[2023] JMCC COMM 35

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2017CD00627

BETWEEN	**MORRIS DEAN**	**CLAIMANT**
AND	**BEVON MORRISON**	**1ST DEFENDANT**
AND	**CARIBBEAN VIBES LIMITED**	**2ND DEFENDANT**

IN OPEN COURT

Ms. Stephanie Williams & Ms. Ronece Simpson instructed by Henlin Gibson Henlin for and on behalf of the Claimant

Dr. Mario Anderson instructed by Barbican Law Clinic for and on behalf of the Defendants

Dates Heard: June 7, 8 & 9, November 28, 29 & 30, December 1, 2022 and July 10, 2023

Civil Practice & Procedure – Joint Venture – Restitution – Unjust Enrichment – Money had and received – Equitable mortgage – Creation of an equitable mortgage – Breach of Contract – Available Remedies – Damages – Compounded Interest

PALMER HAMILTON, J

BACKGROUND

[1] By way of an Amended Claim Form, the Claimant is seeking the following Orders:

(a) Damages;

(b) *Damages in the sum of* ***TEN MILLION TWO HUNDRED AND EIGHTY-ONE THOUSAND TWO HUNDRED AND SIXTY-EIGHT DOLLARS AND ELEVEN CENTS ($10,281,268.11);***

(c) *Compounded Interest at the rate of 18.92% per annum being the Domestic currency weighted Loan Interest Rate as published by the Bank of Jamaica for the month of July 2012 on the sum of $10,281,268.11;*

(d) *A declaration that the Claimant is entitled to relief by way of restitution;*

(e) *A declaration that the Claimant will be unjustly enriched if the sums are not repaid;*

(f) *A declaration that the Claimant holds an equitable mortgage in the sum of Five Million Seven Hundred and Ninety-Four Dollars One Hundred and Thirty-Six Dollars and Ninety-Five cents (J$5,794,136.95) with interest thereon at the rate of 18.92% over all that parcel of land being Lots 1 & 2 Haws Pen in the parish of St. Mary and being all the land comprised in Certificate of Title registered as Volumes 1342 Folio 796 and Volume 1342 Folio 797 of the Register Book of Titles;*

(g) *The Defendants' interest in the land shall be sold to recover the total sums outstanding and secured by the equitable mortgage together with legal fees, costs and expenses;*

(h) *An Order that property located at Haws Pen being Lot Nos. 2 & 3 Part of Haws Pen, St. Mary registered at Volume 1342 Folio 796 and Volume 1342 folio 797 of the Register Book of Titles be sold on the open market to enforce the judgment debt in favour of the Claimant in the sum of Ten Million Two Hundred and Eighty-One Thousand Two Hundred and sixty-Eight Dollars and Eleven Cents ($10,281,268.11) with interest at the rate of 18.92% per annum;*

(i) *Henlin Gibson Henlin, Attorneys-at-Law is to have conduct of the sale and is to carry out the sale and administer the proceeds thereof in accordance with law and with the directions of the Court as stated herein;*

(j) *That there be valuations by Allison Pitter & Company or such other reputable valuator of Lot Nos. 2 & 3 Part of Haws Pen, St. Mary registered at Volume 1342 Folio 796 and Volume 1342 Folio 797 of the Register Book of Titles;*

(k) *Damages in favour of the Claimant and cost for valuation report is to be satisfied from the gross proceeds of sale of the said land;*

(l) *Any person in possession or in receipt of the rents or profits, of the land or any part of the land is to deliver up possession of the land or receipt of the rents and profits to such person and on such date as the Court may direct;*

(m) That the Registrar of the Supreme Court be empowered to execute any document or documents with regard to the sale of the property in that the 1st Defendant refuses or neglects to do so within fourteen (14) days of being requested to do so;

(n) Upon completion of the sale of the said Land, the Claimant is to prepare a Certificate of Sale of Land to be endorsed by the Registrar of the Supreme Court for registration at the Office of titles in order to complete and give effect to the sale;

(o) Costs;

(p) Such further and/or other relief as this Honourable court deems fit.

[2] The Claimant is alleging that on or about the 1st day of March, 2012, he was introduced to the 1st Defendant who owned and operated the 2nd Defendant. He stated that the 1st Defendant provided him with a cash flow projection and she enquired if he was interested in entering a joint venture agreement, where he would provide financing for the 2nd Defendant and for the development of property located at Lot Nos. 2 & 3 Part of Haws Pen, Saint Andrew registered at Volume 1342 Folio 796 and Volume 1342 Folio 797 of the Register Book of Titles, hereinafter referred to as 'Lot 2 Haws Pen' and 'Lot 3 Haws Pen' respectively. The Claimant further alleged that at this initial meeting, it was agreed between himself and the 1st Defendant, on her behalf and on behalf of the 2nd Defendant, that he would invest One Million Five Hundred Thousand Dollars ($1,500,000.00) in the 2nd Defendant and that he would be made a director and shareholder of the 2nd Defendant. It was also agreed that the Claimant would be reimbursed for his financial input in addition to sharing in the profits of the 2nd Defendant and that the Claimant would also receive statements and cash flow projections for the 2nd Defendant. The Claimant further alleged that he had further discussions with the 1st Defendant regarding "Project Operation Grow," which was the project to develop the Haws Pen properties. The Claimant stated that he invested and loaned money to the 2nd Defendant in accordance with their joint venture and those sums have not been repaid. The Claimant also alleged that he discharged the mortgages on the Haws Pen properties and held onto the titles as security.

[3] The Defendants filed a Defence and while they admitted that they had an initial meeting with the Claimant on or about the 1st day of March, 2012, they denied that they provided him with any cash flow projections and they also denied that they discussed the real estate project. The Defendants admitted to the sums the Claimant outlined was invested by him, however they denied that they agreed to reimburse the Claimant as he was an equity investor, whose participation was solicited and accepted as a joint venture partner in the real estate project and in the 2nd Defendant's operations. They stated that the Claimant functioned as a member of the 2nd Defendant's Board of Directors and operated as a member of the 2nd Defendant's management team. The Claimant was privy to all of the 2nd Defendant's financial and business information. The Defendants further stated that the 2nd Defendant's business prospects were severely damaged by the actions of the Claimant when he had excessive and unreasonable demands for monies and when that could not be met, he disparaged the Defendants to creditors, customers and potential business prospects. The Defendants denied that they were enriched, unjustly or otherwise, as the Claimant's withdrawal from the joint venture agreement his hostile demands for satisfaction has caused the Defendants loss and damage. The Defendants further denied that there is an equitable mortgage in favour of the Claimant.

[4] The Defendants also counterclaimed against the Claimant for damages for breach of the joint venture agreement wherein the Claimant agreed to participate in funding the operations of the 2nd Defendant and the sub-division and sale of lots in the Haws Pen property owned by the 1st Defendant. The Defendants are seeking the following Orders:

> *(a) Damages for breach of Contract;*
>
> *(b) A declaration that the parties were partners in a joint venture agreement;*
>
> *(c) A declaration that the partnership be dissolved with effect from the 12th of December, 2017;*

(d) An order for the settling of the accounts of the partnership for the period commencing March 3, 2012;

(e) Costs; and

(f) Further and such other relief as the court deems just.

ISSUES

[5] The following issues arise for my determination:

(a) What were the terms of the joint venture entered into by the parties?

(b) Has there been a breach of those said terms by either party?

(c) Whether the Defendants were unjustly enriched at the expense of the Claimant;

(d) Whether the criteria exist for piercing the corporate veil. If yes, whether it is necessary to pierce the cooperate veil and hold the 1st Defendant liable;

(e) Does the Claimant hold an interest or equitable mortgage on the 1st Defendant's properties;

(f) What remedies, if any, are available to the parties?

(g) Is the Claimant entitled to compound interest?

