IN THE COURT OF APPEAL OF BELIZE AD 2020

CIVIL APPEAL NO 8 OF 2018

**JEAN REYES (as herself and as Administratrix for the estate of the deceased, Francis Johnston)** Appellant

v

**AMELIA JOHNSTON** Respondent

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BEFORE

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| The Hon Sir Manuel Sosa | President |
| The Hon Mr Justice Samuel Awich | Justice of Appeal |
| The Hon Mr Justice Lennox Campbell | Justice of Appeal |

K Musa for the Appellant
M Chebat SC for the Respondent

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12 March 2019 and 22 December 2020

**SIR MANUEL SOSA P**

**[1]** I concur in the reasons for judgment given, and the orders proposed, in the judgment of Campbell JA.

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SIR MANUEL SOSA P

**AWICH JA**

**[2]** I have read, in draft, the judgment of my Brother, Campbell JA and concur in the reasons for judgment given, and the orders proposed, therein.

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AWICH JA

**CAMPBELL, JA**

**[3]** Ms Jean Reyes, the Appellant, and the 2nd Defendant below, has a registered leasehold interest in Caribbean Shores, Block 16, Parcel 127411 (the subject property). She shared a common law relationship, with Harold Johnston, the brother of the late Francis Johnston.

**[4]** The Respondent, the Claimant below, is a widow and the Administratrix of the Estate of her late husband, Francis Johnston. She holds a lease to the property from the Government of Belize.

**Background**

**[5]** The facts are helpfully summarized in the learned Chief Justice's judgment.

> *"On March 12th the Appellant's property was advertised to be sold by public auction. The brother-in-law of the Respondent called the Respondent's husband on the 14th March 2006 to inform that his home was up for auction and sought his brother's help. The mortgage held by the Alliance Bank (Alliance) was paid off by a loan obtained by the Respondent and her husband from Belize Bank. The claim was to have title of the Appellant delivered based on an alleged agreement by the Belize Bank to the Respondent and her husband."*

**[6]** On the 17th March 2006 a letter from Belize Bank to Alliance, noted that, an earlier letter was sent to Alliance, giving an undertaking to pay the sum outstanding for a signed transfer of the title. On the 24th March 2006, Alliance responded that, following discussions, it was agreed to substitute the signed transfer with a signed discharge of charge.

**[7]** Belize Bank in a letter dated 5th May 2006 reminded Mrs. Amelia Johnston and her husband, that when they spoke to the Belize Bank in March, it understood that Alliance was going to sell the subject property under terms of the charge which they held for $140,000 and that Mr Francis' brother, Harold, and Ms. Reyes, had called on them for assistance. The Bank subsequently sent Mr. and Mrs. Francis Johnston forms to facilitate the transfer of the subject property into their names. The Ministry's consent was needed to effect the transfer. That consent was not obtained. Although the Government of Belize was paid by the Johnstons to permit a voluntary transfer, Ms Reyes had refused to sign the transfer.

**The Claim**

**[8]** Mrs Johnston had claimed specific performance and damages against Belize Bank for breach of the agreement herself and her husband had with that bank. It was alleged that under that agreement Belize Bank was to obtain the title for the subject property over which Alliance had a charge. The funds borrowed from Belize Bank was to purchase that property. Mrs Johnston also sought damages against the Belize Bank.

**[9]** It was alleged by Mrs Johnston that Ms Jean Reyes had benefitted unjustly from the payment of $220,000.00 to Alliance by Belize Bank on behalf of the Appellant. Mrs Johnston sought an order for possession of the property or alternatively a declaration that Ms Reyes has been unjustly enriched from the payment of $220,000.00 by Belize Bank made on behalf of Ms Johnston to Alliance. An order was also sought that the Ms Reyes pays to Mrs Johnston the sum of $220,000.00 with consequential damages. Interest and costs were also sought.

**[10]** In its Amended Defence the Belize Bank stated, that it was represented to the Bank that Ms Reyes would execute the transfer of title. The Defence of Ms Reyes alleged that she did not know the details of the negotiations between her then common law husband, Harold, and his brother. She asserted that it was a family arrangement and was not intended to create legal relations. It was a loan acquired to purchase the property and repaid when the Appellant and her husband could afford to do so.

