

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

MONTSERRAT

MNIHCVAP2021/0009

BETWEEN:

ORIS SULLIVAN

Appellant

and

DAGRIEEE WILSON

Respondent

Before:

The Hon. Mr. Trevor Ward
The Hon. Mr. Paul Webster
The Hon. Mde. Esco Henry

Justice of Appeal
Justice of Appeal [Ag.]
Justice of Appeal [Ag.]

Appearances:

Mr. Sylvester Carrott for the Appellant
Mr. Jean Kelsick for the Respondent

2023: January 24;
July 28.

Civil appeal – Claim for monies paid – Findings of fact – Appellate interference – Whether the learned judge erred in making a decision on the claim for monies paid and not on the claim for restitution and/or unjust enrichment – Whether the learned judge erred in granting Ms. Wilson’s claim for the sums paid — Unjust enrichment – Whether Ms. Wilson would have made out a claim for unjust enrichment – Elements of a contract – Intention to create legal relations - Whether the judge erred in holding that the monies advanced by Ms. Wilson constituted a loan which was repayable by Mr. Sullivan even though the parties were in a relationship – Whether the learned judge erred in finding that there

was an agreement to repay the Debt at the rate of 13% per annum which was later reduced to 5.99% per annum – Whether the learned judge erred in dismissing Mr. Sullivan’s counterclaim – Whether the learned judge erred in ordering the sale of the Toyota Altezza post-judgment and the splitting of the proceeds of sale – Set-off – Whether the Court should set off the sum of \$17,000.00 paid by Mr. Sullivan towards the Toyota Altezza against any judgment made in favour of Ms. Wilson

The appellant, Mr. Oris Sullivan (“Mr. Sullivan”) and the respondent, Ms. Dagrie Wilson (“Ms. Wilson”) were in a romantic visiting relationship from 2011 until it ended acrimoniously in 2016. In or around April 2013, prior to the breakdown of the romantic relationship, Mr. Sullivan was in the process of constructing a house at Barzeys, Montserrat. While construction was ongoing, Mr. Sullivan’s mother passed away in the United Kingdom (“the UK”) and he travelled there to bury her. While in the UK, and even at some point after his return to Montserrat, between May 2013 and March 2014, Ms. Wilson assisted in financing the completion of the house by paying debts due and owing to various third parties including contractors and suppliers of goods and services. These payments, according to Ms. Wilson, amounted to \$41,903.60 and were made at Mr. Sullivan’s oral request and on the promise that he would repay her when he obtained financing from the bank. Ms. Wilson made these payments with her own money which she had planned to use to finance the opening of her hairdressing salon, Beauty Plus.

Ms. Wilson is also the operator of a car rental business which is registered in her name. The business was started in or about 2012 with a Toyota Altezza motor vehicle registration number R1620 (“the Toyota Altezza”). Both Ms. Wilson and Mr. Sullivan contributed to the purchase price of \$29,000.00. The vehicle is registered in Ms. Wilson’s name.

Mr. Sullivan eventually obtained a loan in August 2013 but failed to repay Ms. Wilson the said \$41,903.60 despite her repeated written and verbal requests. Ms. Wilson then had to get a loan from the Bank of Montserrat Ltd for \$42,000.00 repayable at a rate of 5.99% to finance the opening of Beauty Plus.

Between 4th January 2016 and 1st June 2016, Mr. Sullivan made payments to Ms. Wilson totalling \$6,450.00 which reduced the debt to \$35,550.00 exclusive of interest (“the Debt”). In August 2016, Mr. Sullivan complained that he had never received anything for the Toyota Altezza or from the profits of the rental car business and he stopped making payments to Ms. Wilson.

On 14th May 2019, Ms. Wilson brought a claim in the court below to recover the Debt which she claimed represented the balance of the \$42,000.00 (rounded off) paid by her at Mr. Sullivan's express verbal request and on his behalf to discharge debts owed by him to third parties. In the alternative, her claim was based on restitution and/or unjust enrichment of Mr. Sullivan at her expense.

Ms. Wilson further claimed that pursuant to Mr. Sullivan's request and in consideration of her giving him time to pay the said sum of \$42,000.00 in instalments and forbearing to sue, Mr. Sullivan undertook to pay the said sum of \$42,000.00 to her in instalments, with interest of 13% per annum on the reducing balance. However, she claimed that she was willing to reduce the rate of interest to 5.99% per annum and accordingly claimed interest at the said rate of 5.99% per annum continuing until judgment or sooner payment.

In his defence filed on 4th June 2019, Mr. Sullivan denied owing the amount claimed by Ms. Wilson. However, he admitted that payments were made by Ms. Wilson to the building contractor at his request. He disputed the total amount claimed and asserted that there was never any agreement for monies spent by Ms. Wilson to be repaid, nor for the payment of any interest. He justified Ms. Wilson's involvement in the building process by asserting that there was an agreement between them that the downstairs section of the house would be used as Ms. Wilson's hairdressing salon.

In relation to the payments made between 4th January 2016 and 1st June 2016, Mr. Sullivan claimed that they were made to assist Ms. Wilson's son with travel expenses to St. Maarten and denied that they were made towards the payment of the sum of \$42,000.00 said to be owed to Ms. Wilson. Mr. Sullivan also asserted that sometime in 2016, Ms. Wilson had agreed to have the sum set off in exchange for his interest in the car rental company which he claimed was jointly owned by the parties. Mr. Sullivan counterclaimed for breach of contract. In particular, he claimed 50% of all earnings from the rental of the Toyota Altezza by Ms. Wilson and 50% of all earnings of the rental business which he estimated to be no less than \$50,000.00 from 2012 to the present.

In his judgment delivered on 22nd July 2021, the learned judge found that there was a promise by Mr. Sullivan to repay Ms. Wilson all the monies that she advanced on his behalf and for which he benefitted. The learned judge accepted Ms. Wilson's evidence that there was an agreement to repay the Debt at the rate of 13% per annum which was later reduced to 5.99% per annum. The judge decided that Ms. Wilson was entitled to the sum of \$35,550.00 claimed as money paid at the request and on behalf of another person, plus interest at the rate of 4% per annum until payment and prescribed costs on the

claim. He did not stipulate the date from which interest would start accruing. The learned judge also dismissed Mr. Sullivan's counterclaim with prescribed costs to Ms. Wilson, after concluding that the evidence demonstrated the car rental business was Ms. Wilson's sole business without any input from Mr. Sullivan. Following the delivery of the judgment, the learned judge directed that the Toyota Altezza be sold and the proceeds of sale be distributed equally between the parties.

Being dissatisfied with the decision of the learned judge, Mr. Sullivan appealed and Ms. Wilson counter-appealed. The grounds of appeal and the counter appeal raise four main issues for determination this Court: 1) whether the learned judge erred in granting Ms. Wilson's claim for the sums paid and the basis of the award; 2) whether the learned judge erred in finding that Ms. Wilson is entitled to the interest claimed; 3) whether the learned judge erred in dismissing Mr. Sullivan's counterclaim and 4) whether the learned judge erred in ordering the sale of the Toyota Altezza post-judgment and the splitting of the proceeds.

Held: allowing the appeal in part, dismissing the counter-appeal and making the orders set out at paragraph 94 below, that:

1. It is not uncommon for litigants to advance more than one cause of action in their claim, with one or more being alternative arguments. This case is no different. Ms. Wilson's claim was couched in three ways. The learned judge summarized the claims as one for money paid at the express request of Mr. Sullivan, or alternatively, for restitution and/or unjust enrichment. He then proceeded to deal with the claim as one for money paid to third parties at the express request of Mr. Sullivan. The judge's treatment of the case on this basis cannot be faulted. He referred to the relevant authorities and concluded that this was a claim for money paid by Ms. Wilson at the request of Mr. Sullivan from which he benefitted, and he agreed to repay the amount advanced by Ms. Wilson at his request. It was open to the learned judge to make his decision on any one or more of the claims that were pleaded. He made his decision on the claim for money paid. He did not have to go on to make a further decision on the claim for restitution/unjust enrichment. Accordingly, the appellant's contention that the learned judge treated the case as one of a contract loan simpliciter, is without merit.

