NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV0307/2007

BETWEEN	MUSSON (JAMAICA) LIMITED	CLAIMANT
AND	CLAUDE CLARKE	DEFENDANT

W. Panton and P. Simmonds instructed by Dunn Cox for the Claimant

V. Chen and S. Edwards instructed by Chen Green & Company for the Defendant

Unjust enrichment-Promissory Note-Guarantee-Subrogation

Heard: May10, 11, 12, June 22, 2010 and June 13, 2011

Lawrence-Beswick J

1. In this matter, the claimant, Musson (Jamaica) Limited, (Musson), is seeking to recover from the defendant, Mr. Claude Clarke, approximately $12 million, claiming that sum to be the amount which Mr. Clarke must pay to discharge his debt to Musson. Musson alleges that Mr. Clarke had a loan from Citibank by virtue of a promissory note and failed to pay when Citibank requested repayment. Musson claims to have guaranteed the loan and as Mr. Clarke's guarantor, paid the sum owed to Citibank.

2. Musson's case is that Mr. Clarke has failed to repay Musson that amount it had paid to Citibank on his behalf and that he thereby unjustly enriched himself. Its claim is for restitution.

3. Mr. Clarke's defence is that he owes no money to Musson or Citibank and that he received money from neither Musson nor Citibank. He asserts that any monies paid to Citibank by Musson resulted from an arrangement between the two entities, using Mr. Clarke as an unwitting party.

The Claim

4. Musson claims that the amount of approximately $12 million being sought from Mr. Clarke arose from a series of promissory notes signed by him, which commenced, according to Musson, with a stamped promissory note, dated November 17, 2000. Mr. Clarke had signed it, promising to pay to Musson $7,937,524.21 for value received.

5. Musson alleges that there were three other stamped promissory notes in 2001 to 2003, signed by Mr. Clarke which were in fact an extension and renewal of the approximately $7 million loan initially granted in 2000, less some payments that were made to reduce the debt.

In its amended claim form, Musson alleges that Mr. Clarke's debt to it is either $12,136,200.07 or $12,935,152.80. The former amount is the debt after the deduction of certain amounts which Musson states were repaid by Mr. Clarke. The latter amount is the debt if Mr. Clarke denies having orally authorised the payment of those amounts to Musson.

The Circumstances under which the Promissory Notes Arose

6. There is no challenge to the legality or authenticity of the promissory notes but the parties are not agreed as to the circumstances under which they arose.

Musson's case is that Mr. Clarke had a personal debt to Musson and willingly signed the promissory notes to pay that debt within a specified time. When that time passed with insufficient payment made, he renewed the promissory note, promising to pay that new debt which would have arisen with the added interest. This continued from 2000 to 2003. Eventually, Musson sold the note to Citibank.

Musson's case is that the debt was owed to Musson as a result of an earlier business transaction between Musson and Mr. Clarke ("the Highgate/Candyman transaction").

7. Mr. Clarke's case is that he signed the notes, not for value for himself but to assist Musson with a cash flow problem which had arisen because of the failure of Highgate Food Products Limited, (Highgate), to pay some monies due to Musson under the said Highgate/Candyman transaction. Mr. Clarke was a director and principal shareholder of Highgate and was well aware of that debt due to Musson. Musson therefore regards the notes as accurately stating the agreement between Mr. Clarke and itself whereas Mr. Clarke regards the notes as a method he used to assist Musson's cash flow problem at Musson's request.

Value received

8. Musson admits to having received value for what it initially described as the first promissory note dated November 17, 2000. It was credited with the amount of the note which it said was the amount Mr. Clarke owed.

Mr. Panton, Counsel for Musson, argues that when Musson sold Mr. Clarke's promissory note to Citibank, this was in fact a transfer to Citibank of Mr. Clarke's indebtedness to Musson and Musson was guaranteeing the payment of the debt.

Mr. Clarke for his part, maintains that he received no value from or for the notes.

9. The first issue therefore is whether Mr. Clarke is estopped from denying that he received value for signing the promissory note.

There is unchallenged evidence of an earlier promissory note dated August 1998. Counsel for Musson altered his initial position and invited the court to say that the November 17, 2000 note was not the first one but rather, was part of a series of renewals commencing with that of August 18, 1998. However, at the same time there is also evidence on behalf of Musson that the loan which Musson alleges was made to Mr. Clarke originated in November 2000.