**[11]** Mrs Johnston testified that it was Harold who indicated to her that Ms Reyes' home was on auction and that "he was going to be on the street" Mrs Johnston says that herself and her husband, went to the Belize Bank to purchase the subject property. She denies that the transaction was a "family arrangement," not intended to create legal relations. The parties are agreed that this intervention by the Johnstons was not communicated to Ms Reyes or Harold.

**[12]** In cross-examination Ms. Reyes denied ever being asked to sign any document to facilitate transfer of the property. She characterized the discharge of the charge as a family matter and not a commercial matter. It was to be repaid whenever herself and Harold Johnston were able so to do. She did not accept that the Johnstons had intended to purchase the mortgage from Alliance Bank and hold it for themselves. That suggestion was based on paragraph 5 of the Amended Defence filed on behalf of Ms Reyes. Paragraph 5 stated that "Francis Johnston intended to purchase the mortgage from Alliance Bank and hold the charge until they could pay off the loan". This arrangement was not supported by the evidence. (See paragraph 27 of judgment).

**Chief Justice's decision**

**[13]** The Court found that "contrary to the evidence of the 2nd defendant (Ms Reyes), the Johnstons intended to enter into strict business arrangement for the purchase of the property by means of a loan from the 1st defendant."

**[14]** By his decision dated the 17th of November, 2017, and the Order dated the 19th of January, 2017, the learned trial Judge ruled in favor of Mrs. Johnston finding that:

"(1) The Claim for Specific Performance and damages against the lst Defendant (The Belize Bank Ltd.) stands dismissed. (2) That the Appellant has been unjustly enriched to the extent of $220,000.00 by the payment of the 1st Defendant (The Belize Bank Ltd.) to Alliance Bank on behalf of the Respondent. (3) That the property of the Appellant, namely Parcel 127411 situate in Block 16 of the Caribbean Shores Registration Section is subject to a charge by way of subrogation in favor of the Respondent."

**The Appeal**

**[15]** An appeal against the judgment was filed. The Grounds of Appeal were:

(i) The learned trial Judge erred in law or acted upon a wrong principle when he found and declared that the Appellant had been unjustly enriched to the extent of $220,000.00 by the payment by the 1st Defendant to Alliance Bank on behalf of the Respondent.

(ii) The learned trial Judge erred in law or acted upon a wrong principle in declaring that the property of the Appellant is subject to a charge by way of subrogation in favor of the Respondent.

(iii) The learned trial Judge erred in law or acted upon a wrong principle in finding that the Claim was not statute-barred by section 4 (a) of the Limitation Act, Chapter 170 of the Laws of Belize, paragraph 3 of the Respondent.

**Ground one - The learned trial Judge erred in law or acted upon a wrong principle when he found and declared that the Appellant had been unjustly enriched to the extent of $220,000.00 by the payment by the 1st Defendant to Alliance Bank on behalf of the Respondent**

**[16]** In **Benedetti v Sarwiris A.C. 938**, the United Kingdom Supreme Court (Neuburger P, Kerr, Clarke, Wilson, Reed LLJ) delivered on 17th July 2013. The focus of the issue was only the law of unjust enrichment. The Court endorsed the well-established questions that a Court confronted with a claim for unjust enrichment must ask itself. These questions are: (i) Has the defendant been enriched? (ii) Was this enrichment at the defendant's expense? (iii) Was the enrichment unjust? (iv) Are there any defences available to the defendant?

**[17]** The Supreme Court in ***Benedetti*** followed ***Bangue Fianciere de la Cite v Parc (Battersea ) Ltd. [1999] 1 AC 221***, Lord Slyn stated that if the first three questions are answered affirmatively and the fourth negatively, then the claimant will be entitled to restitution and that the four elements "constitute the fundamental conceptual structure" . See also ***Investment Trust Companies v HMRC [2012] EWHC458*** at paragraph 38 per Henderson J.