Samsoondar v Capital Insurance Company Ltd [2020] UKPC 33 applied.

2. The elements of a valid contract are well known. There must be an offer capable of acceptance, an unequivocal acceptance of that offer, and consideration moving from the promisor to the promisee. In ascertaining whether there was a binding agreement to pay interest on the Debt, the court must find an intention to create legal relations. Generally, domestic arrangements between spouses and couples lack contractual force. However, this is a general presumption that may be rebutted by evidence of the real intention of the parties. The following factors are relevant: (a) what the parties said to each other either orally or in writing; (b) the context in which the statements were made; (c) the conduct of the parties; and (d) how grave the consequences would be to the innocent party if the promises made by the other party were to be breached. The claim for interest in this case is based on an oral agreement between the parties. The learned judge made a finding of fact that there was an agreement to repay the Debt at the rate of 13% per annum, later reduced to 5.99% per annum, and Ms. Wilson was accordingly entitled to interest on the Debt. However, there is no evidence, apart from her own recollections of a telephone call made more than a year before, that Mr. Sullivan had agreed to pay 13% interest or interest at any other rate. This is not to say that interest was not discussed. Mr. Sullivan says it was not. But even if it was discussed, there is no other evidence corroborating this claim for an exorbitant interest rate that is more than three times the statutory rate on judgments and more than twice the amount that Ms. Wilson said the banks in Montserrat were charging at the time. The contemporaneous evidence, or lack thereof, does not support a finding that the parties intended to create a binding oral contract to pay interest on the Debt at 13% per annum. Accordingly, the learned judge did not take all the circumstances into consideration and as a result, his decision on interest was plainly wrong. The appeal on this ground is therefore allowed, and the award of prejudgment interest set aside.
3. With regard to Mr. Sullivan's counterclaim, apart from the admissions about the Toyota Altezza, he did not produce any evidence to show that the car rental business was jointly owned by him and Ms. Wilson. There is no evidence of any document, agreement or contribution that he made toward the car rental company apart from the contribution to the purchase of Toyota Altezza. This is compounded by the fact that the company is in Ms. Wilson's sole name. He failed to make out his

contention that he was entitled to 50% of the car rental company. The appeal against the dismissal of the counterclaim for at least 50% of the assets of the car rental company is accordingly dismissed.

4. On 22nd July 2021, the learned judge delivered his judgment in open court making the orders that are appealed in this appeal. From that point, he was functus and his post-judgment order should be treated as no more than a method that the parties could consider for resolving the outstanding issue of the Toyota Altezza. However, this Court has the power to make orders in respect of matters that were before the lower court and not disposed of at the trial. As Ms. Wilson is amenable to selling the Toyota Altezza and dividing the profits equally, the vehicle shall be sold at market value and the proceeds be split equally between the parties on completion of the sale. Mr. Sullivan's claim to set off of his contribution of \$17,000.00 towards the purchase of the vehicle against any monies that he might owe Ms. Wilson is dismissed.

Section 20 of the **Supreme Court Act** Cap. 02.01 of the Revised Laws of Montserrat applied.

JUDGMENT

- [1] **WEBSTER JA [Ag.]**: This appeal challenges the decision of the learned trial judge to award the sum of \$35,550.00 to the respondent as the balance due on monies paid by her at the appellant's express verbal request and on his behalf to discharge debts then due and owing by the appellant to various third parties. The learned judge also awarded interest on the award at a rate of 4% per annum until payment and prescribed costs to the respondent, and dismissed the appellant's counterclaim.

Background

- [2] The appellant, Mr. Oris Sullivan (“Mr. Sullivan”) and the respondent Ms. Dagrie Wilson (“Ms. Wilson”) were in a romantic visiting relationship from 2011 until it ended acrimoniously in 2016.
- [3] In or around April 2013, prior to the breakdown of the romantic relationship, Mr. Sullivan was in the process of constructing a house at Barzeys, Montserrat. While construction was ongoing, Mr. Sullivan’s mother, who was residing in the United Kingdom (“the UK”), passed away. Mr. Sullivan travelled from Montserrat to the UK to bury her. While Mr. Sullivan was in the UK, and even at some point after his return to Montserrat, between the period May 2013 and March 2014, Ms. Wilson assisted in financing the completion of the house by paying debts due and owing to various third parties, including contractors and suppliers of goods and services. These payments, according to Ms. Wilson, amounted to \$41,903.60 and were made at Mr. Sullivan’s oral request and on the promise that he would repay Ms. Wilson when he obtained financing from the Bank of Montserrat Ltd. It is not disputed that Ms. Wilson made these payments with her own money which she had planned to use to finance the opening of her hairdressing salon, Beauty Plus, located at Brades, Montserrat.
- [4] Ms. Wilson is also the operator of a car rental business which is registered in her name. The business was started in or about 2012 with a Toyota Altezza motor vehicle registration number R1620 (“the Toyota Altezza”). Both Ms. Wilson and Mr. Sullivan contributed to the purchase price of \$29,000.00. The vehicle is registered in Ms. Wilson’s name.

- [5] Mr. Sullivan eventually obtained a loan in August 2013 but failed to repay Ms. Wilson the said \$41,903.60. Ms. Wilson wrote to Mr. Sullivan on 26th September 2014 claiming the \$41,903.60. She sent a hard copy of the letter by registered post and a soft copy by email. Mr. Sullivan did not respond to the letter. In August 2015, Ms. Wilson informed Mr. Sullivan that construction of Beauty Plus had started and requested repayment of the amount due to her. Mr. Sullivan did not comply with the request saying that he was not in a position to repay at that time. Ms. Wilson had to get a loan from the Bank of Montserrat Ltd for \$42,000.00 repayable at a rate of 5.99% to finance the opening of Beauty Plus.
- [6] Between 4th January 2016 and 1st June 2016, Mr. Sullivan made payments to Ms. Wilson totaling \$6,450.00 which reduced the debt to \$35,550.00 exclusive of interest. No further payments were made despite requests from Ms. Wilson. I will refer to the said reduced sum of \$35,550.00 hereafter as “the Debt”.
- [7] In August 2016, Mr. Sullivan began to take issue with the payments to Ms. Wilson. He asserted that he had never received anything for the Toyota Altezza or from the profits of the rental car business. Several letters, emails and WhatsApp messages were exchanged between the parties and counsel for the parties concerning the repayment of the outstanding sum, but Mr. Sullivan did not make any more payments to Ms. Wilson.

Proceedings in the court below

- [8] On 14th May 2019, Ms. Wilson brought a claim in the court below to recover the Debt which she claimed represented the balance of the \$42,000.00 (rounded off) paid by her at Mr. Sullivan's express verbal request and on his behalf to discharge debts then owed by him to various third parties. In the alternative, Ms. Wilson's claim was based on restitution and/or unjust enrichment of Mr. Sullivan at her expense.
- [9] Ms. Wilson further claimed that pursuant to Mr. Sullivan's request and in consideration of her giving him time to pay the said sum of \$42,000.00 in instalments and forbearing to sue, Mr. Sullivan undertook to pay the said sum of \$42,000.00 to her in instalments, with interest of 13% per annum on the reducing balance. However, he failed to make any payments and, as stated above, she had to borrow money from the Bank of Montserrat to finance the launching of her business, Beauty Plus. Despite this, she was willing to reduce the rate of interest to 5.99% per annum. She accordingly claimed interest at the said rate of 5.99% per annum and continuing until judgment or sooner payment, based on Mr. Sullivan's express agreement, promise and undertaking to pay such interest on the Debt and thereafter on the reducing balance.
- [10] In his defence filed on 4th June 2019, Mr. Sullivan denied owing the amount claimed by Ms. Wilson. However, he admitted that payments were made by Ms. Wilson to the building contractor at his request. He disputed the total amount claimed and asserted that there was never any agreement for monies spent by Ms. Wilson to be repaid, nor for the payment of any interest. He justified Ms. Wilson's involvement in the building process by asserting that there was an agreement between

them that the downstairs section of the house would be used as Ms. Wilson's hairdressing salon.

