said at paragraph [43]:

> "…Although the equitable doctrine of fraudulent concealment does have a limited area of operation by virtue of section 27 of the Limitation of Actions Act (reproducing section 26 of the English Real Property Limitation Act 1833), it is clear that by its terms that that section is only applicable to suits for the recovery of land or rent…"

[37] In their work, Limitation of Actions, published in 1940, the learned authors, Preston and Newsom seem to be of a similar view. They assert that, prior to the Judicature Act of 1873 in England, fraud did not postpone the running of time for the application of the Limitation of Actions Act. The learned authors so stated at page 356:

> "At common law neither fraud as part of a cause of action nor the fraudulent concealment of a cause of action was a ground for postponing the running of time: *Imperial Gas Co. v. London Gas Co.* (1854), 10 Ex. 39; *Hunter v. Gibbons* (1856), 1 H. & N. 459."

That opinion is accepted as being correct. As will be demonstrated below, however, the introduction of the Judicature Acts allowed for the postponement of the running of time in the cases of fraudulent concealment of the right of action. That was as a result of the availability of equitable remedies, despite a claim being ostensibly a common law one.

[38] Preston and Newsom contend, at page 355, that the situation in equity was different from that at common law. In equity, they correctly point out, fraud postponed the running of time. They state:

> "The equitable doctrine was that the effect of fraud was to postpone the running of time until the person damnified thereby had discovered it or ought to have done so. So stated, the doctrine applied both to (*a*) cases of actions based on fraud, and (*b*) cases where a right of action was fraudulently concealed. In neither case was the plaintiff barred until six years had expired after the actual or notional discovery: see *Oelkers v. Ellis* [1914] 2 K.B. 139 at p. 150…."

[39] The English Limitation Act, 1939, has ameliorated the situation with regard to claims in common law. Section 26 of that statute postpones the running of time until the victim of the fraud discovers the fraud. The legislature of this country, however, despite nudges by this court in both **Melbourne v Wan** and **Brown and Another v Jamaica National Building Society**, has failed to pass a modern statute addressing limitations of actions. We, therefore, continue to struggle with the 400 year old, 1623 Limitation Act, received from England (see section 46 of the Limitation of Actions Act).

[40] Section 27 of the Limitation of Actions Act, allows the postponement of the running of time in the case of concealment by fraud, but limits it to the recovery of land or rent. The section does not apply otherwise.

[41] Based on the above reasoning, it is necessary to discuss the impact of a limitation period, created by the Limitation of Actions Act.

[42] Usually, the reliance on the provisions of the Limitation of Actions Act as a defence to a claim, is to be demonstrated at a trial. In certain circumstances, however, a defendant may rely on a limitation of actions defence prior to the trial. A defendant may apply to strike out a claim if it appears on the face of the claim, that it is time-barred (see **Lt Col Leslie Lloyd v The Jamaica Defence Board and Others** (1978) 16 JLR 252). The basis of the application is that the claim amounts to an abuse of the process of the court (see rule 26.3(1)(b) of the CPR). A defendant may also rely on a limitation of actions point if the claimant seeks to amend his claim to add a party or to seek a remedy, which the proposed party, or the defendant, asserts is time barred.

[43] In the case of amendments, the reliance on a limitation of actions defence is provided for in rules 19.4 of the CPR, in respect of the addition of parties, and rule 20.6 in respect of amendments to statements of case. Rule 19.4 is not relevant to the circumstances of this case and need not be quoted. Rule 20.6 states:

> "(1) This rule applies to an amendment in a statement of case after the end of a relevant limitation period.
>
> (2) The court may allow an amendment to correct a mistake as to the name of a party but only where the mistake was –
>
> (a) genuine; and
>
> (b) not one which would in all the circumstances cause reasonable doubt as to the identity of the party in question."

[44] The rule is not entirely helpful in circumstances such as the present where the proposed amendment is not in respect of a party's name. In these circumstances, the

decision of **The Jamaica Railway Corporation v Mark Azan** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 115/2005, judgment delivered 16 February 2006 provides some assistance. In delivering the judgment in that case, K Harrison JA stated at paragraphs 27 and 28:

> "27. There is provision in CPR, r. 20.6, for a party who wishes to amend a statement of case in respect of a change of name after a period of limitation has expired. There is no provision however, in our Rules for the substitution or addition of a new cause of action after the expiration of the limitation period.
>
> 28. Our Rules do not presently state any specific matters that the court will take into consideration in assessing whether a proposed amendment in fact amounts to a new cause of action (as opposed to a new party). In the final analysis, the decision whether or not to grant such an application, one ought to apply the overriding objective and the general principles of case management."