When did the Promissory Notes/Loan Arise?

10. The pleadings allege two different dates. In the Amended Particulars of Claim,[1] Musson alleges that it was because of a loan agreement of November 17, 2000, that Mr. Clarke was obliged to repay Citibank, the sum of $7,937,524.21, being principal of $5,953,143.10 with interest of $1,984,381.11.

11. But in its Amended Reply, Musson pleads that it was on or about August 18, 1998 that it received money from Citibank as a result of its sale of a promissory note issued by Mr. Clarke to Musson. It alleges further that the note was extended and renewed through other notes until February 2005 when Citibank called on Musson to pay the sum as guarantor.

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[1] Para 3

In evidence is a letter from Musson to Citibank detailing Citibank's purchase of a promissory note from Musson for $9,937,524.21 issued by Claude Clarke. That letter is dated August 18, 1998.

12. For his part, Mr. Clarke alleges the promissory notes arose in August 1998, when a difficulty arose in the Highgate/Candyman transaction. In support of his account as to how the promissory notes arose, he relies on his own testimony and the absence of any evidence from Musson to show that he, Mr. Clarke, personally owed Musson any debt.

The Highgate/Candyman Transaction

13. It is clear that the promissory notes arose as a result of the Highgate/Candyman transaction.

An examination of the transaction is therefore important. Simply put, Musson agreed to distribute Highgate products and share the resulting profits with Candyman Jamaica Limited (Candyman)/Highgate.

In 1993, Highgate had appointed Candyman as the exclusive distributor of its products. Candyman also distributed Kraft products.

On June 5, 1998 Musson agreed to purchase from Candyman, all current stocks of Kraft and Highgate products, and to become the distributor of those products. Candyman would receive 20% of the net profits from the sale of the products.

Candyman warranted that if, at August 15, 1998, any of the goods that Musson had bought had not been sold, then it would refund to Musson that cost and it would also refund any of its receivables that Musson had been unable to collect on behalf of Candyman.

Because Highgate had in 1993 assigned its distributorship rights to Candyman, Highgate was required to consent to any change in the rights. The consent was obtained in this 1998 agreement.

Mr. Clarke was the managing director and principal shareholder of Highgate and regarded Candyman as one and the same as Highgate. Neither Candyman nor Highgate paid the money which had become due to Musson on August 15, 1998.

14. Mr. Hoo Fatt, a former director of Musson confirmed that as of that date Highgate /Candyman owed Musson about $7.9million and were unable to pay. Mr. Clarke's testimony is that he agreed to co-operate with the late Mr. Blades, chairman and managing director of Musson, to prevent Mr. Blades' expressed embarrassment at Highgate's failure to pay which was resulting in a cash flow problem for Musson. At Mr. Blades' request he therefore signed a promissory note dated August 18, 1998 which would allow Citibank to pay Musson the amount of the note, $9,937,524.21 and he thereafter continued to renew the note in accordance with the requests from Mr. Blades.

Guarantee

15. Musson's case is that it guaranteed to Citibank the payment of the note. The stamped guarantee indemnity dated November 18, 2002 states that Musson "unconditionally and irrevocably guarantees payment ... of all moneys, obligations ... now or hereafter due" to Citibank by Mr. Claude Clarke whom it stated had received a loan facility from Citibank. The only evidence of Mr. Clarke having any dealings with Citibank is the promissory note(s).

16. It is unchallenged that Mr. Clarke received no money from either Citibank or Musson. Nor is there evidence of Mr. Clarke being a party to the negotiations between Musson and Citibank concerning the promissory note(s).

Promissory Note Called In

17. The unchallenged evidence is that Musson on November 15, 2004 through Mr. Hoo Fatt informed Citibank that they would no longer guarantee the promissory note of Mr. Clarke and that they, Citibank, should seek to collect the debt from Mr. Clarke.

18. Subsequently, on February 25, 2005, Citibank informed Musson that they had tried unsuccessfully to obtain the money from Mr. Clarke so they were calling on Musson for payment, as guarantor.