[11] In relation to the payments made between 4th January 2016 and 1st June 2016, Mr. Sullivan claimed that they were made to assist Ms. Wilson's son with travel expenses to St. Maarten and denied that they were made towards the payment of the sum of \$42,000.00 said to be owed to Ms. Wilson. Mr. Sullivan also asserted that sometime in 2016, Ms. Wilson had agreed to have the sum set off in exchange for his interest in the car rental company which he claimed was jointly owned by the parties.

[12] Mr. Sullivan counterclaimed for breach of contract. In particular, he claimed 50% of all earnings from the rental of the Toyota Altezza by Ms. Wilson and 50% of all earnings of the rental business which he estimates to be no less than \$50,000.00 from 2012 to the present. The essence of his claim is that in 2011 he and Ms. Wilson agreed to enter into the car rental business together, with Ms. Wilson running the business. Further, they always agreed that the profits of the business would be shared equally on a 50-50 basis. Further still, he contributed \$17,000.00 towards the purchase of the Toyota Altezza which then had a value of \$29,000.00.

[13] It is his assertion that the Toyota Altezza was rented out on several occasions both on long-term and short-term rentals with the income being used to pay the balance of the loan that was used to help to purchase the vehicle. He claimed that three other vehicles were subsequently bought and monies obtained from the rentals were applied

towards payment of the vehicles. He claimed that he never received any monies from the rental business or from the sale of one of the vehicles to a medical doctor.

[14] In her reply to the defence and counterclaim, Ms. Wilson denied that there was ever any agreement between the parties that the downstairs of the house would be used to operate Beauty Plus and that her payments to third parties were in furtherance of that agreement. She reiterated that Mr. Sullivan asked her to assist him financially with the costs of the construction and promised to repay her upon his return from the UK.

[15] Ms. Wilson also retorted that Mr. Sullivan did not and never did own the car rental company jointly with her. The car rental company was an expansion of Beauty Plus and Mr. Sullivan had no interest in it. Mr. Sullivan only had an interest in the Toyota Altezza.

The judgment

[16] In his judgment delivered on 22nd July 2021, the learned judge found that there was a promise by Mr. Sullivan to repay Ms. Wilson all the monies that she advanced on his behalf and for which he benefitted. The learned judge accepted Ms. Wilson's evidence that there was an agreement to repay the Debt at the rate of 13% per annum which was later reduced to 5.99% per annum. The judge decided that Ms. Wilson was entitled to the sum of \$35,550.00 claimed as money paid at the request and on behalf of another person, plus interest at the rate of 4%

per annum until payment and prescribed costs on the claim. He did not stipulate the date from which interest would start accruing.

[17] The learned judge also dismissed Mr. Sullivan's counterclaim with prescribed costs to Ms. Wilson. Apart from the fact that the Toyota Altezza was jointly purchased by the parties, the learned judge was of the view that the evidence in support of Mr. Sullivan's counterclaim was generally lacking in candour.

[18] The judge accepted that while the vehicles were rented out, the evidence demonstrated that at all material times it was Ms. Wilson's sole business without any input from Mr. Sullivan. Accordingly, the court rejected the claim that there was a contract between Mr. Sullivan and Ms. Wilson as asserted in his counterclaim.

[19] Following the judgment, there was a series of email exchanges between counsel for the parties for settling the trial order, the judge not having done so. Despite the failure of counsel to agree the terms of the order, the order was subsequently settled by the registrar of the High Court and entered on 21st January 2022.

[20] Following the delivery of the judgment in July 2021 the learned judge directed that the Toyota Altezza be sold and the proceeds of sale be distributed equally between the parties.

The appeal

- [21] Mr. Sullivan, being dissatisfied with the learned judge's decision, appealed. In his notice of appeal filed on 7th January 2022, he advanced 11 grounds of appeal challenging both findings of fact and law of the learned judge. It is not necessary to repeat the 11 grounds of appeal at this point because they are substantially covered in my consideration of the issues below.
- [22] Ms. Wilson counter-appealed on the grounds that (1) notwithstanding the learned judge's correct finding of money paid by her at Mr. Sullivan's request, the learned judge failed to rule on the alternative claim grounded in unjust enrichment, when the same was properly pleaded and canvassed at both the trial and in the respondent's written submissions after trial, and (2) further or in the alternative, if the learned judge concluded, having found for Ms. Wilson in that the money paid by her was at Mr. Sullivan's request, it was unnecessary for him to also address her alternative claim in unjust enrichment, he erred by failing to say so in his judgment and to disclose his reasons for so finding.
- [23] Based on the grounds of the appeals by both parties, the following are the main issues for consideration on this appeal: 1) whether the learned judge erred in granting Ms. Wilson's claim for the sums paid and the basis of the award; 2) whether the learned judge erred in finding that Ms. Wilson is entitled to the interest claimed; 3) whether the learned judge erred in dismissing Mr. Sullivan's counterclaim 4) whether the learned judge erred in ordering the sale of the Toyota Altezza post-judgment and the splitting of the proceeds.

Submissions of counsel

Issue 1 – Awarding the amounts claimed by Ms. Wilson

- [24] The crux of the submissions advanced by learned counsel Mr. Sylvester Carrott on behalf of Mr. Sullivan on the first issue is that the learned judge erred in concluding that the monies claimed by Ms. Wilson were recoverable on the basis of monies paid to a third party by Ms. Wilson on Mr. Sullivan's behalf. He submitted that the learned judge treated the matter as though it was a contractual loan repayable with interest in circumstances where this was not Ms. Wilson's pleaded case.
- [25] Mr. Carrott submitted that this was simply a case of an acrimonious fall out between two people who were formerly in a romantic relationship and argued that there is a presumption that parties in such a relationship have no intention to create legal relations save for proprietary rights or constructive trusts, neither of which was Ms. Wilson's case. Such payments are usually made for love and affection.
- [26] Mr. Carrott submitted that the mere fact that a couple in a relationship pay money on each other's behalf to third parties, in and of itself is not sufficient to ground liability. There needs to be something more. Mr. Carrott submitted that there was no authority to support the proposition that parties in a romantic relationship could so bind themselves as to make the arrangement legally enforceable. Mr. Carrott urged the Court to find that Mr. Sullivan did not accept or have a legal obligation to repay the sums to Ms. Wilson. However, Mr. Sullivan accepted that there was a moral obligation for him to repay (whatever that means).

- [27] Mr. Carrott, in reliance on **Featherwood Trading Limited v Fraunteld Management Limited**,¹ argued in the alternative that there are no findings by the learned judge that would support a finding of unjust enrichment. He argued that even if one party agrees to reimburse the other, that is not sufficient to ground a finding of unjust enrichment. A mere promise to repay is not sufficient. It is necessary to find conduct that is unjust. Nowhere in the judgment did the learned judge make such a finding of unjust conduct by Mr. Sullivan. He argued that if the learned judge made such a finding on Ms. Wilson's claim, he ought to have made a similar finding on the counterclaim.
- [28] Learned counsel for Ms. Wilson, Mr. Jean Kelsick, submitted that Ms. Wilson's main contention is that she assisted Mr. Sullivan in the construction of his home by paying the building expenses while he was away and he promised her that he would repay her when the bank approved his loan. She said that Mr. Sullivan agreed to reimburse her with one cheque as soon as his loan was approved.
- [29] Mr. Kelsick submitted that Mr. Sullivan's assertion that the trial judge treated Ms. Wilson's claim as a contractual loan simpliciter repayable with interest is erroneous. He submitted that the learned judge found for Ms. Wilson on the monies paid by her on behalf of Mr. Sullivan and awarded interest under what was effectively a contract of forbearance.