SUBMISSIONS

[6] I wish to thank Counsel for their submissions and supporting authorities which provided valuable assistance to the Court in deciding the issues. They were thoroughly considered. However, I do not find it necessary to address all the submissions and authorities relied on but I will refer to them to the extent that they affect my findings.

LAW

PIERCING THE CORPORATE VEIL

[7] It is a well-established company law principle arising from **Salomon v Salomon and Company** [1997] AC 22 that a company is a separate legal entity from its shareholders and controllers. This means that, the company has its own legal personality, has its own rights and liabilities and can sue and be sued in its own name. However, there are situations where the Court may disregard the separate legal personality of the company and impose liability on individuals in the company. This is what is known as piercing the corporate veil. Edwards J in **Div. Deep Limited, Mahesh Mahtani and Haresh Mahtani v Topaz Jewellers Limited and Raju Khemlani** [2017] JMCC Comm 26 examined several cases and outlined the basis upon which a Court will depart from the **Salomon v Salomon** principle. A similar approach was taken by Laing J in **McDonald Millingen v Margie Geddes and Bardi Limited** [2019] JMCC COMM. 30.

[8] I wish to adopt the principles as outlined by Edwards J in **Div. Deep Limited**:

> *[57] The first starting point for me is the case of **Gilford Motor Company Limited v Horne** [1933] Ch 935. In that case Mr Horne formed a company, JM Horne and Company Limited, for the sole purpose of avoiding a restraint of trade clause in his previous contract of employment to the plaintiff. The Court of Appeal in granting an injunction against Horne, stated that it was:*
>
> > *"...quite satisfied that this company was formed as a device, a stratagem, in order to mask the effective carrying on of a business of Mr E.B Horne. The purpose of it was to try to enable him under what is a cloak or a sham, to engage in business."*
>
> *[58] One identifiable principle, therefore, is that the veil of incorporation may be pierced where the incorporation was a cloak or a sham to avoid an existing legal obligation. The legal obligation in the case of Mr Horne was to abide by the restraint of trade clause in his previous contract. He used the company therefore, to act as his agent in conducting business that he himself should not have been conducting. The company was a cloak behind which he hid to do what he could not legally do.*

*[59] In **Jones v Lipman** [1962] 1 WLR 832, Mr Jones entered into a contract to sell property to another and reneged on the deal. In order to avoid an order for specific performance to transfer the property to the buyer he incorporated a company and transferred the property to that company. In deciding to pierce the corporate veil, the court found that the company was a creature of the controller, 'a device and a sham, a mask' used by Mr Jones in order to avoid his equitable obligations.*

*[60] In both **Gilford Motor Company Limited v Horne** and **Jones v Lipman** the controller of the company had a pre-existing legal obligation which he was attempting to evade by incorporating and interposing a company. There is therefore, the principle that the veil of incorporation will be pierced where the company was incorporated to conceal or evade legal or equitable obligations or to evade a law relating to the distribution of assets or to frustrate the enforcement of law.*

*[61] Another broader principle is that the veil may be pierced to prevent an abuse of the corporate legal personality. It may also be expressed as a narrower principle that it may be pierced to undo a relevant impropriety or wrongdoing where no other remedy is available to the victim of that wrongdoing. To be relevant that wrongdoing must be linked to the use of the corporate structure to evade an existing legal obligation. See **Prest v Prest and others.***

*[62] In **Prest v Prest and others** the Supreme Court in the UK declined to pierce the corporate veil because there was no evidence that the corporate structure had been created for any "improper purpose". In that case an appeal was brought by a wife in matrimonial proceedings against her husband, a Nigerian oil trader, who had no substantial assets in the UK. He, however, owned and controlled several companies worldwide which were holding companies for several valuable assets in the UK. The trial judge held he was entitled to pierce the corporate veil under some wider distinct jurisdiction under the Matrimonial Causes Act (UK) and ordered the companies to transfer assets to the wife.*

[63] The English Court of Appeal set aside that order in a majority decision. It held that there was no reason to pierce the corporate veil in this case as the corporate structure and asset ownership had not been created for any improper purpose. The Court of Appeal denied any notion of any wider distinct jurisdiction under the Matrimonial Causes Act for a court to ignore the separate legal personality created by incorporation.

[64] On appeal to the UK Supreme Court, that court agreed that this case was not an appropriate case to pierce the corporate veil. The court found that the corporate structure had been created for wealth protection and tax avoidance and that there was no evidence that

the companies were set up to avoid any existing legal obligations. Interestingly, however, the Supreme Court upheld the wife's appeal on the entirely different basis that the companies held the properties on resulting trust for the wife.

[65] The gravamen of the Supreme Court's decision regarding the issue of when it would be necessary to lift the corporate veil was that whilst there may be circumstances in which the court would disregard the veil of incorporation, those cases were indeed rare. In the judgment of Lord Sumption SCJ, in which he refers to several authorities, he took the view that those authorities which refer to 'facade' and to 'sham' are in fact referring to two separate principles, that is, the 'concealment principle' and the 'evasion principle'. The concealment principle, he declared, did not involve piercing the corporate veil at all. Lord Sumption said at paragraph 34-35:

> *"...the corporate veil may be pierced only to prevent the abuse of corporate legal personality. It may be an abuse of the separate legal personality of a company to use it to evade the law or to frustrate its enforcement. It is not an abuse to cause a legal liability to be incurred by the company in the first place. It is not an abuse to rely upon the fact (if it is a fact) that a liability is not the controller's because it is the company's. On the contrary that is what incorporation is about. I conclude that there is a limited principle of English Law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control. The court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the company's separate legal personality."*

[66] Lord Sumption was also of the view that there must be some relevant impropriety or wrongdoing which must be linked to the use of the company structure to avoid or conceal liability. Of this, what he termed, the evasion principle, he said:

> *"…it is that the court may disregard the corporate veil if there is a legal right against the person in control of it which exists independently of the company's involvement, and a company is interposed so that the separate legal personality of the company will defeat the right or frustrate its enforcement." The court will then pierce the corporate veil for the sole purpose of depriving the company and its controller of any advantage it otherwise wrongfully obtained by the reliance on the company's separate legal personality.*

[67] Lord Neuberger in his judgment agreed with Lord Sumption that the authorities deal either with cases involving concealment of the nature of the arrangements with a company or the interposing of a company to evade a legal obligation. He also agreed that those cases which involved concealment were not cases which properly involved piercing the corporate veil at all. He said that where a company was used to disguise the nature of the arrangement, the court need only look behind the company to see the true party to the arrangement. This, he said did not involve piercing the corporate veil at all. He also agreed, at paragraph 81, that the doctrine should only be invoked where: "…a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately frustrates by interposing a company under his control."

*[68] Lord Neuberger also agreed with Munby J at first instance in **Ben Hashem v Ali Shayif** [2008] EWHC 2380, that where the power exists to pierce the corporate veil it should only be done where there is in fact no other remedy available.*

[69] Lady Hale was not prepared to accept unreservedly the differentiation by designation of a principle of concealment or evasion but was content to ground the principle in the fact that persons who operate limited companies should not be allowed to take unconscionable advantage of the people with whom they do business.