[45] K Harrison JA accepted that the addition of a new cause of action could, in some cases, result in injustice to the defendant against whom the proposed amendment was aimed. In his view, such an amendment would be allowable where the issues raised by it are not new, or would have to be the subject of the litigation in any event. The test would be whether the defendant would be embarrassed in his defence.

[46] The learned judge of appeal explained two principles that provide guidance to the consideration of proposed amendments, such as the impugned amendment. The first principle is that "an amendment should be allowed if it can be made without injustice to the other side" (paragraph 25). The second is that the court should apply the overriding objective, contained in rule 1.1 of the CPR. He went on to explain the

principles guiding the identification of a new cause of action. He said, at paragraph 29 of his judgment:

> "The authorities establish certain principles in relation to what amounts to a new cause of action. The following instances are set out but they are not exhaustive:
>
> (i) If the new plea introduces an essentially distinct allegation, it will be a new cause of action. In ***Lloyds Banks plc v Rogers*** (1996) The Times, 24 March 1997, Hobhouse LJ said inter alia:
>
> > '…if factual issues are in any event going to be litigated between the parties, the parties should be able to rely upon any cause of action which substantially arises from those facts.'
>
> (ii) Where the only difference between the original case and the case set out in the proposed amendments is a further instance of breach, or the addition of a new remedy, there is no addition of a new cause of action. See ***Savings and Investment Bank Ltd v Finckin*** [2001] EWCA Civ 1639, The Times, 15 November 2001.
>
> (iii) A new cause of action may be added or substituted if it arises out of the same facts, or substantially the same facts, as give rise to a cause of action already pleaded.
>
> (iv) In the case of ***Brickfield Properties Ltd v Newton*** (1971) 1 WLR 862 a general endorsement on the writ claimed damages against an architect for negligent supervision of certain building works. The particulars of claim were served after the expiry of the limitation period and contained claims both for negligent supervision and negligent design. It was held by the Court of Appeal that the negligent design claim arose substantially out of the same facts as the negligent supervision claim and in its discretion the court allowed the amendment."

[47] Those principles, and the bases for them, were again analysed, in detail and without dissent, by this court in **Sandals Resorts International Limited v Neville Daley and Company Limited** [2018] JMCA App 24.

[48] The next issue to be decided, in the context of the present case, is whether a limitation of actions defence exists.

[49] In the impugned amendment, Mr McLaughlin accused Ms Grant and Mr Smith of a number of fraudulent actions, which were almost all associated with the sale of the vehicle to him. It is only necessary to summarise the relevant accusations:

1. failing to disclose that the vehicle had been pledged to the bank;
2. transferring the vehicle to him knowing that it was subject to the bill of sale;
3. collecting the sum of $300,000.00 in those circumstances;
4. misrepresenting that the vehicle was free and clear of all incumbrances;
5. supplying a certificate of title that falsely purported to be free of all incumbrances;
6. inducing him to buy the vehicle despite the circumstances.

In relation to the claim for unjust enrichment, the claim asserted that Ms Grant and Mr Smith were:

> "Unjustly enriched by the new value of the [vehicle], of **One Million One Hundred and Fifty Thousand Dollars ($1,150,000.00)**, seizure by [the bank] to off-set the…loan." (Emphasis as in original)

[50] The reasoning derived from **Brown and Another v Jamaica National Building Society** demonstrates that Mr McLaughlin's claim against Ms Grant and Mr Smith, in the impugned amendment, for breach of contract, misrepresentation, deceit, and unjust enrichment, is based on a claim at common law. It would be subject, therefore, to a limitation period of six years in accordance with section 3 of the Limitation of Actions Act of 1623. There would normally be no postponement on the running of time. There may yet, however, be a relief in equity, depending on the evidence adduced by Mr McLaughlin.

[51] The next question relates to the date from which time would begin to run, for the purposes of the Limitation of Actions Act. Some aspects of the claim have been made in contract, some in tort and the remainder for restitution.

[52] The learned authors of Winfield & Jolowicz Tort, 18th Edition, para 26-8, opine that the authorities, which consider legislation, enacted prior to the Limitation of Actions Act of 1980 (UK), show that the limitation "period begins to run, 'from the earliest time at which an action could be brought'". The learned authors continue:

> "'Cause of action' means that which makes action possible'. A cause of action arises, therefore, at the moment when a

> state of facts occurs which gives a potential claimant a right to succeed against a potential defendant."

They rely on **Reeves v Butcher** [1891] 2 QB 509, 511 and **Read v Brown** (1888) 22 QBD 128, 131 as authority for their propositions.