¹¹ BVIHCVAP2012/0020 (delivered 10th June 2013, unreported).

It was pleaded as such in the claim form and addressed at some length in Ms. Wilson's witness statement.

[30] Mr. Kelsick argued that the learned judge did not find that the money advanced to third parties was repayable in contract but rather under the distinct remedy of money paid. Learned counsel submitted that Ms. Wilson's claim was pleaded as money paid (which leads to restitution) and unjust enrichment, and a contract for interest on the amount owed. Mr. Kelsick submitted that even though the learned judge did not use the phrase "money paid" or the word "restitution", he acknowledged that the claim was grounded in restitution, money paid and unjust enrichment.² It can reasonably be inferred that in the disposition of the judgment, the learned judge had restitution and money paid in mind when he found for Ms. Wilson.

[31] Mr. Kelsick also made the overarching submission that the judge's findings are largely findings of fact and this court should not lightly interfere with these findings. He cited several authorities on how the Court should deal with such findings. I will deal with his submissions in further detail - when I come to deal with the general principles of appellate approach to findings of fact.

Issue 2 - Interest

[32] Mr. Carrott submitted that the learned judge erred in awarding interest to Ms. Wilson. He reminded the Court that Ms. Wilson's claim was for monies paid to third parties at the request of Mr. Sullivan. There was

² Paragraph 1 of the judgment.

no contract let alone a contract to pay interest at the rate of 5.99%, or indeed 13% per annum. For an award of pre-judgment interest there has to be a contract and where, as in the present case there was no written agreement, there would have to be compelling evidence of an oral agreement. He submitted further that there is no statutory provision for pre-judgment interest in the Territory of Montserrat. In any event, Ms. Wilson not being a licensed money lender could not have agreed a contractual rate of interest above the bank lending rate. Mr. Carrott also argued that there was no evidence to support Ms. Wilson's contention that she had to borrow money from the bank at a rate of interest of 5.99%. Mr. Carrott did not dispute that at common law interest can be claimed under a contract made between two parties whether verbal or written.

- [33] Learned counsel Mr. Kelsick submitted that interest can be claimed by contract and there was an oral agreement between the parties that the judge accepted.

Issue 3 – Dismissing the counterclaim

- [34] Regarding issue 3, learned counsel Mr. Carrott challenged the learned judge's assessment of the evidence in the court below and his dismissal of the counterclaim. Mr. Carrott submitted that the learned judge's rejection of Mr. Sullivan's counterclaim that the Toyota Altezza was in effect used as the seed money for the car rental business was one such example of error in his assessment of the evidence. He reminded the Court that Ms. Wilson admitted that

the Toyota Altezza was used for rental purposes in her reply and defence to counterclaim but suggested that she did not need the money for the purchase of other vehicles as claimed by Mr. Sullivan. However, the learned judge ignored this admission and held that the car was not used as a car rental at all because Ms. Wilson had stated so in her evidence. In dismissing the counterclaim, the learned judge ignored Mr. Sullivan's evidence, his reply and defence to counterclaim and only focused on Ms. Wilson's oral evidence.

Issue 4 – The post-judgment order

- [35] Issue 4 concerns the order made after the delivery of judgment for the sale of the Toyota Altezza. At the conclusion of the appeal hearing on 24th January 2023, the Court ordered the parties to file supplementary submissions on the appropriate order the Court should make with regard to the Toyota Altezza. In submissions filed on 16th February 2023, learned counsel Mr. Carrott stressed that Mr. Sullivan provided the seed money for the car rental company to the tune of \$17,000.00 which he contributed for the purchase of the Toyota Altezza and that this sum should be set off against any judgment in favour of Ms. Wilson, even though set-off was not pleaded. Mr. Carrott submitted that the solution arrived at by the learned judge does not do justice to Mr. Sullivan's case in that it fails to reimburse Mr. Sullivan for the seed money for Ms. Wilson's car rental company. Additionally, this was supposed to be treated as monies advanced to a third party at the request of Ms. Wilson.

[36] Mr. Carrott also took issue with the procedure used by the learned judge to dispose of the issue regarding the Toyota Altezza. He submitted that while the fact that the learned judge gave the direction post-judgment does not in itself invalidate the order, but this was not a clerical mistake that could be corrected using the Court's power in rule 42.10 of the **Civil Procedure Rules 2000** ("CPR") (the slip rule). Further, the issue is compounded by the fact that the learned judge did not give any reasons or the basis for ordering the sale. There is no addendum or revision of the judgment delivered on 22nd July 2021. There was simply a message to the Court Administrator to direct the parties accordingly.

[37] Mr. Carrott submitted that the manner in which the learned judge dealt with the Toyota Altezza means that the counterclaim was not properly determined. He invited this Court to either remit the counterclaim to the lower court to be determined by a different judge or alternatively, that this Court can, exercising the powers of the Court below, make a determination on the counterclaim in the interest of finality. He urged this Court to determine the counterclaim.

[38] Mr. Kelsick submitted that the starting point for issue 4 is whether the Court of Appeal has jurisdiction to make the post-judgment order. He relied on sections 31(1)b and 33(1)(a) of the **Supreme Court Act**³ and submitted that the broad powers contained in the latter section give the Court jurisdiction to amend the judgment and therefore to

³ Cap. 02.01 of the Revised Laws of Montserrat.

address the issue of the Toyota Altezza. However, in exercising its discretion under section 33(1)(a) the Court should not abate the sum awarded to Ms. Wilson by the \$16,500.00 contributed by Mr. Sullivan. In any event, Mr. Sullivan's new claim made in his counsel's post-judgment submissions for a set-off should not be allowed because it was not pleaded in his defence or claimed in his counterclaim. Mr. Sullivan's pleaded case focused on establishing a 50% interest in Ms. Wilson's car rental business. Mr. Kelsick reminded the Court that the ultimate purpose of a party's pleading is to inform the other party of the case that is made out against him or her.

[39] Learned counsel Mr. Kelsick submitted that the trial judge's post-judgment suggestion that the Toyota Altezza be sold and the proceeds of sale be divided equally between the parties was nothing more than a suggestion, with which Ms. Wilson agreed. He asked the Court to infer that the trial judge was content to leave the matter there and this is why he (the judge) chose not to invoke the slip rule under CPR 42.10(1). He also invited the Court to draw the inference that this suggestion did not form part of the judgment because it was not a remedy pleaded by Mr. Sullivan or sought by him at the trial. Learned counsel submitted that the learned judge did not err or was plainly wrong in his judgment and there is no need for the Court to exercise its powers under section 33(1)(a) of the **Supreme Court Act** by amending or varying the judgment.

[40] Alternatively, Mr. Kelsick submitted, if the Court is minded to amend or vary the judgment, it is invited to go no further than endorsing the

trial judge's suggestion by ordering the sale of the Toyota Altezza and the equal division of the proceeds of sale as opposed to abating the sum awarded to Ms. Wilson by \$16,500 or \$17,000.00. The learned judge accepted Ms. Wilson's evidence including her evidence that the Toyota Altezza cost \$29,000.00 and that Mr. Sullivan contributed \$17,000.00 to the purchase price while she serviced a loan of \$12,000.00 that made up the difference of the purchase price. Ms. Wilson's evidence is that she both serviced the loan and met the cost of repairing the vehicle on her own. In reexamination, Ms. Wilson testified that the Toyota Altezza never made a profit which was accepted by the trial judge. Ordering the sale of the Altezza and equal distribution of the proceeds of sale would produce a just result.

- [41] Having outlined the submissions of counsel on the issues I will now deal with general principles regarding appellate approach to findings by a trial judge and then analyse the issues in the appeal.

Principles guiding appellate interference

- [42] At the heart of this appeal is a challenge to the learned judge's findings of fact and the inferences drawn from those findings. Accordingly, this appeal brings into sharp focus the approach of appellate courts to disturbing findings of fact and the evaluation of evidence.