*[70] Lord Mance agreed that the veil should only be pierced on the evasion principle suggested by Lord Sumption. He also agreed that concealment cases only involved the use of the corporate structure to conceal the real actor(s) or were based on some analysis of some other relationship which may be found to exist, such as principal–agent, nominee or trustee-beneficiary. Lord Mance also made reference to his decision in the Privy Council case of **La Generals des Carrieres et des Minesv Hemisphere Associates LLC** [2012] UKPC 27. In giving the judgment of the Board in that case, Lord Mance said the Board was prepared to accept as correct, without further consideration, those principles expounded by Munby J at 1st instance in Ben Hashem v Ali Shayif. In that case Munby J in discussing the basis on which a court may pierce the corporate veil formulated six principles as follows:*

> *"In the first place, ownership and control of a company are not of themselves sufficient to justify piercing the corporate veil. This is, of course, the very essence of **Salomon v A Salomon & Co Ltd** [1897] AC 22...*
>
> *Secondly, the court cannot pierce the corporate veil, even where there is no unconnected third party involved, merely because it is thought necessary in the interest of justice.*

> *Thirdly, the corporate veil can be pierced only if there is some impropriety.*
>
> *Fourthly, the court cannot, on the other hand, pierce the corporate veil merely because the company is involved in some impropriety. The impropriety must be linked to the use of the company structure to avoid or conceal liability…*
>
> *Fifthly, it follows from all this that if the court is to pierce the veil it is necessary to show both control of the company by the wrongdoer(s) and impropriety, that is, (mis(use) of the company by them as a device or facade to conceal the wrongdoing… Finally, and flowing from all this, a company can be a facade even though it was not originally incorporated with any deceptive intent.*
>
> *The question is whether it is being used as a facade at the time of the relevant transaction(s). And the court will pierce the veil only so far as is necessary to provide a remedy for the particular wrong those controlling the company have done. In other words, the fact that the court pierces the veil for one purpose does not mean that it will necessarily be pierced for all purposes."*

[71] These principles were also referred to and approved by Lord Sumption at paragraph 25 of his judgment.

[72] Lord Clarke in his judgment agreed that the principle existed but felt that the power to pierce the corporate veil should only be applied when no other conventional remedy is available. He, like Lady Hale, was reluctant to agree to a categorization into 'concealment' and 'evasion' principle, without further argument.

[73] Lord Walker was prepared to see it as part of the disparate occasions on which some rule of law produces apparent exceptions to the principles of separate juristic personality. It may, he said, result from statutory provisions or from joint liability in tort, or from the law of unjust enrichment or principles in equity and the law of trust.

*[74] Since **Prest v Prest and others**, the Supreme Court again reiterated in **Antonio Gramsci Shipping v Lemberge** [2013] ECWA Civ 730 that the corporate veil should only be pierced in a case of evasion of legal obligations. Closer home in **International Hotels (Jamaica) Limited v Proprietors Strata Plan No 461** [2013] JMCA Civ 45, Panton P referred to the foundation principle in Salomon v Salomon. In considering when it might be appropriate to disregard the general principle of separate legal personality, Panton P referred to the decision in **Prest v Prest and others** which he said located the jurisdiction to disregard the principle in a*

> *limited category of cases where there was an abuse of the corporate structure for the purpose of some wrongdoing. He applied that principle in the case before the appellate court and found that there was no relevant wrongdoing requiring the veil to be pierced.*

UNJUST ENRICHMENT & RESTITUTION

[9] I wish to note that the Claimant's claim for unjust enrichment and restitution walk hand in hand. As such, the law relating to both will be dealt with together. In so doing, I rely on the following excerpt from the Halsbury's Laws of England, Volume 88 (2019) paragraph 410 which deals with the structure of an unjust enrichment claim and stated that-

> *It is generally accepted that there are four elements of an unjust enrichment claim: (1) the defendant must have been enriched; (2) the enrichment must have been at the expense of the claimant; (3) that enrichment must have been unjust; and (4) there are no applicable defences. The claimant must satisfy the court that the first three elements of the claim have been satisfied. All three must be satisfied before an unjust enrichment claim can succeed. The fourth element, namely the defences, is likely to assume ever increasing significance in the cases. As the courts slowly expand the grounds on which restitution can be ordered, it will fall to the defences to keep liability within acceptable bounds. In addition to these four elements it is sometimes said that there is a fifth stage to the inquiry, namely the remedies which are available to the claimant.*

[10] The structure has been accepted in our jurisdiction and was relied on by Brooks J in **Earle Alexander Shim v Sylvia Elmay Shim & Elizabeth German** (unreported) Claim No. 2005HCV02986 delivered on May 16, 2008. The claimant in that case sought a declaration as to an interest in the house and consequential orders allowing him to recover his investment in the property based on assurances and encouragement given by the defendants. Brooks J held that the defendants were unjustly enriched at the claimant's expense based on promises made to him by the defendants and that the claimant was entitled to restitution by virtue of a refund of the sums he proved to have spent in constructing the property.

[11] Learned Counsel for the Claimant relied on the case of **Claudette White v Cyril Mullings and Eldred Mullings** [2017] JMSC Civ 111 which provided much use to this Court. In that case, Fraser J dealt with the relationship between a claim for

restitution and unjust enrichment. He stated that a pre-requisite for granting the remedy of restitution was establishing that the benefit that the defendant enjoyed was unjust. Fraser J relied on the following excerpt and further stated that:

> *[114] In the Law of Restitution, 1998, 5th edition, p. 15, the learned authors Goff and Jones note that:-*
>
> > *In restitution, as in other subjects, recourse must be had to the decided cases in order to transfer general principle into concrete rules of law. As Lord Wright once said of Lord Mansfield's famous dictum in **Moses v. Macferlan**: 'Like all large generalisations, it has needed and received qualifications in practice...The standard of what is against conscience in this context has become more or less canalised or defined, but in substance the juristic concept remains as Lord Mansfield left it.'*
> >
> > *As might be expected a close study of the English decisions, and those of other common law jurisdictions, reveals a reasonably developed and systematic complex of rules. It shows that the principle of unjust enrichment is capable of elaboration and refinement. It presupposes three things. First, the defendant must have been enriched by the receipt of a benefit. Secondly, that benefit must have been gained at the plaintiff's expense. Thirdly, it would be unjust to allow the defendant to retain that benefit. These three subordinate principles are closely interrelated, and cannot be analysed in complete isolation from each other. Examination of each of them throws much light on the nature of restitutionary claims and the principle of unjust enrichment.*
>
> *[115] In the context of the instant case, the law of restitution presupposes three things. Firstly, that the defendants were enriched from a benefit received; secondly, the benefit was derived at the claimant's expense and thirdly, that it would be unjust to allow the defendants to retain that benefit.*
>
> *[116] In **City Properties Limited v New Era Finance Limited** [2016] JMCC Comm. 1, Edwards J. stated at para. 63:*
>
> > *So a claimant must have given up something to the benefit of a defendant without it being a gift and the defendant must have freely accepted that benefit and had at least incontrovertibly benefitted from the claimant's loss. Restitution as a legal proposition can no longer be termed new and has firmly taken root in the common law.*

[12] Straw JA in **Clayton Morgan & Company v The Estate of Sandra Graham-Bright, Gifford Thompson & Shields, Lord Anthony Gifford and Hugh Thompson** [2020] JMCA Civ 50 relied on the following excerpt in relation to "an unjust enrichment claim" at paragraph 525, the learned authors of Halsbury's Laws of England, Volume 88 (2019), states:

> *"Where work has been done and it is necessary to ascertain the rights and obligations of the parties, the party who has done the work may be able to bring an unjust enrichment claim against the recipient. In order to do so, the claimant must show that the defendant was enriched at the claimant's expense as a result of the work which has been done. The unjust factor in anticipated contract cases will usually be failure of consideration but may also be mistake. To show that the work was done for a consideration that failed, the courts will have regard to the basis on which the work was done to ascertain whether the work was performed on the shared basis that it would be remunerated under an anticipated contract which failed to materialise."*

MONEY HAD AND RECEIVED

[13] Brooks JA in **Sherrie Grant v Charles McLaughlin and Collin Smith** [2019] JMCA Civ 4 stated that:

> *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 quasicontract, 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."