[53] In the 1888 work by Sydney Hastings, A Short Treatise on the Law relating to Fraud and Misrepresentation, the learned author stated at pages 2-3:

> "**Statute of Limitations no bar in case of Fraud**
>
> In a case in which relief is sought against a wrong which has been kept concealed by the fraud of the wrongdoer, the Statute of Limitations will not be held a bar to the action, as the Statute only runs from the time when the fraud was, or with due diligence might have been discovered. (**Deane v Thwaites**, 21 Beav 621) …
>
> In an action to recover by way of damages money lost by the fraudulent representations of the defendant a reply to a defence of the Statute of Limitations that the plaintiff did not discover and had not real means of discovering the fraud within six years before action, and that the existence of such fraud was fraudulently concealed by the defendant until within six years, was held good by the Court of Appeal. **Gibbs v Guild** 9 QB 59). …"

[54] In **Gibbs v Guild** (1882) 9 QBD 59, the defendant had induced the plaintiff to purchase shares in a company. The shares were always "worthless", and consequently, the plaintiff lost the price he paid for them. The plaintiff sued the defendant to recover the loss. The statement of defence was that the plaintiff's cause of action, if there was one, accrued more than six years before the commencement of the action. The plaintiff's response was that the fraud could not have been discovered before it was, as he had no means of discovering it within six years before the commencement of the

action. Further, the plaintiff stated that the existence of and means of discovering the fraud were deliberately concealed by the defendant. The court considered the issue of the availability of the limitation defence.

[55] The plaintiff succeeded and the defendant appealed. The Court of Appeal, by a majority decision, upheld the first instance judge's decision and agreed that the plaintiff did not discover the fraud within six years. It also found that the plaintiff had no reasonable means of discovering the fraud, within that time, and that the existence of such fraud was fraudulently concealed by the defendant before the six years expired. In justifying this position and deliberating whether to treat the proceedings as a common law proceeding in which the defendant would likely succeed, or as an equity proceeding in which the plaintiff would be entitled to succeed, Coleridge CJ said at page 66 that:

> "…Strictly speaking … it is an action in the High Court of Justice created by the Judicature Act of 1873, by which common law and equity in a certain sense were both abolished, that is to say, the right and the principles of both remained, but they were not allowed to exist in conflict with one another, and the High Court of Justice was not only empowered, but was ordered to administer justice according to the principles of law and equity together, and to give relief according to such principles concurrently. It seems to me, therefore, plain that it is fallacious to treat this as if it were either an action at law or a suit in equity before the Judicature Act, 1873. By the operation of that Act each division of the High Court is to administer justice according to so much of the principles of either of the two old conflicting systems as may be necessary to give effectual and complete relief to the suitors before the Court."

[56] The other member of the majority, Brett LJ, in his judgment, said that the "case … is one in which before the Judicature Acts there would have been a concurrent

remedy in the Courts both of Law and Equity". Based on the decision in **George Booth v George, Earl of Warrington** [1714] 4 Bro P C 163; (1714) 2 ER 111, Brett LJ said that, where concurrent jurisdiction existed in the Courts of Equity and Common Law, the Court of Equity would not have been prevented by a limitation defence from applying equitable principles, **if there had been fraudulent concealment of the cause of action by the defendant**. The highlighted words are stressed as an important aspect of the decision. Brett LJ further stated at page 72 of the report:

> "…It seems then to me that we are bound by authority, which shews not that the Court of Equity construes the Statute of Limitations in any way different from the Court of Common Law, nor that the Court of Equity will not apply the Statute of Limitations when the cause of action has accrued more than six years. [B]ut that the Court of Equity in a case like the present would have given the remedy which the plaintiff seeks, and, applying their own equitable doctrine, would have prevented this particular defendant from defeating the plaintiff's claim by means of the Statute of Limitations … It is true that the present case might be treated as a common law action, but it is also one which might have been treated before the Judicature Acts as a suit in equity. Under these circumstances, it seems to me that merely because it is brought in the Common Law Division we have no right to say it is not a suit in equity, and if it be a suit in equity then we are bound, by the authorities to which I have referred, to hold that the plaintiff is not deprived of his remedy by reason of the plea of the Statute of Limitations, because the reply sets up an equity to which effect would be given by a Court of Equity…."

[57] Both Lord Coleridge CJ and Brett LJ expressed reservations on the accuracy of **Hunter v Gibbons** and **Imperial Gaslight Co v London Gaslight Co**, which were cited above in the extract from Preston and Newsom's text. In fact, the learned authors

recognise the change that the Judicature Act of 1873, made to the litigation landscape. They said at page 356:

> "After the Judicature Act, 1873, that branch of the equitable doctrine which postponed the running of time where the right of action was fraudulently concealed prevailed: see *Gibbs v Guild* (1882), 9 Q.B.D. 59; but contrast *Barber v Houston* (1884), 14 L.R. Ir. 273; (1885), 18 L.R. Ir 475. But it remained uncertain up till 1st July, 1940, whether in common law action of deceit any allowance could be made to the plaintiff for the time during which he was deceived…Under the Limitation Act, 1939, s. 26, these distinctions became academic."