[43] It is a widely accepted principle that an appellant who challenges a trial judge's findings of fact and inferences drawn from such findings along with evaluation of evidence, has to satisfy an extremely high threshold. This has been confirmed in multiple authorities emanating from both the Eastern Caribbean Supreme Court and the highest courts in England. In **Piglowaska v Piglowski**,⁴ a decision of the House of Lords, Lord Hoffman explained the rationale undergirding the need for appellate restraint when reviewing findings of fact. He explained that:

“[T]he appellate court must bear in mind the advantage which the first instance judge had in seeing the parties and the other witnesses. This is well understood on questions of credibility and findings of primary fact. But it goes further than that. It applies also to the judge's evaluation of those facts. If I may quote what I said in *Biogen Inc. v. Medeva plc* (1996) 38 BMLR 149 at 165: ‘The need for appellate caution in reversing the trial judge's evaluation of the facts is based upon much more solid grounds than professional courtesy. It is because specific findings of fact, even by the most meticulous judge, are inherently an incomplete statement of the impression which was made upon him by the primary evidence. His expressed findings are always surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance. . . of which time and language do not permit exact expression, but which may play an important part in the judge's overall evaluation.’”

[44] Most recently, this principle was confirmed by the Privy Council in **Ming Siu Hung and others v J F Ming Inc and another**.⁵ In **Ming Siu Hung**, Lord Briggs delivering the judgment of the Board stated:

⁴ [1999] 3 All ER 632.

⁵ [2021] UKPC 1.

“It is necessary at this point to bear in mind the well-settled constraints upon the appellate jurisdiction, when asked to re-exercise a discretion conferred upon the first instance judge. These constraints form part of a package, developed over many years, which ensure that the benefit of finality which should normally follow from the judicial determination of the parties’ dispute is not rendered ineffective by undue appellate activism. The general reasons for appellate restraint are well summarised by Lewison LJ in his well-known judgment in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5; [2014] FSR 29, para 114, as follows: “114. Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: *Biogen Inc v Medeva plc* [1977] RPC 1; *Piglowska v Piglowski* [1999] 1 WLR 1360; *Dattec Electronics Holdings Ltd v United Parcels Service Ltd* [2007] UKHL 23; [2007] 1 WLR 1325; *In re B (A Child) (Care Proceedings: Threshold Criteria)* [2013] UKSC 33; [2013] 1 WLR 1911 and most recently and comprehensively *McGraddie v McGraddie* [2013] UKSC 58; [2013] 1 WLR 2477.”

- [45] In sum, the authorities confirm that an appellate court should exercise caution in its review of the findings of facts and inferences drawn from the facts by trial judges. Put another way, a trial judge’s findings of fact and the inferences to be drawn from those findings should not be interfered with by an appellate court simply because the appellate court would have found them differently. The appellate court must be satisfied that the trial judge’s findings are blatantly wrong to warrant interference.⁶ I will bear these principles in mind when considering the grounds of appeal which are essentially challenges to the judge’s assessment of the facts.

⁶ *Watt or Thomas v Thomas* [1947] AC 484.

Analysis

Issue 1 – The award to Ms. Wilson

- [46] The first issue relates to the award of the Debt to Ms. Wilson. The learned judge accepted her evidence that she had been asked by Mr. Sullivan to pay the builders and that he would repay her. The judge found that she was entitled to the Debt plus interest at the rate of 4% per annum until payment and prescribed costs on the claim. He found her to be very forthright in her testimony under cross-examination and displayed a high level of clarity in answers concerning the monies paid on behalf of Mr. Sullivan during the period when he was in the UK. At paragraph 40 of the judgment, the learned judge stated that he was impressed with Ms. Wilson's demeanor and found that she conducted her affairs in a very professional manner.
- [47] Mr. Sullivan's first point of contention with the learned judge's finding that Ms. Wilson was entitled to the Debt plus interest is that the judge treated the claim as a contractual loan simpliciter. This contention can be disposed of quickly as it misrepresents the learned judge's treatment of the claim. Ms. Wilson's claim was couched in three ways. Firstly, she sought to recover the Debt as money paid to third parties at the express request of Mr. Sullivan. Although Ms. Wilson did not expressly plead for monies paid to third parties, the essence of her claim was adequately set out. The judge's treatment of the case on this basis cannot be faulted. He referred to **Re a Debtor**,⁷

⁷ [1937] 1 All ER 1.

Chitty on Contracts,⁸ and **Halsbury's Laws of England** and concluded that this was a claim for money paid by Ms. Wilson at the request of Mr. Sullivan from which he benefitted, and he agreed to repay the amount advanced by Ms. Wilson at his request.⁹ The judge also said that the claim was based on restitution and/or unjust enrichment. This is apparent from paragraph 1 of his judgment where he summarized Ms. Wilson's claim as one for money paid at the express request of Mr. Sullivan or alternatively for restitution and/or unjust enrichment.

[48] It is not uncommon for litigants to advance more than one cause of action in their claim, with one or more being alternative arguments. This case is no different. It was open to the learned judge to make his decision on any one or more of the claims that were pleaded. He made his decision on the claim for money paid. He did not have to go on to make a further decision on the claim for restitution and/or unjust enrichment.

[49] In the circumstances, it is not correct to say that the judge treated the case as one of a contract loan simpliciter.

[50] The next issue is whether it was open to the learned judge to uphold Ms. Wilson's claim in light of the evidence and the relevant law. This requires the Court to consider firstly the nature of the claim for restitution of monies paid to a third party at the request of the

⁸ 26th edition, 1989.

⁹ Paragraph 41 of the judgment.

defendant. The law allows recovery of such sums. The use of the word restitution does not detract from the real claim which is for the recovery of the amounts paid. Restitution in this context is the remedy for recovering the Debt based on the claim for monies paid on behalf of Mr. Sullivan.

- [51] An early statement of the principle can be found in the 1937 decision of the Court of Appeal in **Re a Debtor**¹⁰ where Greene LJ said:

“It is, in my opinion, settled beyond possibility of dispute that where “A” at the request of “B” guarantees payment of “B’s” debt to “C,” the law implies an undertaking by “B” to indemnify “A” in respect of any sums which he properly pays to “C” under the guarantee. This is merely a branch of a wider rule which is laid down in numerous authorities. I may quote as examples *Brittain v Lloyd*, where, at p 773, Pollock CB, says:

“It is clear, that, if one requests another to pay money for him to a stranger, with an express or implied undertaking to repay it, the amount, when paid, is a debt due to the party paying from him at whose request it is paid, and may be recovered on a count for money paid...the request to pay, and the payment according to it, constitute the debt; and whether the request be direct as where the party is expressly desired by the defendant to pay, or indirect, where he is placed by him under a liability to pay, and does pay, makes no difference;”

- [52] A modern statement of the principle can be found in the 1989 edition of **Chitty on Contracts** (26th edition) which was relied on by Mr. Kelsick. At paragraph 2110, the learned editors state:

“Recovery of money paid at the defendant's request. For many years, restitution has been available (through the action "for money paid") to recover money paid by the plaintiff to a third

¹⁰ [1937] 1 All ER 1.

person at the request, express or implied, of the defendant, and with an undertaking, express or implied, on his part to repay it; and it is immaterial whether or not the defendant is relieved from a legal liability by the payment. This type of claim is not obviously contractual, since the implied undertaking to repay is often fictional; furthermore the plaintiff need not have been under any contractual obligation to make the payment, and the defendant's request may not have referred to a precise sum of money; the ground for recovery is akin to the principle of the law of agency which imposes on the principal an obligation to indemnify his agent against any liability which he may incur in the exercise of his authority. However, although it is treated here for convenience, it is not restitutionary since the plaintiff will be entitled to be indemnified even though his payment has conferred no benefit on the defendant."