[14] Straw JA in **Clayton Morgan & Company v The Estate of Sandra Graham-Bright, Gifford Thompson & Shields, Lord Anthony Gifford and Hugh Thompson** also considered the following excerpt from Halsbury's Laws of England, Volume 88 (2019) at paragraph 405, where it is stated under the heading, "money had and received":

> *An action for money had and received was a form of action used by claimants who were, for example, seeking to recover from the defendant money which had been paid to the defendant: (1) by mistake; (2) upon a consideration which had totally failed; (3) as a result of imposition, extortion or oppression; or (4) as the result of an undue advantage which had been taken of the claimant's situation, contrary to the laws made for the protection of persons under those circumstances. Money had and received proved to be perhaps the most influential of all the restitutionary claims, being the most flexible and the most commonly used. As framed, it only applies to claims to recover money paid by the claimant to the defendant. The scope of the law of unjust enrichment and restitution is not, however, defined by the action for money had and received; there are restitutionary claims which do not fall within the province of the action and, equally, there are claims which do fall within the scope of the action which are not restitutionary in nature. It is only those claims which fall within the scope of the action for money had and received and which are founded upon the principle of unjust enrichment which fall within the scope of the law of unjust enrichment."*

EQUITABLE MORTGAGE

[15] The creation, effect and enforcement of an equitable mortgage was succinctly dealt with by Nembhard J in **Karin Murray v Brilliant Investments Limited and Shurnette Davis (Representative of the Estate of Allan Davis) and Brilliant Investments Limited v Jennifer Messado** [2022] JMSC Civ 67. Nembhard J stated that:

> ***Mortgage***
>
> *[14] A mortgage may be both legal and equitable. It is a disposition of property as security for the repayment of a loan or discharge of an obligation. Generally, whenever a disposition of an estate or interest is originally intended as a security for money, whether this intention*

appears from the deed itself, from any other instrument or from oral evidence, it is considered as a mortgage and redeemable.

The burden and standard of proof

[15] Where a claimant alleges that a mortgage has been created, a burden of proof is cast on him or her to prove his or her case on a balance of probabilities. This principle was enunciated by Sir Robert Megarry V-C in ***Re Alton Corporation*** *[1985] BCLC 27, at page 33, paragraph b:-*

> *"It must be for the party who sets up the existence of a mortgage to satisfy the court, on the civil standard of proof, that a mortgage has been created."*

[16] In ***Miller v Minister of Pensions*** *[1947] 2 All ER at pages 373-374, Denning J, speaking of the degree of cogency which evidence must reach in order that it may discharge the legal burden in a civil case, said: -*

> *"That degree is well settled. It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not', the burden is discharged but if the probabilities are equal it is not."*

The creation of an equitable mortgage

[18] Where the mortgagor executes a document purporting to charge his interest in land, which document does not satisfy the requirements of the ROTA, the question to be determined is, what is the effect that that document has, if any at all.

[19] There can be no doubt that the owner of an interest in land may create an equitable mortgage.

[20] One method by which an equitable mortgage may be created is by the delivery to the lender of the title deeds relating to the borrower's land, accompanied by a demonstrably clear intention to treat the land as security for the monies advanced. See – ***Fitzritson v Administrator General*** *(1969) 11 JLR 288; (1969) 15 WIR 94, as per Graham-Perkins J (as he then was). It is not necessary that any general words of charge be used. It is sufficient if the court can fairly gather from the instrument an intention by the parties that the property referred to in the document should constitute a security. See –* ***Cradock v Scottish Provident Institution*** *(1893) 69 LT 380, at page 382, per Romer J*

[21] The law clearly establishes that an equitable mortgage may be created by: -

a. an agreement to create a legal mortgage;

b. a mortgage of an equitable interest;

c. a mortgage that fails to comply with the formalities of creating a legal mortgage See – Halsbury's Laws of England/Mortgage (Volume 77 (2021))/3, at paragraph 215; or

d. a deposit of the title deeds or duplicate certificate of title to the lender See – Fitzritson v Administrator General (supra).

The effect of an equitable mortgage

*[22] An equitable mortgage creates a charge on the property but does not convey a legal estate or interest to the mortgagee. It only transfers an equitable estate or interest in the property. The legal interest in the property remains with the mortgagor (**Downsview Nominees Ltd. and Another v First City Corporation Ltd. and Another** [1993] A.C. 295, at page 311 C-E). The operation of an equitable mortgage is that of an executory assurance, which, as between the parties, and so far as equitable rights and remedies are concerned, is equivalent to an actual assurance, and is enforceable under the equitable jurisdiction of the court (**Downsview Nominees Ltd. and Another v First City Corporation Ltd. and Another** (supra)).*

Enforcement of an equitable mortgage

[23] Under the equitable jurisdiction of the court, an equitable mortgagee may be entitled to a variety of equitable remedies. Halsbury's Laws of England Volume 77 (2021), at paragraph 248 provides a detailed summary of the remedies available to an equitable mortgagee. It reads as follows: -

> *"An equitable mortgagee is entitled to possession if there is a special agreement or the court so orders. He may appoint a receiver if empowered to do so expressly or by statute; otherwise an application to the court is necessary. If an express or statutory power exists he may sell the property and may have express powers enabling him to convey the legal estate. He may obtain an order for sale, specific performance, or foreclosure; and he may, instead of proceeding against the security, bring a claim on the personal covenant."*

[24] Additionally, an equitable mortgagee by deposit is entitled to call for a legal mortgage, even in the absence of an express agreement, unless the right is excluded by an agreement.

*[25] In **Jamaican Redevelopment Foundation Inc v Anthony Everald Ferguson** Claim No. 2010 HCV 03288, unreported, judgment delivered on 22 July 2011, Brooks J (as he then was) in speaking of the enforcement of an equitable mortgage stated as follows: -*

> *"For the equitable mortgagee to have the right to call for a legal mortgage to be executed, requires an intention on the part of the mortgagor to create a mortgage. There, however, need be no specific words to that effect. So long as the right has not been excluded, the mortgagee, who has had a title deposited with him as security, may call for a legal mortgage."*

Approaching the court

[26] The procedure with respect to mortgage claims is outlined in Part 66 of the Civil Procedure Rules, 2002 ("the CPR"). Rule 66.2 provides that a mortgage claim is to be commenced by way of a Fixed Date Claim Form and is to be supported by evidence on affidavit.

[27] The cogency of the evidence required is also provided for by the CPR. Rule 66.4 of the CPR provides that the supporting evidence is to include: -

(a) exhibiting a copy of the original mortgage;

(b) exhibiting a copy of any other document which sets out the terms of the mortgage;

(c) giving particulars of –

i. the amount of the advance;

ii. the interest payable under the mortgage;

iii. the amount of any periodic payments required to be made and stating whether or not such payments include interest;

iv. the amount of the repayments that have been made;

v. the amount of any repayments or interest due but unpaid at the date of the claim and at the date of the affidavit;

vi. the amount remaining due under the mortgage; and

vii. where the claim includes a claim for interest to the date of judgment, the daily rate at which such interest accrues.

[16] Brooks J in **Jamaica Redevelopment foundation Inc v Anthony Everald Ferguson** (supra) stated that:-

*[8] One method by which an equitable mortgage may be created is "by the delivery to the lender of the title deeds relating to the borrower's land, accompanied by a demonstrably clear intention to treat the land as security for the monies advanced" (per Graham-Perkins J (as he then was) in **Fitzritson v Administrator General** (1969) 11 JLR 288; (1969) 15 WIR 94.*

*[9] Similarly, Romer J, in **Cradock v Scottish Provident Institution** (1893) 69 LT 380, at p. 382 said: "To constitute a charge in equity by deed or writing it is not necessary that any general words of charge should be used. It is sufficient if the court can fairly gather from the instrument an intention by the parties that the property therein referred to should constitute a security." That decision was affirmed on appeal. (See (1894) 70 LT 718).*

COMPOUND INTEREST

[17] Campbell J in the case of **Casilda Silvest** (supra) discussed the aim of awarding interest. He stated at paragraphs 19-20 that:

"[19] The aim of awarding interest is not to punish the Defendants. Forbes J, in the case of Tate & Lyle Food & Distribution Ltd v Greater London Council & Anor [1981] 3 All E.R. 716 at page 722, is apposite. He said:

"… I do not think the modern law is that interest is awarded against the defendant as a punitive measure for having kept the plaintiff out of his money. I think the principle now recognized is that it is all part of the attempt to achieve restitutio in integrum. One looks, therefore, not at the profit which the defendant wrongly made out of the money he withheld (this would indeed involve a scrutiny of the defendant's financial position) but at the cost to the plaintiff of being deprived of the money which he should have had. I feel satisfied that in commercial cases the interest is intended to reflect the rate at which the plaintiff would have had to borrow the money to supply the place of that which

> *was withheld. I am also satisfied that one should not look at any special position in which the plaintiff may have been; one should disregard, for instance, the fact that a particular plaintiff, because of his personal situation, could only borrow money at a very high rate or, on the other hand, was able to borrow at specially favourable rates. The correct thing to do is to take the rate at which the plaintiffs in general could borrow money."*
>
> *[20] The applicable rate may be determined by adducing oral or documentary evidence. The rate so determined would naturally contemplate the vagaries of the money market, as it applies to the plaintiffs generally. In British Caribbean Insurance Company Limited v Delbert Perrier, at page 354, Carey J.A, laid down the following important guidelines. He said:*
>
> > *"this leads me to venture the rate which a judge should award in what may be described as commercial cases. It seems to me [to be] clear that the rate awarded must be a realistic rate if the award is to serve its purpose. The judge, in my view, should be provided with evidence to enable him to make that realistic award. In the case just cited, evidence was in fact led by the plaintiff, but I can see no objection to documentary material being properly placed before the judge. Statistics produced by reputable agencies could be referred to the judges to enable him to ascertain and assess an appropriate rate."*

[18] I am guided by Sykes J in **RBTT Bank Jamaica Limited v YP Seaton, Earthcrane Haulage Limited, YP Seaton & Associates Company Limited consolidated with YP Seaton v RBTT Bank Jamaica Limited** [2014] JMSC Civ 139, where he stated, in deciding whether compound interest should be awarded, that:

> *The House of Lords decided in **Sempra Metals v Inland Revenue Commissioners and another** [1998] 1 AC 561, that compound interest is a fact of commercial life and it reflects economic reality. Importantly, the House decided that irrespective of the position in equity, the common law now had the power to award compound interest. The Court of Appeal of Jamaica in **YP Seaton & Associates Company Limited v The National Housing Trust** [2013] JMCA 44 accepted the reasoning in Sempra and held in that case that the arbitrator had the power to award compound interest. There is nothing in the reasoning of McIntosh JA that suggested that her Ladyship's analysis was restricted to the particular facts of the case. Her Ladyship was making the point, following Sempra, that Jamaican law had followed the same path as that outlined in Sempra. McIntosh JA expressly relied 'on the general propositions relating to compound interest contained therein insofar as they are relevant to the issue in the instant case' (para 27). Her Ladyship noted that the reasoning in Sempra was not*

> *out of step with the Privy Council's decision in* ***Financial Institutions Services Ltd v Negril Holdings Ltd*** *(2004) 65 WIR 227. In that case, one of the issues was whether there was evidence that banks in Jamaica charged compound interest on overdraft facilities. Their Lordships reviewed the evidence (see paragraph 33 of advice) – which consisted of National Commercial Bank charged compound interest for near onto 30 years prior to the testimony in that case; Citibank had charged compound interest for about 24 years prior to the testimony in the case; the Bank of Nova Scotia charged compound interest for 106 years prior to the testimony; Mutual Security Bank had charged compound interest – and concluded that the evidence established that compound interest was the banking practice in Jamaica. Lord Walker, speaking on behalf of the Board, described the matter at paragraph 34 in this way*
>
> > *This evidence established, with striking unanimity, that interest on overdrafts with commercial banks was calculated on a daily basis and charged to the account on the last working day of the month. This produced the effect of compound interest, although not all the witnesses used that particular form of words to describe it. In only one case (the NCB) was it clearly established that this practice was, at the material time, covered by an express contractual term*

ANALYSIS

A. *What were the terms of the joint venture entered into by the parties?*

[19] The parties are *ad idem* that they entered into a joint venture whereby the Claimant would provide financing for the 2nd Defendant and for the development of 2 properties. Brown, Y J in **Donald Rose Silvera & Joan Patricia Lindsay v Alphanso Curtis** [2017] JMSC Civ 221 was dealing with whether an agreement was a joint venture or tenancy relied on The Encyclopedia of Terms and Precedents 5th Edition, Volume 19 for the definition of a joint venture, which stated that:

> *A joint venture may be defined…as any arrangement whereby two or more parties cooperate in order to run a business or to achieve a commercial objective.*
>
> *At paragraph 31, it states that in a joint venture it is important to establish the nature of the business or the project which the parties have in mind, including the type of activity, its geographical scope, and the extent to which any party is committed to it to the exclusion of other similar activities.*

[20] Since the parties are *ad* idem on this point, I see no need to make a definitive finding. However, some of the terms of the joint venture has caused much contention between the parties. For ease of understanding, I will deal with each aspect of the joint venture separately. Firstly, I will deal with the aspect concerning the monies advanced for the conduct of the 2nd Defendant's business and then the issues surrounding the development of the Haws Pen properties.

Conduct of the 2nd Defendant's business

[21] It is agreed between the parties that the Claimant would provide financing for the 2nd Defendant and in exchange he would receive shares and be appointed as a Director of the 2nd Defendant. Therefore, there is no need for me to make a finding in regard to this aspect as both sides accepted this as a term of the joint venture. The crux of the contention between the parties is whether the sums advanced by the Claimant to conduct the business of the 2nd Defendant were in fact loans which ought to have been repaid by the Defendants or whether the sums advanced were investments which were not to be repaid by the Defendants.

[22] The Claimant sought to rely on a letter dated March 19, 2012 from the 1st Defendant to him which referenced discussions they had regarding the investment the Claimant was to make in the 2nd Defendant. The letter further stated that it was agreed initially, that One Million Five Hundred Dollars ($1,500,000.00) would be invested in the 2nd Defendant and in exchange, the Claimant would be appointed Director and offered shares. It is important to note, that this letter was not signed by the 1st Defendant, in fact it was an unsigned letter which has her particulars on it. The Claimant has also placed before this Court, several invoices which categorizes the sums advanced to the 1st Defendant as *"business/investment loans."* Some of these invoices were signed as received and some of them were not.

[23] I am willing to accept the evidence of the Claimant that the sums advanced were in fact loans which ought to have been repaid. However, I do not accept that this

ought to be applied to every sum advanced by the Claimant. Even though, I am of the view that the characterization of these payments as investments does not reasonably lead one to conclude that they ought not to be repaid. I agree with the submissions of Learned Counsel for the Defendants that the various terms used to describe the sums advanced are instructive. One such term referred to the sum advanced as "directors input." Throughout the documentary evidence, the 1st Defendant herself categorized some of the sums as a loan. One such example can be seen in the email thread of May 1, 2012 where the Defendant indicated that they would borrow a sum of money and even gave an interest rate. Another example can be seen where the 1st Defendant signed the invoices and therefore accept the sums as a business investment/loan.

[24] I am therefore of the view that, the terms of the joint venture were that the Claimant would be reimbursed for sums that were clearly classified as loans and that he would share in the profits of the 2nd Defendant's business in relation to the other sums expended. Even if I am wrong, and the intention of the parties was that the Claimant would invest in the 2nd Defendant on an equity basis, the Claimant would still be entitled to some compensation for the sums advanced.

