THE EASTERN CARIBBEAN SUPREME COURT

IN THE COURT OF APPEAL

MONTSERRAT

MNIHCVAP2021/0006

BETWEEN:

[1] THE OFFICE OF THE DEPUTY GOVERNOR
[2] MINISTRY OF AGRICULTURE

Appellants

and

ASHEL BRAMBLE

Respondent

Before:

The Hon. Dame Janice M. Pereira — Chief Justice
The Hon. Mr. Paul Webster — Justice of Appeal [Ag.]
The Hon. Mde. Esco L. Henry — Justice of Appeal [Ag.]

Appearances:

Ms. Renée Morgan for the Appellants
Mr. Sylvester Carrott for the Respondent

2023: January 25;
July 28.

Civil appeal - Appellate interference with findings of fact made by lower court - Doctrine of res ipsa loquitur - Whether the learned judge erred in fact and/or law in finding that the doctrine of res ipsa loquitur did not arise – Unjust enrichment – Mistake of fact – Mistake of law - Whether the learned judge erred in fact and/or law in holding that the appellants had not made out their case of unjust enrichment based on mistake of fact and law – Constructive dismissal - Whether the judge erred in holding that Ashel Bramble was constructively dismissed – Frustration of employment contract

Ashel Bramble, the respondent, was employed by the Government of Montserrat ("GoM") on a non-pensionable basis under an unwritten contract, working as a tractor driver for the Ministry of Agriculture. On 11th April 2013, while driving a GoM-owned tractor, it fell into a drain and was damaged, causing him to sustain a neck injury. The severity of his injury required surgery and extensive medical treatment abroad. The Human Resources Management Unit ("HRMU") within the Deputy Governor's office undertook to pay his salary,

per diem, medical, accommodation, therapeutic and gym expenses associated with his treatment regimen in Antigua. The Governor granted him discretionary leave from 1st January 2014 until 30th November 2014. Mr. Bramble went to Antigua in January 2014 and had the surgery. His care was administered by Dr. Joseph John and physiotherapist Ms. Christine Gillis-Gerard.

In separate letters dated 5th May 2016 and 1st June 2016, Dr. John and Ms. Gillis-Gerard cleared Mr. Bramble to resume work in September 2016. He did not disclose the letters or their contents to HRMU, the office responsible for monitoring his progress. HRMU Director, Ms. Joycelyn Hogan discovered this sometime in April 2017 through a chance encounter with him. Although he was no longer under Dr. John's or Ms. Gillis-Gerard's care, Mr. Bramble continued to receive payments between September 2016 and March 2017. His rent and gym fees were also paid. By letter dated 21st March 2017, HRMU notified him that his salary and other payments would cease that month. His lawyer responded on his behalf by letter dated 3rd May 2017, demanding that the salary be reinstated and requesting that a detailed assessment be conducted by a neurosurgeon. By further letter dated 14th August 2017, his new lawyer indicated that his injury persisted and he threatened to sue if his salary was not reinstated.

In December 2017, the appellants sued Mr. Bramble, invoking the doctrine *res ipsa loquitur* and claimed damages for repairs to the tractor. They sought restitution of $49,035.13, being the monies paid to him and on his behalf between September 2016 and March 2017. The appellants alleged that Mr. Bramble did not inform them that he had been cleared to return to work in September 2016, yet he continued to accept payments and benefits despite no longer receiving treatment from Dr. John and Ms. Gillis-Gerard. They pleaded that by failing to report for work after receiving clearance to do so, he was out of office without leave and without a reasonable excuse for being granted leave longer than the statutory period. They also claimed to have laboured under the mistaken belief that he was undergoing treatment from Dr. John and Ms. Gillis-Gerard; that he had remained on approved leave; that they failed to realise that the contract of employment was terminated by the doctrine of frustration and/or that he had abandoned his post pursuant to regulation 30 of the Public Service Regulations ("PSR") or was absent from work without leave in contravention of General Order ("GO") 610. They contended that he was overpaid due to their mistakes regarding the factual and legal reality and that he was unjustly enriched by those payments. Mr. Bramble denied the claims. The learned judge found that the cause of the accident remained unexplained; that Mr. Bramble was not negligent and *res ipsa loquitur* did not arise. In relation to the unjust enrichment claim, he held that HRMU intended to pay Mr. Bramble until informed otherwise, but not by him. He concluded that it was not a mistake to pay him from September 2016. He found that Mr. Bramble had been constructively dismissed on 27th March 2017 and that his 'extraordinary income remained legitimate between September 2016 and March 2017'.