**[18]** In answer to this court, Mr Musa acknowledged that the first two questions had to be answered in the affirmative. He has accepted the submissions on behalf of Mrs. Johnston that Ms. Reyes has been enriched. Neither is he disputing that Ms Reyes' enrichment was at the Johnstons' expense. However, Mr Musa contends that the enrichment of Ms Reyes at the expense of Amelia and Francis Johnston did not constitute unjust enrichment, because it was part of a family arrangement, not meant to create legal relations. Mr Musa further submitted that the family arrangement, is one which falls within the recognized limits under the law in which restitution would not have been granted. (See paragraph 42 Appellant's written submission) Mr Musa relied on ***Goff and Jones on the Law of Restitution, 5th Edition.***

**[19]** Mr Chebat submitted that the Chief Justice was correct, and adopted as his own paragraph 48 of the Chief Justice's judgment, where it is noted:

> *"It cannot be gainsaid that the second defendant was enriched by having indebtedness on the charge on her property paid off by the Claimant who is now out of pocket to the extent of $220,000.00." That fact was not challenged. The*

*Claimant intended to derive a benefit for making the payment and that has not materialized. He says meanwhile the second defendant enjoys possession of the property which remains in her name without fair or foreclosure from the Alliance Bank. I do not accept the second defendant's assertions that it was a family matter and the money was payable whenever and however she could. Accordingly, the Claimant is entitled to a restitutionary remedy*."

Mr Chebat further submitted that it was never intended to be a family transaction. He made reference to the cross-examination o6f Ms Amelia Johnston by Mr Marshalleck SC, where according to Mr Chebat, Mrs Johnston remained unshaken on the point that, her husband and her intention was to purchase the property. She denied that she was seeking to assist Jean Reyes and Harold. Mr Chebat submitted that the learned Chief Justice, correctly rejected the assertion that it was a family matter.

**[20]** The Court having decided that Ms Reyes was unjustly enriched at the expense of the Respondent, a restitutionary remedy becomes applicable. The basic principle is that a claim for unjust enrichment is not a claim for compensation for loss but for recovery of a benefit unjustly gained (by a defendant). The learned authors of ***Hanbury and Martin Modern Equity***, ***Fourteenth Edition by Jill Martin*** in addressing the doctrine of unjust enrichment says at p 641: "*This is a doctrine which appears in nearly every system of law. It lays down as a general principle that where the defendant is unjustly enriched at the plaintiff's expense, the defendant must make restitution to the plaintiff. Such a principle has its greatest scope in the area of quasi contract, but overlaps also into contract, tort and many areas of equity*."

**[21]** Ms Reyes' response to Mrs Johnston's claim that she was unjustly enriched is that, the benefit was given as part of a family arrangement, which was not intended to create legal relations. This was the issue before the English Court of Appeal in ***Jones v Padavatton [1968] EWCA Civ. 4 (29th November 1968 Court of Appeal (Danckwerts Salmon Atkinson LLJ***). The parties were a mother and her daughter. It was suggested that the daughter who had a well-established job in Washington DC, should go to England to read for the Bar. It was unclear who initiated the idea.

However, the daughter alleged she was induced by extreme pressure from the mother, who promised her a monthly maintenance of $200. The duration of the maintenance payments by the mother was unclear. The mother acquired a house in England for the daughter's occupation and to let to tenants. There were no terms in writing and the precise terms of the arrangements were difficult to ascertain. The parties had a falling out and the mother issued summons for possession and the daughter counter claimed for expenses she incurred in furnishing the apartment.

**[22]** Two questions were raised on this issue for consideration, per Lord Danckwerts;

> *"At any rate, two questions emerged for argument: (1) Were the arrangements (such as they were) intended to produce legally binding agreements, or were they simply family arrangements depending for their fulfilment on good faith and trust, and not legally enforceable by legal proceedings? (2) Were the arrangements made so obscure and uncertain that, though intended to be legally binding, a court could not enforce them?"*

Mr Dillon, for the daughter, argued strenuously for the view that the parties intended to create legally binding contracts. He relied upon the old case of ***Shadwell v Shadwell, (1960) 9 Common Bench New Series***, ***159***, ***(142 English Reports, 62)***, and ***Parker v Clark [1960] 1 WLR 286***.

**[23]** Mr Sparrow argued on the mother's behalf for the contrary view that there were no binding obligations and that if there were, they were too uncertain for the court to enforce. His stand-by was ***Balfour v Balfour (1919) 8 King's Bench Division 571***. The principles involved are very well discussed *in* ***Cheshire & Fifoot on Contract (6th edition) at pages 94-96***.

**[24]** The Court of Appeal unanimously found that there was no intention to create legal relations. Lord Danckwerts observed that the terms of the arrangement between the parties seemed more obscure and uncertain the further the discussions went. The acceptable duration of the daughter's studies was not finally settled.