Haws Pen properties

[25] There are two (2) letters which are before me which deal with the Haws Pen properties and a project that the parties have termed "Project Operation Grow." The first letter is an unsigned letter from the 1st Defendant to the Claimant and states that she would assign 30 acres of the land for the Project to the Claimant until the project is completed so as to secure his interests and also provide a return on his investment which will be agreed upon. The second letter is dated March 26, 2012 from the 1st Defendant to the Claimant which speaks to the Haws Pen properties and states Claimant's involvement in the project, which is to clear the mortgage and implement Project Operation Grow, will be done on an equity basis. The letter outlines the value of the inputs and further stated that Lot 2 Haws Pen will be used as security.

[26] The Claimant's position is that he was to hold on to the titles of both properties and the letter of March 26 was an attempt by the 1st Defendant to change the terms of the agreement regarding Project Operation Grow. The 1st Defendant does not agree with this position. Her position is that the Claimant was to only retain the title for Lot 2 Haws Pen. I accept the evidence of the 1st Defendant in this regard. There is a document that was tendered as an exhibit which the Claimant has admitted to writing and admitted that his signature appeared at the end of it which clearly states that they were to retain the title of Lot 2 Haws Pen. There is no other documentary proof to support what the Claimant is alleging. Even having received the letter of March 26, there is nothing from the Claimant to show that he does not agree with the contents or any other proof of what he is alleging.

[27] In light of that, I am inclined to accept that the Claimant was only to retain the title for Lot 2 Haws Pen. The Claimant has not put forward any proof that the joint venture included Lot 3 Haws Pen. Project Operation Grow involved 30 acres of land which was accounted for with Lot 2 Haws Pen which was 104 acres.

B. *Has there been a breach of those said terms by either party?*

The Claimant

[28] The logical question that follows is whether or not there has been a breach of the terms of the joint venture by the Defendants. The answer to that question is yes. Even though, it was agreed that the Claimant would be appointed as a Director and would receive shares in the 2nd Defendant, there is no evidence that was done. There is also no evidence that the Claimant was repaid for any sums advanced as loans and/or investments to the Defendants. The 1st Defendant herself admitted during cross-examination that she started the process to have the shares computed and assigned to the Claimant but it was not complete. One of the witnesses for the Defendants, Ms. Edna Campbell, indicated that she was a Chartered Accountant and she was contracted by the 2nd Defendant to review the financial and business information of the company with a view to determine the

value of the company and the number of shares to be allocated to the Claimant based on the amount of money he had invested in the company. However, before she was able to complete her analysis, she was asked to return all the documents to the company as the Claimant wished to do the analysis himself, which she did.

[29] The Claimant has denied that this is so. However, I am not prepared to make a finding that this was in fact so or not so. The evidence is that it was agreed between the parties that certain things would happen based on the Claimant's investment, however, they were not done. The fact that they were not is a *prima facie* breach of those terms.

[30] The agreement in relation to Lot 2 Haws Pen had a timeframe by which it was to be completed by. The Claimant maintained that he saw no steps being taken to have the property developed. A year after this aspect of the agreement was entered into the Claimant alleges that he saw still no steps being taken regarding the development and he was not repaid any sums. This was evidenced in the letter from the Claimant's Attorney-at-Law at the time to the Defendants' Attorneys-at-Law at the time. The debt that the Claimant incurred regarding Lot 2 Haws Pen has still not been repaid, nor is there any evidence before me of that. I therefore find that the Defendants have breached the terms of the joint venture.

The Defendants

[31] The Defendants have counterclaimed for breach of contract by the Claimant. I see no merit in their counterclaim. I see no evidence of a breach of the joint venture by the Claimant. While I find merit in Learned Counsel for the Defendants submission that the Claimant had no right to retain the title for Lot 3 Haws Pen, I do not see how it amounts to breach of contract.

[32] Perhaps, if the Defendants had a made a counterclaim for damages in respect of the wrongfully held title, I would be minded to find in favour of them. However, no such claim being made and no loss of damages being proved, I am unable to make

a finding in this regard. I therefore find, that there is no breach of the terms of the joint venture by the Claimant, and by extension no breach of contract.

C. *Whether the criteria exist for piercing the corporate veil. If yes, whether it is necessary to pierce the cooperate veil and hold the 1st Defendant liable*

[33] Learned Counsel for the Claimant submitted that the 1st Defendant deliberately abused the corporate structure of the 2nd Defendant in order to avoid liability for her personal conduct. It was further submitted that the 1st Defendant used the 2nd Defendant to enter into this agreement with the Claimant on the agreed terms and knew of the 2nd Defendant's obligations under the agreement. The 1st Defendant was also the sole officer who could have effected compliance with the terms of the agreement and she deliberately and knowingly failed to comply with the terms using the 2nd Defendant as a shell to conceal her activities. Learned Counsel contended that the Court should find that the 1st Defendant's purpose for entering into the agreement was to use the 2nd Defendant as a sham for taking money from the Claimant without affording any benefit to him. Learned Counsel supported this with the fact that the 2nd Defendant was only operational for the period whereby the Claimant was "investing" his money into its affairs as after the "investments" ceased, the 2nd Defendant ceased its operations shortly after. It was further contended that, on a balance of probabilities, the 2nd Defendant was actually operating as the alter ego of the 1st Defendant. Learned Counsel for the Defendants made no submissions in this regard.

[34] Having examined the cases, it is clear that the Court will pierce the corporate veil where there is evidence that there is abuse of the separate legal status of the company for the purpose of some wrongdoing. It is not possible for me at this time to make a finding that the 2nd Defendant was incorporated to evade the legal obligations the 1st Defendant had towards the Claimant as the 2nd Defendant was already incorporated at the time when the joint venture with the Claimant was entered into. However, this does not prevent a finding that the 2nd Defendant at the time of the joint venture was being used a sham or façade by the 1st Defendant to

conceal some wrongdoing. There are some instances where the lines between the 1st Defendant and the 2nd Defendant are blurred. The 1st Defendant operates the 2nd Defendant in an informal manner, for example letters are sent on the letterhead of the 1st Defendant in some instances and other times it is on the letter head of the 2nd Defendant. However, this does not amount to an abuse of the corporate structure of the 2nd Defendant. It is not in dispute that the monies advanced by the Claimant was used to conduct the business of the 2nd Defendant. The 2nd Defendant only has 1 director and 1 shareholder so, the money could only have gone to the 1st Defendant. The liability is therefore the company's, that is the 2nd Defendant.

[35] There is no evidence of an abuse of the corporate structure of the 2nd Defendant for some wrongdoing. The 1st Defendant in cross-examination stated that the 2nd Defendant is a limited liability company and is separate from her. That is a fact. The 1st Defendant's knowledge of company law cannot be used against her and it cannot be said that the veil ought to be pierced where a legal liability was incurred by the company. The fact that the 2nd Defendant was only operational for the period whereby it was in a joint venture with the Claimant does not, in my view, show abuse of the corporate structure and the separate legal personality of the 2nd Defendant by the 1st Defendant which is relevant to these proceedings.

[36] Throughout the case and Learned Counsel's submissions, the distinction between the agreement entered into regarding the investment in the 2nd Defendant and the agreement entered into regarding the Haws Pen property sometimes become a little blurred, I see the need to treat them as separate and distinct under this issue specifically. In my view, the agreement entered into regarding the Haws Pen property was an agreement between the 1st Defendant and the Claimant. The properties belonged to the 1st Defendant and for whatever reason, she wanted them to be developed and sought the assistance of the Claimant. The 1st Defendant would therefore be liable for whatever findings are made by me in respect of any liability or damages in respect of the Haws Pen property. Therefore, there is no need for the piercing of the corporate veil for this agreement.

D. *Whether the Defendants were unjustly enriched at the expense of the Claimant*

[37] In determining this issue, there are four (4) elements that must be considered. In light of the above reason separating the two (2) agreements, they will be dealt with separately under this issue as well. However, I am of the view that the two of the elements can be dealt with together. The first element is whether the Defendants were enriched. This element can also be tied in with the second element which is whether this enrichment was at the expense of the Claimant. The answer to both those questions is yes. The Defendants are not disputing that the Claimant advanced sums to them. It is also not in dispute that the Defendants were facing financial difficulties.