19. Musson in discharging its liability to Citibank as guarantor paid Citibank on February 28, 2005 the amount of $5,856,889.17, according to Mr. Peter Walker, Chief Accountant at Musson. On whose behalf was that payment made? The guarantee clearly named Mr. Claude Clarke as the principal debtor. There was mention of neither Candyman nor Highgate.

Is Mr. Clarke the same as Highgate or Candyman?

20. Musson's position is that in its dealings with Mr. Clarke, it regarded him as being one and the same as Highgate. Indeed according to Counsel Mr. Panton, Mr. Clarke provided invoices in his name personally as well as in Highgate's name. He submits that since Mr. Clarke was the managing director and principal shareholder of Highgate, although the transaction was between Candyman, Highgate and Musson, all parties accepted that any debt of Highgate or Candyman was a debt of Mr. Clarke.

To support that, Counsel Mr. Panton argues on behalf of Musson, that the promissory notes make no reference to Highgate but only to Mr. Clarke.

21. However, Mr. Noel Hoo Fatt, former director of Musson testified that although he did not know details of the arrangement between Mr. Clarke and the late Mr. Blades, he knew that Musson kept separate accounts for Highgate and for Mr. Clarke although some entries on Mr. Clarke's account concerned Highgate's transactions. Yet he regarded Candyman and Highgate as the same entity and his evidence is that Musson treated them as such in relation to sharing of profits.

Mr. Peter Walker, Chief Accountant at Musson, confirmed that he treated Highgate, Candyman and Mr. Clarke as the same and only one account was maintained for them.

The question as to whether Mr. Clarke is the same as Highgate or Candyman is fundamental to the issues to be determined.

Evidence of the amount owed

22. It would therefore be useful to consider here, the evidence as to who was/were indebted to Musson. Musson has provided evidence of accounts it maintained for monies owed to it by Mr. Clarke, Highgate and Candyman. The only evidence of indebtedness of Mr. Clarke or the companies to Musson is the indebtedness which resulted from the agreement created on August 15, 1998 that Musson would take over the distribution of Highgate products.

Mr. Peter Walker, the Chief Accountant, testified as to a particular account being Claude Clarke's but agreed that in that account was a transaction concerning Highgate, not Mr. Clarke. Even so, the entry of the transaction was, according to Mr. Walker,

wrong. It was noted as being an interest payment when it should have been noted as profit.

The exhibited accounts start from November 13, 2001 with a balance of $2,236,400.88 and have figures carried forward from a previous page which was not exhibited. Mr. Walker testified that that balance which had been brought forward had been repaid.

The evidence is that accounts prior to January 2001 are destroyed or misplaced or cannot be produced.

23. The Financial Controller of Musson, Mr. Geoffrey Messado, swears in his affidavit that Musson has no documents showing that Highgate was ever indebted to Musson. His evidence is that the debt being claimed is a personal debt of Mr. Clarke which Mr. Messado says is confirmed by the promissory note of August 18, 1998. He gave no evidence as to how that personal debt arose.

24. Witnesses from Musson did not know details as to the accurate amount said to be owed to Musson by Mr. Clarke and how any such amount as there may be, was in fact computed.

Mr. Walker, the Chief Accountant, knew nothing about Musson guaranteeing to pay Citibank if Mr. Clarke failed to pay his promissory note. He had therefore made no provision for that in the accounts he maintained for Musson.

He had no recollection of receiving $7.9 million for Musson on August 15, 1998 as payment for a debt of Highgate. He did not prepare budgets but he checked bank accounts and would expect to have seen evidence of the sale of promissory notes if Musson had sold such notes.

In my view the evidence concerning Musson's accounts in this matter is unhelpful. On November 10, 2008 the Court ordered that Musson must provide to Mr. Clarke all documents relating to the indebtedness of Highgate to Musson which were in their possession. Most of the relevant documents have not been produced and the witnesses for Musson have fundamentally different recollections of the pertinent transactions or have no knowledge of important details.

Mr. Hoo Fatt, the former director, testified as to having acted in accordance with Mr. Blades' directions and not knowing or recalling the details of the Highgate/Candyman transaction.

25. Mr. Clarke relies on the terms of the Highgate/Candyman agreement between Musson, Candyman and Highgate to prove his lack of personal involvement. Nowhere in the agreement is there any reference to him. The parties are named as Musson, Candyman and Highgate.