**[25]** Lord Danckwerts concluded: *"There is no doubt that this case is a most difficult one, but I have reached a conclusion that the present case is one of those family arrangements which depend on the good faith of the promises which are made and are not intended to be rigid, binding agreements.* ***Balfour v Balfour*** *was a case of husband and wife, but there is no doubt that* ***the same principles apply to dealings between other relations***, ***such as father and son and daughter and mother*** *This, indeed, seems to me a compelling case. Mrs Jones and her daughter seem to have been on very good terms before 1967".* The mother was entitled to possession and the Court declined to uphold the daughter's counter-claim. (emphasis added)

**[26]** Lord Salmon took another route to the same conclusion. He said:

> *"There is no dispute that the parties entered into some sort of arrangement. It really depends upon (a) whether the parties intended it to be legally binding; and (b) If so, whether it was sufficiently certain to be enforceable.*
>
> *... Mr Sparrow has said, quite rightly, that as a rule* ***when arrangements are made between close relations***, ***for example between husband and wife***, ***parent and child or uncle and nephew in relation to an allowance***, ***there is a presumption against an intention of creating any legal relationship***. *This is not a presumption of law, but of fact. It derives from experience of life and human nature which shows that in such circumstances men and woman usually do not intend to create legal rights and obligations, but intend to rely solely on family ties of mutual trust and affection. This has all been explained by Lord Justice Atkin in his celebrated judgment in* ***Balfour v Balfour****.*

**[27]** The distillation of the authorities reveals the ingredients of the "close relationship between the parties, which gives rise to the presumption that there is no intention to create legal relations. Lord Danckwerts, said *"Balfour v. Balfour was a case of husband and wife, but there is no doubt that the same principles apply to dealings between other relations, such as father and son and daughter and mother.*"

**[28]** Lord Salmon accepted counsel's definition of "close relations" as being "between husband and wife, parent and child or uncle and nephew." In addition, the learned judge of Appeal was impressed that the relationship between the mother and daughter was "very close." It seems to me that even where ties have been established along the lines of "blood relations," the attitude of the individuals to each other may be a factor for consideration in determining whether a presumption has been raised that there was no intention to create legal relationship.

**[29]** Ms. Reyes was the common-law spouse of the Respondent's brother-in-law. By the time of this action, that union had come asunder. The subject property was never in the possession of Harold. Harold is not a party in this matter. There is unchallenged evidence before the court that Ms Reyes was "estranged from the family". The dealings at the Belize Bank in relation to the subject property was not communicated to her, indeed there appears to be little communication between the parties generally.

**[30]** Does the experience of "life and human nature" lead this court to the view that this is a family arrangement with no intention to create legal relations? Is this a case intended to rely solely on family ties of mutual trust and affection? The Appellant's evidence is that it was Harold's plight that was invoked when the assistance was sought from the Johnstons. Mr Musa was unable to deny the learned President's observation that acquisition of the property by Francis was not inconsistent with the Johnstons acquiring the property and allowing Harold to remain there. It is conceded that Ms Reyes has benefitted and continues to benefit at the expense of the Johnstons. She has admitted a loan, albeit the payment terms are disputed. On the evidence, there are no attempts to address the payment on the loan for the six years and 3 months before the filing of this claim.

**[31]** The presumption against the intention to create legal relations in these circumstances is a rebuttable one. The test to be applied is an objective test to what was said, written and the circumstances that existed. The Appellant knew that in the absence of the benefit that was extended to her by the Respondent, she would have

been dispossessed of the subject property. There was no acknowledgement to the Johnstons, for what Mr Musa has argued, at one point, was a gift. The first communication on the evidence was years after the Johnstons intervention with Ms Reyes being told that the loan should be repaid whenever herself and Harold were able to pay. In any event the admission by the Appellant that a repayment was required made it difficult for the Appellant to maintain, that this was a family arrangement.

**[32]** The learned Chief Justice had the advantage of seeing the witnesses and their response and to assess their demeanour. I find the learned Chief Justice was correct in finding that the Appellant was unjustly enriched and that this was not a family arrangement but a commercial undertaking by the Respondent.