The appellants dissatisfied with the learned judge's judgment have appealed. Among other things, they complained that the learned judge asked questions about matters which were neither pleaded nor addressed in submissions and erred by relying on the answers in making his determination. The main issues to be determined by this Court are: (i) whether the learned judge erred in fact and/or law in finding that the doctrine of *res ipsa loquitur* did not

arise; (ii) whether the learned judge erred in fact and/or law in holding that the appellants had not made out their case of unjust enrichment based on mistake of fact and law; and (iii) whether the judge erred in holding that Ashel Bramble was constructively dismissed.

Held: making the orders set out in paragraph [115] of the judgment, that:

1. It is settled law that an appellate court must exercise extreme caution and be slow to overturn findings of fact made by a trial judge, or inferences drawn from such findings. It would interfere with such findings only if satisfied that the lower court's conclusions on the facts were plainly wrong; or if there is little or no adequate evidence to support them; or if the judge did not properly analyse the evidence in its entirety. Among the reasons for this caution is the reality that having seen the witnesses, the trial judge possesses certain advantages over the appellate court in assessing credibility and had a firsthand appreciation of the breadth of the evidence that is not usually available to the appellate court.

   Biogen Inc v Medeva plc [1997] RPC 1 applied; **Flat Point Development v Mary Dooley** ANUHCVAP2015/0029 (delivered 13th March 2019, unreported) followed; **St. Kitts Marriott Resort v Deborah Stevens** SKBMCVAP2016/0001 (delivered 30th October 2020, unreported) followed.

2. The doctrine of *res ipsa loquitur* allows a claimant to make out a prima facie case of negligence against a defendant even if the claimant is unable to show exactly how an accident happens, but can nevertheless demonstrate through evidence, that the accident was more than likely caused by the defendant's failure to use appropriate care for the claimant's safety, unless there is some other explanation. In this case, the judge considered the allegations of negligence and had ample evidence from which to justifiably and sensibly make the factual conclusions that he did and to conclude as a matter of law that the maxim *res ipsa loquitur* was inapplicable to the facts of the present case. The learned judge's questions were relevant to and probative of the factual and legal elements of the *res ipsa loquitur* maxim. The criticisms levelled at him in this regard, are unfair and unfounded. The learned judge's ultimate conclusion was therefore reasonable in view of the evidence and the law. It follows that the prayer for damages would fall away and the related arguments do not need to be considered.

   Grenada Electricity Services Limited v Isaac Peters Civil Appeal No. 10 of 2002 followed; **Halsbury's Laws of England** Vol. 33 4th Ed. (Reissue) paragraphs 664-668 at para. 664 applied.

3. A *prima facie* case of unjust enrichment is made out by proving four elements – (a) enrichment of the defendant; (b) at the claimant's expense; (c) the enrichment was unjust; and (d) the defendant has no defence to the cause of action. In deciding whether or not a particular 'enrichment is unjust', mistake of fact and mistake of law are causes of action that can render an enrichment unjust. There is also a general right to recover money paid under a mistake, whether of fact or

law, subject to the defences available in the law of restitution, such as estoppel, limitation, illegality or compromise. In this case, Dr. Smith's opinion (although not adduced) was the sole reason given by the learned judge for concluding that Mr. Bramble thought himself to be unwell. It is also one of the main reasons for his ruling that there was no mistake of fact and hence no unjust enrichment. In those circumstances, the learned judge's determination that unjust enrichment was not made out is undermined by this reliance on a document that was not part of the evidence. The learned judge fell into error in doing so and this led to his further error in relying on it in arriving at his conclusion on the mistake of fact element of the unjust enrichment claim. The learned judge thereby erred in arriving at his determination of the mistake of fact element of the unjust enrichment claim.

Halsbury's Laws of England Vol. 88 (2019), para. 410. applied; **Kleinwort Benson Ltd. v Lincoln City Council** [1999] 2 AC 349 applied; **Kelly v Solari** [1835-42] All ER Rep 320 applied; **Dextra Bank & Trust Co Limited v Bank of Jamaica** [2001] UKPC 50 followed; **Kleinworth Benson Ltd v Lincoln City Council and other appeals** [1998] 4 All ER 513 applied; **Leslie v Farrar Construction Ltd** [2016] EWCA Civ 1041 applied.