- [53] Mr. Carrott also relied **Chitty on Contracts** referring to the 2022 edition and submitted that there is a modern restatement of the law that a claim for money paid is no longer a claim in restitution governed by restitutionary principles, but instead should be looked at in the context of a loan. Further, there is no pleaded case based on a loan and therefore the claim should have been dismissed. He relied on the 34th edition of **Chitty on Contracts (2022)** which states that:

"41-262 A contract of loan of money is a contract whereby one person lends or agrees to lend a sum of money to another, in consideration of a promise express or implied to repay that sum on demand, or at a fixed or determinable future time, or conditionally upon an event which is bound to happen, with or without interest..."

41-263 Where A pays money to B at the request of C, on the terms that he is to be repaid by C, it is sometimes difficult to say whether the transaction amounts to a loan by A to C. There is no doubt that, in certain contexts, money paid by A to B at the request of C could properly be said to be money paid by A to C,

but that does not necessarily mean that the transaction is a loan for all purposes.”

[54] With respect to Mr. Carrott, I do not read this passage as saying that a claim for monies paid on behalf of another is a transaction that in all cases is a loan transaction. Depending on the facts, the transaction may be a loan. But that does not mean that a claim for money paid on behalf of another at the other’s request is necessarily a claim in contract. A claim for money paid on behalf of another is a cause of action based on the defendant’s request to another person and his undertaking to repay that person. **Chitty** says it is akin to agency principles and I agree. But what is apparent to me is that a request to pay money to a third party is not necessarily a loan transaction, though it may be depending on the facts.

[55] In this case, the facts do not point to a loan transaction. It was, as found by the judge, a request by Mr. Sullivan to Ms. Wilson to pay the building expenses and he undertook to repay when his loan was approved. There was no requirement to plead a claim in contract for the repayment of a loan.

[56] Even if the court accepts that the transaction between Mr. Sullivan and Ms. Wilson should be treated as a contract of loan, this does not mean that Ms. Wilson’s claim would not have succeeded. The facts of this case could satisfy the requirements of a contract of loan. A loan contract is an agreement whereby the lender (Ms. Wilson) agrees to pay money to the borrower or to his designate (the

builders), on terms that the borrower (Mr. Sullivan) will repay the money that was paid to the builders. For the agreement to constitute a loan, the payment must be made with a view to giving the borrower financial accommodation which happened in this case – Mr. Sullivan was able to continue construction of the house while he was overseas and without making payments from his money. If Mr. Carrott's argument is correct, it would also mean that his contention that the learned judge erred in treating the matter as a contract is self-defeating. If the judge had treated the transactions between the parties as a loan the money would be recoverable as such. If it was not recoverable on contract principles because of an inadequate pleading (as alleged), it would be recoverable on restitutionary or unjust enrichment principles which are still alive and well in the common law. I will now deal with these principles.

Restitution and unjust enrichment

[57] The learned judge, having decided the case on principles of money paid on behalf of another, it was not necessary for him to deal with the alternative claim of restitution and unjust enrichment. Neither is it necessary for this Court to deal with this alternative claim. But out of deference to the very able and complete submissions of counsel, and the fact that the counter-notice of appeal complains about the judge's failure to deal with the alternative claim, I will deal with restitution and unjust enrichment.

[58] As stated above, learned counsel Mr. Carrott argued forcefully that in order to succeed on a claim for unjust enrichment, there must be

a finding that the conduct of the defendant is unjust. He relied on the fact that the learned judge did not make a finding of unjust conduct by Mr. Sullivan.

[59] The elements for a successful claim in unjust enrichment are set out in the case of **Samsoondar v Capital Insurance Company Ltd**,¹¹ where the Privy Council opined that:

“It has now become conventional to recognize...that a claim in the law of unjust enrichment has three central elements which the claimant must prove: that the defendant has been enriched, that the enrichment was at the claimant’s expense, and that the enrichment at the claimant’s expense was unjust. If those three elements are established by the claimant, it is then for the defendant to prove that there is a defence. The ideal pleading of a statement of case by the claimant should indicate that the claim is for restitution of unjust enrichment and should identify facts that satisfy each of those three elements. While it may be desirable, it is not essential, that the words ‘unjust enrichment’ are used but the claimant must identify sufficient facts to show how those three elements are satisfied: see Goff and Jones, *The Law of Unjust Enrichment* (eds Mitchell, Mitchell and Watterson, 9th ed (2016), para 1-38). The important purpose of a statement of case is to ensure, as a matter of fairness, that the defendant knows the case it has to meet.”

[60] Based on the learning in **Samsoondar** it is evident that a claim for unjust enrichment can be made out as long as it is supported by the relevant facts to satisfy each element, whether or not the term “unjust enrichment” is used in the claim.

¹¹ [2020] UKPC 33.

[61] Ms. Wilson advanced unjust enrichment as an alternative claim in the court below. To succeed on this claim, it was necessary for her to show that Mr. Sullivan was enriched at her expense and that such enrichment was unjust. The first two elements in **Samsoondar** are easily satisfied in this case. Enrichment may take the form of a positive addition to the recipient's wealth such as by way of the receipt of money, or a negative such as when an inevitable expense has been saved. The most common type of the latter is the discharge of an obligation owed by the defendant such as paying his creditor.¹² In this case Mr. Sullivan was enriched in the sense that his property at Barzeys was constructed with financial assistance from Ms. Wilson who is not claiming an interest in the property. He saved some of the inevitable expense of paying contractors and other third-party suppliers of goods and services. Much of his enrichment was at Ms. Wilson's direct expense as she spent her money to assist in the completion of the house. Was there an unjust factor in the case?

[62] The learned editors of **Halsbury's Laws of England** provide guidance on this element. They explain that:¹³

"The claimant must show that it is unjust that the defendant should retain the benefit without making restitution to the claimant. In deciding whether or not a particular enrichment is unjust, the court is not given free rein to give effect to its own perception of what is or is not unjust, but must have regard to whether the facts establish a recognised cause of action in unjust enrichment... Thus, (total) failure of consideration, discharge of the debt of another are all causes of action which can render an enrichment unjust ('unjust factors'). However, restitution will

¹² See *Exall v Partridge* (1799) 101 ER 1405.

¹³ Halsbury Laws of England Restitution and Unjust Enrichment (Volume 88 (2019)).

generally be denied where the benefit was conferred upon the defendant in the form of a valid gift or in pursuance of a valid common law, equitable or statutory obligation owed by the claimant to the defendant.”

[63] The discharge of debt at the defendant’s insistence is clearly a recognized example of an unjust factor in an unjust enrichment claim. It is present in this case. Mr. Sullivan accepted that Ms. Wilson paid money on his behalf to third parties and while he challenged the Debt, it is clear that monies were spent at his request. The payments started when he left to go to the UK and many of the payments are explicable only on the basis that they were made at Mr. Sullivan’s request. If it were true that there was an arrangement that Ms. Wilson would use the downstairs of the house for her hairdressing salon, she would have undoubtedly been involved in the construction process sooner.

[64] Once the elements of unjust enrichment are proved, the burden shifts to the defendant to show that the cause of action has not been established or to identify a reason why the defendant should not be liable or why the liability should be reduced by pleading a defence. Mr. Sullivan did not provide any identifiable defences to Ms. Wilson’s claim.

[65] It is apparent from what I have said in the preceding paragraphs that if it was necessary to make a finding on restitution and unjust enrichment, that finding would be that Ms. Wilson had satisfied the requirements for the claim and it would succeed. But I repeat that

this finding is not necessary to dispose of the appeal because the earlier finding, that the judge did not err in finding that Mr. Sullivan must pay the Debt, is sufficient to dispose of the appeal.