**Ground two - The learned trial Judge erred in law or acted upon a wrong principle in declaring that the property of the Appellant is subject to a charge by way of subrogation in favor of the Respondent.**

**[33]** Subrogation is a doctrine under which one person is entitled to stand in the shoes of another in respect of certain legal and equitable rights. The application of the doctrine is common to insurance contracts or suretyship. In the same vein a person who pays another's debt, may in some circumstances stand in the shoes of the creditor. (***See Cleadon Trust [1939] Ch***. ***286***). Where the defendant pays off debts with monies he never should have had, it is no hardship to him to be put back in the position he was in before using the money to pay the debts.

**[34]** The learned Chief Justice's judgment at paragraph 48 notes: *"It seems to me that the 2nd Defendant has been enriched and that the enrichment is unjust*. *I do not accept the second defendant's assertions that it was a family matter and the money was payable whenever and however she could. Accordingly, the Claimant is entitled to a restitutionary remedy.*"

**[35]** In determining the boundaries within which a restitutionary remedy can apply, ***Goff and Jones on the Law of Restitution***, ***5th Edition at pages 46*** and ***47*** **states**:

> *"What then are the circumstances which form the limits of the restitutionary claim? We shall identify the following limits, which are of necessity generously drawn; as will be seen, some are more firmly drawn than others: (1) The plaintiff conferred the benefit as a valid gift or in pursuance of a valid common law, equitable or statutory obligation which he owed to the defendant; (2) Benefits gratuitously conferred. In principle the fact that a benefit has he plaintiff entered into a compromise or made payment meaning to waive all inquiry into it: (3) The plaintiff conferred the benefit while performing an obligation (other than under compulsion of law) which he owed to a third party, or otherwise while acting voluntarily in his own self-interest; (4) The plaintiff acted officiously in conferring the benefit: (5) The defendant cannot be restored to his original position or is a bona fide purchaser; (6) Public policy precludes restitution. If the defendant can persuade the court that the facts fall within one of these limiting principles, then the restitutionary claim will fail in limine. The limiting principles form the boundaries of the restitutionary claim."*

**[36]** Mr Musa sought to limit the Respondent's pathway to a restitutionary remedy. He submitted that three of the limits to restitution in cases of unjust enrichment as outlined in ***Goff and Jones on the Law of Restitution*** were directly applicable to this case and in such circumstances, the ruling by the learned trial judge that the Appellant was unjustly enriched should be overturned. He identified limits (1), (2) and (4) as being applicable. However in his oral presentation, he abandoned limit (4).

**[37]** Firstly, it was contended, that the benefit as a valid gift had been conferred by Francis Johnston who was merely assisting his brother, Harold Johnston, from losing his home when he paid off the Appellant's debt to Alliance. According to Mr Musa, not only was it a gift, but also a family arrangement that was never intended to create any legal binding relations between the parties. It was submitted there was evidentiary

support for that submission at the trial, at para 45 of the submissions. I cannot accept this submission; this benefit was not gratuitously conferred. The uncontroverted evidence is that Ms Reyes and Harold had contacted the Respondent and Mr. Francis seeking their assistance in respect of the subject property which was listed for a public auction by the mortgagee. Moreover, as was indicated earlier, there is no incongruity between a sibling having the ownership of property transferred into his name and allowing his brother to continue living there free of the stress of being evicted onto the streets.

**[38]** Secondly, learned counsel submitted that the payment made by the Respondent and Francis Johnston was voluntary and the Respondent did not inquire into it until six years and three months later. It was further submitted that the payment was made with the intention to waive all inquiry into it as evidenced by the period of inactivity by the Respondent. The formulation of voluntary payment by Gibbs J, makes it clear that the limiting principle on which Mr Musa relies is confined to cases where there have been a demand made as of right, to which the claimant has responded, being fully aware of the facts on which the demand is made. It is sufficient to say that there was no “demand as of right” made by either the Appellant or Mr. Harold Johnston in the instant case.

**[39]** In the Appellant’s written submission it was submitted in respect of limit (4), that the Respondent had acted "as a mere volunteer" in conferring the benefit. I n the written submission it was contended the recovery will be denied if the plaintiff was officious; or if he thrust himself on the defendant. As I indicated, on further consideration, Mr. Musa abandoned that argument. He was correct in doing so as I could not agree that the Johnstons inserted themselves on the Appellant, There is no evidence to support such a submission. The relevant evidence points in the other direction.