It has already been noted that there is no equivalent, in this jurisdiction, to section 26. The Jamaican legislature, therefore, has not clarified the situation.

[58] The relevant principles concerning the commencement time for limitation purposes were conveniently set out in **Medical and Immunodiagnostic Laboratory Limited v Dorett O'Meally Johnson** [2010] JMCA Civ 42. K Harrison JA made the following points in paragraphs [5] through [8]:

a. the general rule in contract is that the cause of action accrues when the breach occurs and not when the damage is suffered;

b. where the contract is for the sale of goods the buyer's right of action for breach of an implied or expressed warranty relating to goods accrues when the goods are delivered and not when the defect is discovered or damage ensues;

c. the general rule in tort is that the cause of action arises when the damage is suffered and not when the act or omission complained of occurs.

[59] In the instant case, although the claim for unjust enrichment is at common law, based on the circumstances of the case, it is possible that Mr McLaughlin is entitled to benefit from an equitable remedy despite Ms Grant's limitation of actions defence.

[60] Relying on the decision in **Medical and Immunodiagnostic Laboratory Limited v Dorett O'Meally Johnson**, it may be said, depending on the evidence led, that time for the purposes of the limitation period, began to run:

a. in contract, from either 9 February 2006, when the contract and first payment were made, or, possibly in "early 2007", when Mr McLaughlin made the last payment of the purchase price;

b. in tort, and for the purposes of unjust enrichment, on 9 March 2012, when the bank seized the vehicle, and Mr McLaughlin suffered his loss.

[61] In the context of this aspect of the analysis, Mr Neale made two specific complaints about the impugned amendment. Learned counsel submitted that the impugned amendment is flawed in that it fails to state the term of the contract that was breached and the date that it was breached. These flaws, he argued, prevented a determination of the date on which time would begin to run. Mr Neale also submitted

that the learned judge was wrong in allowing the impugned amendment to stand as filed. In making that order, learned counsel submitted, it prevented Ms Grant from benefitting from the limitation defence that time expired on 9 March 2018. The learned judge, counsel submitted, should have realized that the impugned amendment could only have been effective on 30 May 2018, when he was making his order. The limitation of actions defence would therefore apply and it would serve no useful purpose to have granted an order to validate the impugned amendment.

[62] In the light of the various possibilities as to the date from which time began to run against Mr McLaughlin, it was not essential for the learned judge to have resolved that issue at the stage that the case was before him. He was entitled to say that it was a triable issue. That discretion rested with him and this court will not ordinarily interfere with an exercise of discretion in this regard (see **The Jamaica Flour Mills Limited v The Administrator General for Jamaica (Administrator for the Estate of Clinton Alfred Cox, Deceased)** (1989) 26 JLR 154). It was also within the learned judge's discretion to order that the impugned amendment should stand as properly filed. That is an order that is frequently made. It should not be disturbed.

[63] The next question is whether Mr McLaughlin can properly claim that the impugned amendment can benefit from the principles outlined in **The Jamaica Railway Corporation v Mark Azan**. As was mentioned above, the learned judge found that paragraph 7 of the further amended particulars of claim was sufficient a

basis for allowing the impugned amendment. The paragraph is repeated for convenience:

> "[Ms Grant and Mr Smith] sold the said motor vehicle whilst a Bill of Sale was registered to the [bank] and whilst sums were allegedly owing to the [bank]."

[64] The learned judge found that it was sufficient a basis to allow for the impugned amendment. That also was an exercise of a discretion on his part. It cannot be said to have been an unreasonable exercise. It should not be disturbed.

Conclusion

[65] This case involves a number of issues of law, some of which are not free from uncertainty. When considered in the context of a case where there is also uncertainty as to who is the dishonest party, and when it is that time began to run against Mr McLaughlin, for the purposes of the Limitation of Actions Act, the learned judge cannot be found to have been wrong to decide that the case should proceed to trial. His decision not to strike out the impugned amendment and to allow it to stand, as properly filed, should not be disturbed.

PUSEY JA (AG)

[66] I have read, in draft, the judgment of my brother, Brooks JA and agree with his reasoning and conclusion.

MORRISON P

ORDER

(1) The appeal is dismissed.

(2) The order of Batts J made herein on 30 May 2018 is affirmed.

(3) Costs to the 1st respondent to be agreed or taxed.