Issue 2 - The claim for interest

[66] The claim for interest is based on an oral agreement between the parties. The elements of a valid contract are well known. There must be an offer capable of acceptance, an unequivocal acceptance of that offer, and consideration moving from the promisor to the promisee. In ascertaining whether a binding agreement was created, the court must find an intention to create legal relations. In this case, Ms. Wilson claims that there is a contract, albeit oral, between her and Mr. Sullivan in which he agreed to pay interest at the rate of 13% per annum on the sum of \$42,000.00, in return for her not calling in the amount owed. In essence, Ms. Wilson pleaded the existence of a contract of forbearance in respect of the interest payments. Based on the submissions of Mr. Carrott, much of this issue turns on whether there was an oral agreement or understanding to pay interest, and if so, did the parties intend to enter into legal relations.

[67] Generally, domestic arrangements between spouses and couples lack contractual force. However, this is a general presumption that may be rebutted by evidence of the real intention of the parties. The following factors are relevant: (a) what the parties said to each other either orally or in writing; (b) the context in which the statements were made; (c) the conduct of the parties; and (d) how grave the

consequences would be to the innocent party if the promises made by the other party were to be breached.

[68] The learned judge made a clear and unambiguous finding that the parties agreed orally that interest was payable on the outstanding balance of the monies due. The judge's finding is at paragraph 41 where he said:

"The court unhesitatingly finds that the defendant promised to repay the claimant all the monies advanced on his behalf and for which he benefited. The court accepts the claimant's evidence that there was an agreement to repay the debt at the rate of 13% per annum and later reduced to 5.99% per annum. The claimant is therefore entitled to the sum claimed plus interest at the rate of 4% per annum until payment and prescribed costs."

[69] Based on the principles and cases cited above about the reluctance of appellate courts to interfere with findings of fact, especially where the findings are based on the trial judge's evaluation of the witnesses and their evidence, this Court should be very wary about interfering with this finding. That said, having analysed the material before the Court, I am not convinced that the evidence points toward a positive finding that there was an agreement for the payment of interest at the rate of 13% on the sum of \$42,000.00.

[70] The evidence is as follows. On 26th September 2014, Ms. Wilson wrote to Mr. Sullivan demanding repayment of \$41,903.60 by 30th September 2014 failing which she would sue him.¹⁴ This obviously

¹⁴ Record of Appeal page 122.

did not produce results because the demand remained unpaid. In paragraph 18 of her witness statement¹⁵ she said that around 2015 she called Mr. Sullivan and explained to him that she needed him to repay the \$42,000 but she would hold off calling in the amount due if he would pay interest at 13% per annum on the reducing balance. She said Mr. Sullivan verbally agreed. At a later time (date unspecified) she ‘...decided to reduce the interest I am claiming on \$42,000.00 from 13% to 5.99%.’¹⁶ She does not say that she discussed the reduction with Mr. Sullivan. This was apparently a unilateral variation of the alleged oral agreement. She pleaded that Mr. Sullivan expressly agreed to this arrangement verbally in order to give himself more time to pay. It is following this that Mr. Sullivan made the payments totalling \$6,450.00 in 2016. He then stopped making payments.

[71] Mr. Sullivan pleaded in his defence that there was never any conversation between Ms. Wilson and him in respect of any interest and states that no interest was ever agreed.

[72] Based on the way that Ms. Wilson has conducted herself during the latter stages of the relationship I would have expected there to be some contemporaneous writing documenting the oral agreement to pay interest at 13% on the Debt. The first mention in writing of the agreement to pay interest at 13% per annum is in a letter dated 27th February 2017 from Ms. Wilson’s lawyers to Mr. Sullivan. There was

¹⁵ Record of Appeal page 47 paragraph 18.

¹⁶ Ibid, paragraph 18.

no response to this letter and by another lawyers' letter dated 30th May 2018 she repeated the agreement to pay 13% interest, but that she was willing to reduce the agreed rate of 13% to 6% provided that he enter into a written contract of forbearance with her for the repayment of the sum of \$35,550.00. Mr. Sullivan's response on 15th June 2018 was to deny the existence of any agreement to pay interest and his unwillingness to enter into any agreement for the payment of interest. He also noted that none of the banks in Montserrat charge interest close to 13% per annum. Why then would he agree to repay the Debt at 13% per annum?

[73] All this begs the question whether there was a pre-existing contract for forbearance which was going to be altered? I also find it peculiar that Ms. Wilson would not have attempted to get the original interest agreement made 'about 2015' in writing as at the time of the purported agreement to pay interest, she was already experiencing significant difficulties in receiving payments from Mr. Sullivan. I also bear in mind that the evidence shows, and the judge found, that Ms. Wilson is very professional and attentive to detail. She was able to provide documentary evidence of all the monies she spent on the construction of the house. All of this suggests to me that when Ms. Wilson's lawyers wrote to Mr. Sullivan in February 2017 suggesting that the parties enter into a written agreement, there was not yet a contract of forbearance but perhaps an offer or at least an invitation to enter into one.

[74] Even if Ms. Wilson raised the issue of interest during that telephone call in about 2015, there is no evidence, apart from her own recollections of a telephone call made more than a year before, that Mr. Sullivan had agreed to pay 13% interest or interest at any other rate. This is not to say that interest was not discussed. Mr. Sullivan says it was not. But even if it was discussed, there is no other evidence corroborating this claim for an exorbitant interest rate that is more than three times the statutory rate on judgments and more than twice the amount that Ms. Wilson said the banks in Montserrat were charging at the time. The contemporaneous evidence, or the lack thereof, does not support a finding that the parties intended to create a binding oral contract to pay interest on the Debt at 13% per annum.

[75] In light of this evaluation, I consider that the learned judge's treatment of the interest claim in one sentence (in paragraph 41 of the judgment) was inadequate - he did not take into account the delay in asserting the claim, the absence of contemporaneous documents and the exorbitant rate of interest claimed, in accepting Ms. Wilson's evidence that there was an oral agreement to pay interest at 13% per annum.

[76] In short, I think the judge did not take all the circumstances into consideration and as a result, his decision on interest was blatantly wrong. I would allow the appeal on this ground and set aside the award of prejudgment interest.

Issue 3 – Dismissal of the counterclaim

[77] Mr. Sullivan's counterclaim is based on breach of contract. In his witness statement, he deposed that he started the car rental company with Ms. Wilson in 2012. He claims to have contributed \$17,000.00 (in value) towards the purchase of the Toyota Altezza which was the first vehicle used in the car rental business. This is not disputed by Ms. Wilson. Apart from the admissions about the Toyota Altezza, Mr. Sullivan did not produce any evidence to show that the car rental business was jointly owned by him and Ms. Wilson. There is no evidence of any document, agreement or contribution that he made toward the car rental company apart from the contribution to the purchase of Toyota Altezza. This is compounded by the fact that the company is in Ms. Wilson's sole name. It is difficult to support his contentions that he was entitled to 50% of the car rental company.

[78] I note that Mr. Carrott sought to argue that if the Court finds that Mr. Sullivan is liable to Ms. Wilson for payments to third parties, then the same should apply to his contribution to the purchase of the Toyota Altezza. I respectfully disagree with Mr. Carrott on this point. The major difference lies in the evidence. Whereas Ms. Wilson's conduct and evidence clearly demonstrated a promise that she ought to be repaid the money she expended on the construction of the house, Mr. Sullivan was unable to show a similar position in relation to his counterclaim. The appeal against the dismissal of the counterclaim for at least 50% of the assets of the car rental company is accordingly dismissed.

Issue 4 - The post-judgment order

[79] The first matter that the Court must resolve under this issue is the question of jurisdiction, namely, whether this Court is seized with jurisdiction to make an order in relation to the Toyota Altezza. The salient fact in considering this issue is that on 22nd July 2021, the learned judge delivered his judgment in open court making the orders that are appealed in this appeal. From that point, he was functus and had no jurisdiction to amend his decision except under the slip rule in CPR 2000. Neither party suggested that the “order” that the judge made post-judgment for the sale of the Toyota Altezza is a matter that could be considered under the slip rule. If effective, the “order” that the judge made would have been a substantial addition to the orders that he made when the judgment was delivered in open court. It is not surprising that the judge did not attempt to amend or vary the orders that he made in July 2021. His post-judgment order should be treated in the way that I think he intended – a method that the parties could consider for resolving the outstanding issue of the Toyota Altezza. This could also account for the fact that he did not give reasons for making the post-judgment order.