4. The settled position regarding mistake of fact as an unjust factor is that, where money is paid to a defendant or valuable resources are expended on his behalf by a claimant who did so solely because of a belief that certain facts exist, when in reality they do not, and where the payor would not have otherwise made such payment or granted such benefit to the defendant, unjust enrichment is made out subject to any available defences.

Kelly v Solari [1835-42] All ER Rep 320 and **Dextra Bank & Trust** 2001] UKPC 50 followed.

5. It is now established that mistake of law is a valid cause of action and is an unjust factor in unjust enrichment. It arises when money or services are passed from a payor to a payee in circumstances where the payor made the payment only because he erroneously believed that the law required him to do so. If he subsequently discovers and establishes that the law which obtained at the time of payment imposed no such obligation to pay, the payor would have proven his claim for unjust enrichment. It would be unconscientious for the payee to retain the payment and a court would order restitution as in the case of mistake of fact.

Kleinwort Benson Ltd [1998] 4 All ER 513 applied and **Leslie v Farrar Construction Ltd** [2016] EWCA Civ 1041 applied.

6. When considering the issue of mistake of fact as an unjust factor afresh and the issue of mistake of law (which was not examined by the learned judge), it is clear that the appellants' assertions that Mr. Bramble remained an employee of the GoM up to September 2016 and that he was away on approved leave, is problematic for the appellants, without evidence as to the terms under which the

relevant authority approved the extension of paid leave beyond November 2014. The appellants fell short of discharging the burden to establish those facts on a balance of probabilities. This failure wholly undermined their claim that as a result Mr. Bramble was deemed to have abandoned his post, was disqualified by GO 610 from receiving the payments, and that he had been unjustly enriched by receipt of them. The evidence does not support the appellants' contention that the payments after September 2016 were made when by virtue of GO 610 and regulation 30, Mr. Bramble was absent without leave; deemed to have resigned his post and was no longer an employee of the GOM. There is therefore no evidentiary or legal basis for their assertion that the payments were made due to a mistaken belief that he was still an employee after September 2016. Further, the appellants were required to set out in their pleadings, all of the relevant facts on which they rely to establish unjust enrichment. They never claimed that it was a condition of the arrangement with Mr. Bramble, that he continue to receive treatment from Dr. John and Ms. Gillis-Gerard. Their mistaken belief that Mr. Bramble had continued to receive medical care from the doctor and physiotherapist at that time, even if honestly held, is not shown to be based on the contract of employment or other ancillary agreement. The appellants have therefore failed to establish that they made the payments based on the alleged mistake of fact or law. Accordingly, the unjust enrichment claim fails.

7. A contract is frustrated where without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. The doctrine of frustration may apply to a contract of employment which is affected by sufficiently drastic external factors, with the effects that: (i) the contract terminates automatically, without the need for any action by the employer; (ii) there is no right to any back pay from the date of frustration to any later date; and (iii) the fact that termination is by operation of law means that there is no dismissal, which in turn means that the employee cannot claim unfair dismissal or a redundancy payment. The appellants did not by their pleadings or evidence indicate what aspect of the employment contract was incapable of performance after September 2016. On the evidence, the GoM remained ready to assimilate Mr. Bramble into any suitable post for which he was qualified. Further, it was evident that the parties were willing to perform their respective obligations under the contract, albeit with the caveat by Mr. Bramble that he be re-assigned to another role. There is no or very little evidentiary support that the employment contract was frustrated or frustration of the contract was an unjust factor.

   Halsbury's Laws of England Vol. 41 (2021), at para. 735 applied.

8. A court is not required to engage with every legal argument presented in a case. A judge's duty is to address those issues that are indispensable to resolving the dispute and give his reasons. In view of his holdings and the reasons for decision, it was unnecessary for the learned judge to delve into the sub-issue of whether Mr. Bramble's terms of employment allowed for a transfer to another

role, if he was unable to drive tractors. The learned judge was not blatantly wrong for making no ruling on this issue. This ground of appeal is therefore dismissed.

Emerson International Corporation v Renova Industries Ltd and others BVIHCMAP2016/0029 (delivered on 23rd March 2017) followed.

9. It is trite law that a judgment should be confined to the issues which are vital to the resolution of the dispute and that the determination should be restricted to material factual and legal matters. Consideration of constructive dismissal was not essential for resolution of the issues. The learned judge erred in making a finding on a legal matter that was not in dispute. The Court would therefore uphold this ground of appeal and set aside that finding.