26. I find on a balance of probabilities that the agreement was between Musson, Candyman and Highgate and that that was the intention of the parties. Both the late Mr. Blades and Mr. Clarke held critical positions in their respective businesses which they represented in the Highgate/Candyman transaction. I find that each would be aware of the difference between the entities of Highgate, Candyman and the person Mr. Claude Clarke and that they put the words in the agreement reflecting their intention to bind Highgate, Candyman and Musson only, not Mr. Claude Clarke in his personal capacity.

Purpose of Promissory Notes

27. Both Mr. Blades and Mr. Claude Clarke were aware that the Highgate/Candyman transaction was between Musson and Highgate, yet both agreed that Mr. Clarke would

sign the promissory notes concerning the agreement. It is my view that this arrangement regarding the notes was as described by Mr. Clarke – an arrangement to facilitate Musson accessing the funds which Highgate/Candyman had failed to pay and to thereby prevent Musson facing the embarrassment of a cash flow problem.

28. Both parties appreciated that the debt was Highgate/Candyman's and both parties co-operated to alleviate the problem by obtaining money through Citibank, with Musson guaranteeing payment of the note which had been signed by Mr. Clarke. Musson and Citibank negotiated that arrangement.

29. I am fortified in my view by the fact that the promissory notes were eventually written with Citibank, not Musson, as the lender. The promissory notes drawn by Mr. Clarke from August 18, 1998 to November 16, 2001 showed Musson as the lender but from February 20, 2002 to December 2003 they showed Citibank as the lender. Musson's witnesses provide no explanation as to why this change occurred. Mr. Clarke's unchallenged evidence is that on each occasion Musson's representatives handed him the promissory note to sign and he signed, not noticing that there had been a change in the payee. Mr. Clarke was a stranger to the details of the arrangement between Citibank and Musson.

Liability under Promissory Notes

30. There is no documentary evidence of Highgate, Candyman or Mr. Clarke having any obligation to Citibank. It is unchallenged that Mr. Clarke owed no money to Citibank and that Citibank paid him no money.

The only parol evidence concerning Citibank's involvement is from Mr. Clarke who testified that it was Mr. Blades who proposed and executed the Citibank arrangement to solve a problem.

31. The arrangement is documented in Mr. Blades' letter to Citibank dated August 18, 1998 where he recites the agreement with Citibank that Citibank would purchase a promissory note issued by Claude Clarke and would have full recourse to Musson as endorser, with the option to call on Musson to purchase the Note with interest. It makes no mention of any liability of Mr. Clarke.

Is Mr. Clarke bound?

32. However, Mr. Clarke voluntarily signed the promissory notes. Is he bound by them? The last note exhibited which Mr. Clarke signed is dated December 19, 2003. In it he promised to pay to Citibank the amount of $5.5 million with Citibank having full recourse to Musson.

The Bills of Exchange Act states:

> *"The maker of a promissory note by making it – (a) engages that he will pay it according to its tenor; (b) is precluded from denying to a holder in due course the existence of the payee and his then capacity to endorse."*[2]

It is Mr. Clarke's case that he signed the note with no intention to make a binding note for which he would be responsible but rather, he did so to assist the late Mr. Blades/Musson. He personally was gaining no benefit.

33. Indeed, in his affidavit, Mr. Messado, Financial Controller of Musson swears that there is no record of any personal debt of Mr. Clarke to Musson. Also, there is no

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[2] s. 88

evidence that Mr. Clarke obtained any benefit from the payment by Musson to Citibank of the amounts under the guarantee.

34. Counsel for Musson argues that all the promissory notes are signed by Mr. Clarke and he cannot now deny that the claim concerns his debt and not the debt of any other entity. Counsel argues further that if Mr. Clarke is suggesting that the debt concerned Highgate and Candyman, and not himself, it does not matter because Mr. Blades would not know on whose behalf Mr. Clarke was signing since Mr. Clarke represented so many entities. Musson thus seeks from Mr. Clarke relief in restitution.