[80] Having decided that the judge, and by extension this Court, does not have jurisdiction to amend the July 2021 judgment and orders, the next issue is how should this Court deal with the outstanding matter of the Toyota Altezza. Mr. Kelsick suggested that the Court could

remit the matter to the High Court to be considered by another judge. Both counsel acknowledged that remitting the matter to the lower court may not be practicable and invited this Court to make a decision on the matter. I would accept this invitation to consider the matter of the Toyota Altezza because it was a matter in controversy between the parties in the lower court.

[81] The Court's power to make orders in respect of matters that were before the lower court and not dealt with in the disposal of the trial can be found in section 20 of the **Supreme Court Act** which states that:

“The High Court and the Court of Appeal respectively in the exercise of the jurisdiction vested in them by this Act shall in every cause or matter pending before the court grant either absolutely or on such terms and conditions as the court think just, all such remedies whatsoever as any of the parties thereto may appear to be entitled to in respect of any legal or equitable claim or matter so that, as far as possible, all matters in controversy between the parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of these matters avoided.”

The exercise of making an order in this case under section 20 requires considering the evidence and pleadings that were before the lower court and the relevant law.

[82] It is common ground between the parties that Mr. Sullivan contributed the sum of approximately \$16,500.00/\$17,000.00 (in value) towards the purchase price of the Toyota Altezza which was the first vehicle in the car rental business. Ms. Wilson's evidence is

that she paid the remainder of the purchase price by a loan which she obtained and she was also responsible for maintaining the vehicle. There was absolutely no evidence that Mr. Sullivan was entitled to share the profit from the rental of the Toyota Altezza. In fact, Mr. Sullivan only brought up the issue of repayment for his contribution to the purchase of the car after he was asked to repay the monies expended by Ms. Wilson on his behalf.

[83] Mr. Sullivan did not mention his ownership claim to the Toyota Altezza in his defence or counterclaim. In any event, the counterclaim was dismissed. Neither did he plead a set off of the \$17,000.00 against any monies that he might owe Ms. Wilson. However, he asked the Court in his post-judgment submissions to set off the sum of \$17,000.00 against any judgment in favour of Ms. Wilson, notwithstanding the lack of a pleaded set-off.

[84] The only type of set-off that could be applicable to Mr. Sullivan's claim is an equitable set-off which arises when two claims are so closely connected that it would be unjust for one party to enforce its claim without giving credit for the claim of the other party where that other party has been wronged. The challenge that Mr. Sullivan faces in pursuing his claim for a set-off is that he does not have a claim for a share of the sale proceeds of the Toyota Altezza. His claim was for a 50% share of the income from the car rental business. The claim was dismissed by the lower court and the dismissal was confirmed by this Court. Therefore, there is nothing to set off against the award to Ms. Wilson.

[85] In the circumstances I would dismiss the claim for a set-off on two grounds – (1) the claim was not pleaded and was not seriously pursued until Mr. Carrott filed further submissions after trial as ordered by this Court; and (2) there is no proper factual basis to establish a set-off.

[86] This still leaves the issue of what order, if any, to make in respect of the Toyota Altezza. Mr. Sullivan obviously favours the sale order and setting off the \$17,000.00 claim for his share of the Toyota Altezza against the amount owing to Ms. Wilson. I have said enough to rule out this possibility.

[87] Mr. Kelsick has taken a more reasonable stance as his backup position. He said in his post-closing submissions that if the Court were minded to make an order it should go no further than ordering the sale of the vehicle and abating the amount payable to Ms. Wilson by one-half of the net proceeds of sale of the vehicle. This proposal is accepted.

[88] Having regard to the Court's wide powers under section 20 of the **Supreme Court Act** to dispose 'as far as possible, [of] all matters in controversy between the parties' I would order that the Toyota Altezza be sold and the net proceeds of sale be split 50-50 between the parties on completion of the sale.

The counter-notice of appeal

[89] Finally, Ms. Wilson complained in her counter-notice of appeal that the judge erred by not dealing with her alternative claim for restitution and/or unjust enrichment (see paragraph 22 above). Based on my findings in paragraphs 47 and 48 above that the judge made a clear finding on the claim for monies spent on behalf of Mr. Sullivan and that he did not have to deal with the alternative claim for restitution and unjust enrichment, I would dismiss the counter-notice of appeal with no order as to costs.

Conclusion

[90] I have considered the evidence in this case, the legal principles and the judge's decision. I am satisfied that the learned judge did not commit any error in awarding Ms. Wilson the sum of the Debt of \$35,550.00 and I would affirm his finding that the said \$35,550.00 be paid to Ms. Wilson. However, the appeal against the award of interest is allowed and the award for pre-judgment interest on the Debt is set aside.

[91] Having considered Mr. Sullivan's counterclaim afresh, I would also dismiss the appeal against the dismissal of the counterclaim to the extent that it asserts a breach of contract that Mr. Sullivan is entitled to 50% of the assets of the car rental company. However, as Ms. Wilson is amenable to selling the Toyota Altezza and dividing the profits equally, I would order that the Toyota Altezza be sold at market value and the proceeds be split equally between the parties on completion of the sale.

Costs

[92] In awarding costs I take into consideration that both parties have enjoyed some success on the appeal and I would order each to bear his or her own costs of the appeal. The costs orders in the lower court will have to be adjusted to reflect the results of the appeal.

Disposal

[93] In order to appreciate the orders that I propose to make in this appeal it is helpful to recite the orders that were made by the judge after the trial. The judge's orders are:

1. "Judgment is entered for the Claimant on her claim.
2. The counterclaim of the Defendant is dismissed.
3. The Defendant shall pay to the Claimant the following sums:
 - (a) Damages and interest thereon at 5.99% per annum calculated up to the date of judgment i.e., 22 July 2021 of \$53,320.34;
 - (b) Prescribed costs on \$53,320.34 of \$7,998.05;
 - (c) Prescribed costs on the defendant's dismissed counterclaim of EC\$72,500 of \$10,875;
 - (d) Statutory interest at 4% per annum on \$53,320.34 + \$7990.05 + \$10,875.00 = \$73,193.39 from 22 July 2021 to date = \$886.09.
4. Total amount of the judgment debt at 11 November 2021 stands at \$73,079.48." ("the Judge's Orders")

[94] Having considered the material before the Court, the submissions of counsel, and the findings set out in this judgment I would make the following orders:

- (1) Paragraph 3(a) of the Judge's Orders is varied to say that the appeal against the order awarding the Debt of \$35,550.00 to

the respondent is dismissed and the judge's order awarding the Debt is affirmed.

(2) Paragraph 3(a) of the Judge's Orders is further varied to say that the appeal against the award of prejudgment interest on the Debt is allowed and the award of interest (calculated at \$17,920.05) is set aside.

(3) Paragraph 3(b) of the Judge's Orders is varied to say that the respondent is awarded prescribed costs of \$5,325.00 on the dismissal of the appeal against the award of the Debt.

(4) The appeal against the dismissal of the counterclaim is dismissed and paragraph 3(c) of the Judge's Orders is affirmed.

(5) The counter-notice of appeal is dismissed with no order as to costs.

(6) Paragraph 4 of the Judge's Orders is set aside.

(7) The Toyota Altezza be sold at market value and the net proceeds be shared equally between the parties on completion of the sale.

(8) The parties shall bear their own costs of the appeal.

[95] Finally, the Court is indebted to counsel on both sides for their very helpful and thorough written and oral submissions.

I concur.
Trevor Ward
Justice of Appeal

I concur.
Esco Henry
Justice of Appeal [Ag.]

By the Court

Deputy Chief Registrar