[38] Learned Counsel for the Defendants submitted that in circumstances where the Claimant has agreed that he advanced money to the 2nd Defendant for investment purposes it is difficult to see how a claim for unjust enrichment, money had and received and restitution could arise as these remedies are usually based on a defendant committing an equitable wrong, which has not been pleaded. Respectfully, I do not agree with Learned Counsel for the Defendants. The Claimant has alleged that the Defendants' breached the terms of the joint venture agreement. The Claimant is not simply stating that he advanced sums and as such the Defendants were unjustly enriched. The Claimant advanced sums to the Defendants which at the time they both needed and therefore it must follow that they were enriched.

Conduct of the 2nd Defendant's business

[39] In relation to the third element I am guided by the principle relied on by Brooks J in **Earle Alexander Shim**, where he stated that:

> *Bearing in mind that one need not point to any fault on the part of the defendant in considering this question (despite the approach in Dextra Bank), it is appropriate to consider a concept known as "unjust enrichment*

> *by subtraction". The rationale behind this concept is the existence of factors "that render a defendant's enrichment unjust where the enrichment has been subtracted from the claimant". (See page 42 of The Law of Restitution)*
>
> *Mr. Burrows continues by saying that identifying unjust enrichment is not a matter of individual morality but must be guided by the case law. There is case law which establishes that mistake is one of the main factors which can render enrichment unjust. In Kelly v Solari [1841] 9 M & W 54 at page 58, Parke, B. said:*
>
> > *"I think that where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true, which would entitle the other to the money, but which fact is untrue, and the money would not have been paid if it had been known to the payer that the fact was untrue, an action will lie to recover it back and it is against conscience to retain it…"*

[40] I found useful this excerpt from the text Sourcebook of Restitution Law in the Commonwealth Caribbean by Zanifa McDowell at page 16, where she stated that:

> *The reference to unjust enrichment is not an appeal to individual morality; rather it must reflect what the decided cases show to be legally unjust and must be conceptually precise enough to ground restitutionary entitlements in future cases. For restitution by subtraction, unjust factors have been recognised, that is, factors the law recognises as rendering the enrichment deserving of reversal. The main unjust factors in English law are mistake, compulsion, failure of consideration and arguable free acceptance, although this by no means an exhaustive list, and Burrows lists at least eleven unjust factors. These factors are separate from wrongs (torts, breaches of contract, breaches of trust and fiduciary duties and so forth) which may trigger restitution for wrongdoing.*

[41] I also found useful the following paragraphs of the Halsbury's Laws of England, Volume 88 (2019) under the heading, "Failure of Consideration: Money Cases"

> *486. In general*
>
> > *The value of benefits transferred by the claimant to the defendant for a consideration which has wholly or totally failed is, in principle, recoverable, even in a case where the effect of allowing the claimant to recover is to enable him to escape from a bad bargain. A partial failure of consideration will not generally entitle a claimant to recover the value of the benefit which has been conferred on the defendant.*

> *488. The meaning of 'failure of consideration'.*
>
> *It was once thought that a claimant had to avoid a contract ab initio in order to be able to establish that there had been a total failure of consideration. It is now settled, however, that the test is not whether there has ever been a contract, but whether there has ever been any performance by the defendant of any of his obligations under the contract. While it has been stated that the phrase 'failure of consideration' 'is one which in its terminology presupposes that there has been at some stage a valid contract which has been partially performed by one party', examples can be found of cases in which an identical, or at least very similar, principle seems to operate in a non-contractual context. Thus a claimant who pays money to the defendant on a 'subject to contract' basis and who then decides that he does not wish to go through with the purchase is entitled to recover from the defendant the sum so paid5. Other examples can be found of money which has been advanced for a particular purpose and which has been held to be recoverable by the pay or when the purpose for which it was paid has subsequently failed.*

[42] It is clear from the evidence that the enrichment was at the expense of the Claimant as he has not been repaid or given any shares, profits or even appointed as a Director of the 2nd Defendant as was agreed. The Claimant has also not received any repayment of loans given to the 2nd Defendant. This in my view makes the enrichment unjust. Even though the sums advanced were given voluntarily, there was failure of consideration on the part of the 2nd Defendant in the performance of the joint venture. Even if I am wrong in this regard, I am of the view that the enrichment of the 2nd Defendant is unjust by subtraction.

Lot 2 Haws Pen

[43] The 1st Defendant is also not disputing that the Claimant discharged her mortgage on the Haws Pen properties. The Defendants were saved the costs of expending those sums themselves. The 1st Defendant was even at risk of losing the Haws Pen properties as she had defaulted on her mortgage payments. It is clear that the fact that the Claimant discharged the said mortgage meant that the 1st Defendant would still retain the benefit of owning the properties.

[44] Nothing was done regarding the development of Lot 2 Haws Pen and as such the Claimant was not able to recover his interest in same as an equity partner to the 1st Defendant for same. The 1st Defendant by not taking any steps to have the property developed, breached the agreement entered into by the parties. In my view, there is a failure of consideration on the part of the 1st Defendant, and the enrichment was unjust by subtraction.

E. *Does the Claimant hold an interest or equitable mortgage on the 1st Defendant's properties?*

[45] Learned Counsel for the Claimant submitted that the fact that the Claimant paid the sums to clear the mortgage, the said titles being delivered to his Attorneys-at-Law, and the March 26, 2012 letter fulfils the formalities that are required to create an equitable mortgage. Learned Counsel for the Defendants seems to be in agreement with this, with the exception that it would only be in relation to Lot 2 Haws Pen. In light of my findings that the agreement was only in respect of the property at Lot 2 Haws Pen, I will only consider whether an equitable mortgage was created for that property.

[46] There is similarity in this case and the case of **Fitzritson v Administrator General.** The evidence is that the Claimant discharged the mortgages for the 1st Defendant, who had defaulted on her payments and was at risk of losing the properties. It is evident from the letters that the title was intended to be used as a security until the property was developed and sold. It is clear from the evidence before the Court that there was no agreement in respect of the rate of interest to be applied. It seems to me as if the Claimant and the 1st Defendant did not settle on applicable interest rate. As the letters say that the Claimant was an equity investor and they would determine the percentage of the profits to be paid to him. The evidence before me shows that the 1st Defendant's intention was that the title be used as security in respect of Project Operation Grow. As a result of that, an equitable mortgage was created in my view. The mortgages being paid and the Claimant

having not received any monies, can therefore claim back for the monies advanced in Project Operation Grow.

F. *What remedies, if any, are available to the parties?*

[47] In light of my findings, it surely follows that the Claimant is entitled to be compensated. The Claimant is therefore entitled to restitution by virtue of a refund of the sums he advanced to the Defendants.

[48] In relation to the conduct of the business of the 2nd Defendant, I am of the view that the Claimant is only entitled to those sums that were marked as "Investments/Loans." However, having regard to the fact that the 2nd Defendant is not operational and has not been operating since September 2012 I see no benefit in ordering that the Claimant's investment in the 2nd Company be valued. The Defendants are seeking an order that the accounts of the partnership be settled. It would be an exercise in futility. I am of the view that, given the contention between the parties and the antiquity of the claim, the case ought to be completely dealt with at this stage. Even though, the Claimant ought to be compensated for his loss, the Court cannot accept figures placed before it without some objective proof of accuracy or veracity. Similarly, in **Earle Alexander Shim**, Brooks J, was of the same view and he held that the Claimant's valuation of his own work could not properly be used in assessing his own loss.