The Law of Restitution

35. The learned authors of **The Law of Restitution** opine that "the principle of unjust enrichment ... 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."[3]

In discussing the right to recoupment they said:

> *"The classic statement of the common law principle is to be found in a passage from the first edition of* ***Leake on Contract****, which was quoted by Cockburn CJ in* ***Moule v Garrett****.*[4]
>
> > *"Where the plaintiff has been compelled by law to pay, or being compellable by law, has paid money which the defendant was ultimately liable to pay, so that the defendant obtains the benefit of the payment by the discharge of his liability; under such circumstances the defendant is held indebted to the plaintiff in the amount."*[5]

[3] Goff and Jones 5th ed. 1998 at pg 15
[4] (1872) LR 7 Ex 101, 104
[5] Goff and Jones supra at pg 437

36. A claim in restitution is not a claim for loss suffered. It is for the benefit, the enrichment, which the defendant gained at the claimant's expense.[6] "[T]he essence of a claim for .... recoupment is that the[claimant] has discharged the defendant's duty to make a payment to a third party."[7]

Clearly, it is the defendant who would have determined if he wishes any duty or perceived duty to be discharged. There is no evidence of a request by Mr. Clarke, or indeed Highgate or Candyman, made of Musson to make any payment to Citibank on behalf of any of them. Recoupment can only be ordered if the claimant had authorized the payment made or had ratified it.[8] No such authorization or ratification occurred here.

Of course, if a claimant under compulsion of law discharges a debt which the defendant owes to a third party, then the claimant has a right to look to the defendant for reimbursement. That is settled law. However, it is not enough that the payer was bound by contract to make the payment.[9] The compulsion must be by law. Here, in the instant case, any debt which may have arisen would have arisen by a contract.

However, it is not clear as to which liability would have been discharged. Is it the liability of outstanding monies under the 1998 transaction owed to Musson or is it the liability to Citibank under the promissory notes?

Not to be overlooked is the requirement that before Mr. Clarke is ordered to make restitution he must have obtained a discharge of his liability by virtue of the payment.

37. Highgate and Candyman had liabilities under the Highgate/Candyman transaction. The agreement warranted that if the goods purchased by Musson from

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[6] At pg 16
[7] At pg 16
[8] At pg 389
[9] The Esso Bernicia [1989] AC 643 HL

Highgate/Candyman had not been sold by Musson by August 15, 1998 then Candyman would refund their cost to Musson. Similarly, if the accounts receivables which had been assumed by Musson had not been collected by that date then Candyman would refund their value to Musson.

However, there is no evidence of Mr. Clarke himself having a liability to Musson under the Highgate/Candyman transaction or indeed any transaction, whether discharged or not.

38. By an agreement dated November 29, 2005, Highgate acknowledged that it by then owed Musson $28 million. The parties agreed that Highgate would settle the debt by November 28, 2011 and in consideration of that agreement Highgate Holdings Ltd temporarily assigned its trade marks to Musson. The parties further agreed that if the debt were not paid by that date it would be deemed settled and the trade marks would remain permanently with Musson. Mr. HooFatt, former director of Musson, was aware of that agreement.

39. This means that Highgate/Candyman's liability under the Highgate/Candyman transaction had been recognised and provided for under that 2005 agreement which would expire in November 2011. Liability had arisen by August 1998 but the 2005 contract had made provision for its discharge in the future, by 2011. In any event the 1998 liability was not Mr. Clarke's.

40. The other liability of which there is evidence, arises under the promissory notes. Mr. Clarke had promised to pay a specified amount to Musson on some notes and to Citibank on others. The liability was to either Musson or Citibank. Musson is arguing that when it paid as Mr. Clarke's guarantor on the note which it had sold to Citibank, it

had discharged Mr. Clarke's liability under the promissory note. However, there is no evidence of Musson being compelled or compellable in law to pay that money and there is no evidence of any request/authorization or ratification for any payment. There is no evidence of Mr. Clarke being aware either of Musson's decision to pay Citibank or of its actual payment.

Effect of Sale of Note

41. Counsel for Musson argues that when Musson sold the promissory notes to Citibank, Mr. Clarke's indebtedness to Musson was transferred to Citibank and therefore he became the beneficiary of a loan from Citibank which Musson guaranteed. Although Musson is claiming under restitution for unjust enrichment, and does not claim under the guarantee, it nonetheless in its submission relies on Musson acting as a guarantor of the note when it paid.