**[40]** Mr Musa complained that there was no application that the Appellant's property be subjected to a charge by way of subrogation in favor of the Respondent. To my mind the answer is whether it is just. ***Goff and Jones on the Law of Restitution, 5th Edition*** at page 157 notes:

*"The real issue is whether it is just to subrogate A to C's lien or to C's personal claim. A should succeed to the rights of a secured creditor, C, only if he can show: (i) That he intended to make a secured loan (ii) That the loan money was used to pay off a secured creditor, C; and (iii) That subrogation to C's rights would not frustrate the policy which had invalidated the original loan transaction between A and C.*

**[41]** It is not questioned that the money borrowed from Belize Bank was used to discharge the Appellant's liability with Alliance. It is clear that this was the purpose of the agreement between the parties. It was pleaded in the Amended Defence of the Appellant at paragraph 5 that the purpose of the loan was to purchase the charge from Alliance and hold it until the Appellant could pay for it. In these circumstances, there arises an implication of subrogation. In the House of Lords case of ***Orakpo v. Manson Investments Ltd. (1975) AC*** Lord Diplock at page 105 stated:

*"The mere fact that money lent has been expended upon discharging a secured liability of the borrower does not give rise to any implication of subrogation unless the contract under which the money was borrowed provides that the money is to be applied for this purpose.*" ***Wylie v Carl [1992] 1 CH 51***. I would therefore dismiss this ground of appeal.

**Ground three - The learned trial Judge erred in law or acted upon a wrong principle in finding that the Claim was not statute-barred by section 4 (a) of the Limitation Act, Chapter 170 of the Laws of Belize**.

**[42]** It was submitted on behalf of the Appellant that the Statement of Claim clearly sets out that the claim was based on oral negotiations to purchase the property from the Appellant between March and April of 2006. The Claim was therefore founded under simple contract and should have been declared statute-barred in a similar manner as the Claim against the 1st Defendant was found to be statute-barred.

**[43]** In dealing with the limitation issue the learned Chief Justice found that this was not a matter of simple contract. In his judgment at para 51 he says:

> *"The claim against the second defendant for unjust enrichment is founded upon an equitable principle which as explained by Lord Hoffman is grounded in neither contract nor tort. It follows that the claim against the second defendant does not fall under Section 4(e) of the Limitation Act.*

**[44]** The Statute of Limitations, Chapter 170 of the Laws section 4(a) provides:

> *"The following action shall not be brought after the expiration of six years from the date on which the cause of action accrued. (a) Actions founded on simple contract or on tort."*

***Cheshire and Fifoot - The Law of Contract***, ***Seventh Edition p 571*** states:

> *"The expression 'cause of action' means the factual situation stated by the plaintiff which, if substantiated, entitles him to a remedy against the defendant. If, when analyzed it discloses a breach of contract, it accrues, when breach occurs, from which moment time begins to run against the plaintiff."*

**[45]** In the Appellant's written submission it was expressed that time started to run for purpose of the Statute of Limitation, from disbursement of the loan on 19th April 2006. It was the calculation from that date that provided the basis for the contention that the matter was statute-barred, a period of six years and three months having expired from the date of disbursement to the filing of the claim. However, during his oral presentation, in answer to Awich JA, learned counsel conceded that time could not run from the date of disbursement of the loan. It was admitted that date would have been sometime in the future.

**[46]** Mr. Chebat submitted that time could not accrue for the purpose of the Statute of Limitation from the time of disbursement but it would start from the time there was the realization that there was a breach in the sense that the Appellant refused to sign the

consent to transfer the lease which triggered the court action. On the evidence before the Court, that date would be some time after the 18th of August 2009, which was within the period delimited by the statute. I find that the learned Chief Justice applied the relevant principles.

**Disposition**

**[47]** I find that the learned Chief Justice applied the correct principles in finding:

(1) That the Appellant has been unjustly enriched to the extent of $220,000.00 by the payment of the 1st Defendant (The Belize Bank Ltd.) to Alliance Bank on behalf of the Respondent.

(2) That the property of the Appellant, namely Parcel 127411 situate in Block 16 of the Caribbean Shores Registration Section is subject to a charge by way of subrogation in favour of the Respondent.

(3) That the claim was not statute barred.

**[48]** The appeal is dismissed with costs to the Respondent, here and below.

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CAMPBELL JA