[49] Several receipts from wholesales, gas stations and grocery stores were placed into exhibit. I am unable to make an award for restitution for those sums as there is no evidence before the Court that the Claimant gave those sums as a loan, investment or cash advance to the 2nd Defendant. I find the Claimant to be a credible witness and he kept records of the sums that he advanced, however, I cannot ignore the fact that his records are clear as to what sums were loans, investments or cash advances. The Claimant exhibited and included in the Bundle of Agreed Documents invoices, cheques and receipts which clearly stated what the sums were for and as such, in my view, he is only entitled to those sums. The

Claimant is therefore entitled to recover the following: exhibits 32 (i-k), pages 10-27 of Bundle which does not include the receipt for April 3, 2012 for "Director's Input,' and pages 31, 48 and 53. All other invoices and receipts were not accepted by me as being a loan, investment or cash advance.

[50] In relation the Haws Pen property, it is my judgment that the Claimant be entitled to the sums as claimed on the Amended Claim Form. There is documentary proof of what was spent to discharge the mortgage and further how much money the Claimant invested in the property.

G. *Is the Claimant entitled to compound interest?*

[51] It is settled law that the purpose behind an award of interest on a judgment sum is to put the Claimant in the position in which he would have been had he not suffered this loss/deprivation as occasioned by the Defendant. Section 3 of **the Law Reform (Miscellaneous Provisions) Act** gives the Court the power to award interest on debts and damages. It gives the Court the discretion to award interest at such rate as it thinks fit on the whole or any part of the debt or damage for the whole or any part of the period between the date when the cause of action arose and the date of the judgment.

[52] I found the case of **British Caribbean Insurance Company v Delbert Perrier** (supra) to be very useful. Carey J.A. stated in relation to the applicable interest rate in commercial cases that:

> *This leads me to venture the rate which a judge should award in what may be described as commercial cases. It seems to me clear that the rate awarded must be a realistic rate if the award is to serve its purpose. The judge, in my view, should be provided with evidence to enable him to make that realistic award. In the case just cited* (**Motor & General Insurance Co Ltd v Gobin** (1986) 34 WIR 199) *evidence was in fact led by the Plaintiff; but I can see no objection to documentary material being properly placed before the judge to enable him to ascertain and assess an appropriate rate. If, as suggested in* ***Long Young (Pte) Ltd v Forbes Manufacturing & Marketing Ltd*** *(1986) 40 WIR 229, it is desirable that a claim for interest should be included in the prayer, that would remind the parties that evidence can be adduced at the trial. In summary, the position stands as thus: (i) awards should include an order for the defendant to pay interest;*

> *(ii) the rate should be that on which the plaintiff would have had to borrow money in place of the money wrongfully withheld by the defendant; and (iii) the plaintiff is entitled to adduce evidence as to the rate at which such money could be borrowed. Having regard to the evidence led before the trial judge, viz the contents of the statistical digest published by the Bank of Jamaica, he was entitled to fix the rate at which he did…*

[53] Learned Counsel for the Claimant contended that the Court should take into account:

> *(a) It is impossible to borrow commercially on simple interest terms. The commercial reality as accepted in the authorities cited is that in commercial transactions, interest is calculated on the basis of compound interest;*
>
> *(b) The funds were loaned to the Claimant over nine (9) years ago. The commercial value of the funds loaned to the Claimant would have appreciated over time having regard to the economic climate in Jamaica (ie $5M in 2014 is now valued exponentially more now than $5M 2023);*
>
> *(c) The Claimant made numerous requests including to fund his personal medical bills and these requests were ignored;*
>
> *(d) The evidence shows that the Defendants derived financial benefit from the Claimant's "investments"; and*
>
> *(e) The award of compound interest is a fair and just outcome when assessing the Claimant's financial loss.*

[54] I find merit in Learned Counsel's submissions. I agree that it has been several years since the joint venture was entered into and monies changed hands. However, I am mindful that an award of interest is not to punish the Defendants. Learned Counsel exhibited the Bank of Jamaica's interest rates. I therefore have before me evidence which would assist me in making a realistic award. I am, however, not persuaded that the award of interest ought to be compounded. The parties due to the informality surrounding their dealings, had nothing in writing regarding interest rates and did not come to a final agreement as to same.

[55] Learned Counsel for the Claimant has averaged the interest for the period over which the sums were advanced. I accept the figure as put forward by Counsel I therefore exercise my discretion and I am prepared to grant an award of interest

at 18.87% per annum representing the average of the time period that the sums were advanced, that is March 2012 to July 2012, to the date of judgment. I believe same is reasonable in the circumstances.

AFTERWORD

[56] Having looked at the evidence that is before me, it is clear that there is not a formal written contract between the parties. Even though they intended to enter into contractual relations, they handled it informally and it has caused serious issues between them. If anything, this should serve as a warning that when embarking on business arrangements, it is extremely important that the terms of the said arrangement are clearly defined and placed in writing to avoid any confusion. Especially in the light of the fact that the Claimant was aware that the Defendants were facing financial difficulties.

ORDERS

[57] Having regard to the forgoing these are my Orders:

(1) Judgment is entered for the Claimant against the 2nd Defendant in the sum of **THREE MILLION ONE HUNDRED AND SIX THOUSAND ONE HUNDRED AND FORTY-SIX JAMAICAN DOLLARS AND TWENTY-THREE CENTS ($3,106,146.23)** with interest at a rate of 18.87% per annum from July 31, 2012 to July 10, 2023.

(2) It is hereby declared that the Claimant holds an equitable mortgage over the 1st Defendant's property being all that parcel of land being Lot 2 Haws Pen in the parish of St. Mary and being all the land comprised in Certificate of Title registered as Volume 1342 Folio 796 of the Register Book of Titles the sum of **FIVE MILLION SEVEN HUNDRED AND NINETY-FOUR THOUSAND ONE HUNDRED AND THIRTY-SIX JAMAICAN DOLLARS AND NINETY-FIVE CENTS ($5,794,136.95)** with interest at a rate of 18.87% per annum from July 31, 2012 to July 10, 2023.

(3) The property located at Haws Pen being Lot No. 2 Part of Haws Pen, St. Mary registered at Volume 1342 Folio 796 of the Register Book of Titles be sold on the open market to enforce the judgment debt in favour of the Claimant against the 1st Defendant in the sum of **FIVE MILLION SEVEN HUNDRED AND NINETY-FOUR THOUSAND ONE HUNDRED AND THIRTY-SIX JAMAICAN DOLLARS AND NINETY-FIVE CENTS ($5,794,136.95)** with interest at a rate of 18.87% per annum from July 31, 2012 to July 10, 2023.

(4) Henlin Gibson Henlin, Attorneys-at-Law are to have conduct of the sale and are to carry out the sale and administer the proceeds thereof in accordance with law and with the directions of the Court as stated herein.

(5) That there be valuations by Allison Pitter & Company or such other reputable valuator of Lot No. 2 Part of Haws Pen, St. Mary registered at Volume 1342 Folio 796 of the Register Book of Titles.

(6) Damages in favour of the Claimant against the 1st Defendant and cost for valuation report is to be satisfied from the gross proceeds of sale of the said land.

(7) Any person in possession or in receipt of the rents or profits, of the land or any part of the land is to deliver up possession of the land or receipt of the rents and profits to Henlin Gibson Henlin within sixty (60) days of the date of this Order.

(8) The Registrar of the Supreme Court is empowered to execute any document or documents with regard to the sale of the property in that the 1st Defendant refuses or neglects to do so within fourteen (14) days of being requested to do so.

(9) Upon completion of the sale of the said Land, the Claimant is to prepare a Certificate of Sale of Land to be endorsed by the Registrar of the Supreme

Court for registration at the Office of Titles in order to complete and give effect to the sale.

(10) The Defendant's counterclaim is dismissed.

(11) Any person in possession of the title of Lot No. 3 Part of Haws Pen, St. Mary registered at Volume 1342 Folio 797 is to deliver up possession of the said title to the 1st Defendant within fourteen (14) days of the date of this Order.

(12) Costs awarded to the Claimant, to be taxed if not agreed.

(13) Claimant's Attorneys-at-Law are to prepare, file and serve Orders made herein.