Law on Guarantee

42. Musson signed as a guarantor for the promissory notes. It is undisputed that on February 28, 2005 it paid to Citibank the amount of $5,856,889.17 being principal of $5,500,000.00 and interest. The proposal that a guarantor has the right to recover the sums paid to the lender on behalf of the borrower brooks little discussion.

Subrogation is a remedy available to prevent unjust enrichment and is used in certain circumstances such as Bills of Exchange and guarantees. When utilising this remedy the Court exercises its discretion and will decide if a person should or should not be subrogated to all or some of the rights of another, thereby accessing benefits and rights. However, where a surety guarantees a debt he cannot be subrogated to the

creditor without the debtor having consented to the guarantee and to the discharge of the debt. Scarman LJ, in discussing this aspect of the law said:

> *"If without an antecedent request a person ... makes a payment for the benefit of another, the law will, as a general rule, refuse him a right of indemnity."*[10]

43. There is no evidence of a request by Mr. Clarke, or indeed Highgate or Candyman made of Musson to guarantee any payment to Citibank on behalf of any of them. Subrogation would therefore not arise. In any event, in the guarantee which Musson had signed indemnifying Citibank, Musson waived all its rights of subrogation,[11] and thus could not have recovered money by such relief.

44 Further, Counsel for Musson argues that this claim is not based on the promissory notes but rather, upon the benefit Mr. Clarke received when Musson honoured the guarantee to Citibank. The claim is not under the guarantee.

Accommodation

45. Mr. Clarke claims that he signed promissory notes to accommodate Musson. The Bills of Exchange Act provides, "An accommodation party to a bill is a person who has signed a bill as drawer, acceptor or indorser, without receiving value therefor and for the purpose of lending his name to some other person. An accommodation party is liable on the bill to a holder for value...."[12]

46. However, Mr. Clarke's evidence is that he was just following instructions. There is no evidence that he was lending his name to Musson for any transaction. There is no evidence of any explanation to him as to what Musson's arrangement was with Citibank

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[10] **Owen v Tate** [1976] 1QB 402 at 411 - 412
[11] Par 9
[12] s. 28

concerning the note nor of his having any understanding of what was being negotiated between Musson and Citibank.

I do not accept that Mr. Clarke was knowingly an accommodation party.

In any event Counsel for Musson submitted that Mr. Clarke was not an accommodation party because an accommodation party does not receive value for signing the bill and Musson's case is that he received value.

47. The Bills of Exchange Act provides that:

"Valuable consideration for a bill may be constituted by-

(a) any consideration sufficient to support a simple contract;

(b) an antecedent debt or liability....."[13]

There is no evidence of any consideration to cause Mr. Clarke to have signed a promissory note in a personal capacity.

I find on a balance of probabilities that Mr. Clarke speaks truthfully when he says that he signed on the instructions of the late Mr. Blades to prevent Musson's embarrassment, and not for any value for himself.

Conclusion

48. I accept as true that Mr. Clarke and the late Mr. Blades enjoyed a friendly, gentleman's business relationship such that neither party seemed to have required that all details of their agreements be documented, and I make the determination in this matter based on such evidence as is available to me.

The effect of the transfer of the promissory notes by Musson to Citibank with the accompanying guarantee was to allow Musson to utilise that amount which was receivable by it from Highgate/Candyman and which they had failed to pay. The benefit

[13] s.27

was to Musson which, by that process, averted what could have become an embarrassing cash flow problem.

It appears to me that Mr. Clarke has not benefitted from Musson's payment to Citibank, of the value of the promissory note, by virtue of its guarantee; neither, has Highgate nor Candyman. Highgate and Candyman, remain liable for their outstanding debt to Musson until November 28, 2011 at which time specific consequences flow.

Musson did pay an amount to Citibank which it has not yet recouped. However, in my view no one was unjustly enriched in the process. The remedy of subrogation may have been available to Musson to recover its money from Mr. Clarke but it had agreed with Citibank not to pursue that remedy.

In my view, Mr. Clarke himself gained nothing from the transaction. He was not enriched in the process and the claim of unjust enrichment fails.

Order

Judgment for the defendant. Costs to the defendant to be agreed or taxed.