10. In determining what costs award to make, the learned judge made remarks as to the GoM's lawyers being salaried, and other matters which attracted criticism on appeal. However, those remarks constitute permissible commentary, are not objectionable and do not invalidate the learned judge's findings of fact or law as contended. The learned judge did not err and was not blatantly wrong in giving expression to those thoughts. The Court would therefore dismiss the related grounds of appeal.

JUDGMENT

Introduction

[1] **HENRY JA [AG]**: This is an appeal by the Deputy Governor and Ministry of Agriculture in Montserrat ("the appellants") against the learned judge's dismissal of their claim in negligence and unjust enrichment against Mr. Ashel Bramble ("Mr. Bramble"). The appellants contend that the learned judge erred in fact and in law by finding that the doctrine of *res ipsa loquitur* did not arise; by holding that they did not establish that they made certain payments to Mr. Bramble due to mistake of fact and/or law; and by not ordering restitution.

[2] The appellants criticised the judge for not considering their alternative allegation of frustration of contract and for ruling that Mr. Bramble was constructively dismissed. They submitted that constructive dismissal was not pleaded.

Background

[3] Mr. Bramble was employed with the Government of Montserrat ("GoM") on a non-pensionable basis on an unwritten contract. He was attached to the Ministry of Agriculture as a tractor driver. On 11th April 2013, he was driving a tractor owned by the GoM, when it fell into a drain and was damaged. He sustained an injury to his neck that necessitated surgery and extensive medical services abroad. The Human Resources Management Unit ("HRMU") within the Deputy Governor's office undertook to pay his salary, per diem, medical, accommodation, therapeutic and gym expenses associated with his treatment regimen in Antigua. The Governor granted him discretionary leave from 1st January 2014 until 30th November 2014.[1] Mr. Bramble went to Antigua in January 2014 and had the surgery. His care was administered by Dr. Joseph John and physiotherapist Ms. Christine Gillis-Gerard.

[4] In separate letters dated 5th May 2016 and 1st June 2016, Dr. John and Ms. Gillis-Gerard cleared Mr. Bramble to resume work in September 2016. He did not disclose the letters or their contents to HRMU, the office responsible for monitoring his progress. HRMU Director, Ms. Joycelyn Hogan discovered this sometime in April 2017 through a chance encounter with him. When she asked about his treatment in Antigua, he told her to speak with his lawyer. Subsequent inquiries revealed that he had been cleared to return to work. HRMU was provided with copies of the referenced letters around March 2017.

[5] Although he was no longer under Dr. John's or Ms. Gillis-Gerard's care, Mr. Bramble continued to receive payments between September 2016 and March 2017. His rent and gym fees were also paid. By letter dated 21st March 2017, HRMU notified him that his salary and other payments would cease that month. His lawyer responded on his behalf by letter dated 3rd May 2017, demanding that the salary be reinstated and requesting that a detailed assessment be conducted by a neurosurgeon. By

[1] See para. 11 of the Amended Statement of Claim filed on 31st January 2020.

further letter dated 14th August 2017, his new lawyer indicated that his injury persisted and he threatened to sue if his salary was not reinstated.

[6] On 22nd December 2017,[2] the appellants sued Mr. Bramble. They invoked the doctrine *res ipsa loquitur* and claimed damages for repairs to the tractor. They sought restitution of $49,035.13, being the monies paid to him and on his behalf between September 2016 and March 2017. The appellants claimed that he neglected to inform them that he was cleared for work as of September 2016 and accepted the payments and benefits although he was no longer being treated by Dr. John and Ms. Gillis-Gerard.

[7] They pleaded that by failing to report for work after receiving clearance to do so, he was out of office without leave and without a reasonable excuse for being granted leave longer than the statutory period.[3] They claimed to have laboured under the mistaken belief that he was undergoing treatment from Dr. John and Ms. Gillis-Gerard; that he had remained on approved leave; that they failed to realise that the contract of employment was terminated by the doctrine of frustration and/or that he had abandoned his post pursuant to regulation 30 of the **Public Service Regulations** ("**PSR**")[4] or was absent from work without leave in contravention of General Order ("GO") 610. They contended that he was overpaid due to their mistakes regarding the factual and legal reality and that he was unjustly enriched by those payments. Mr. Bramble denied the claims.

[8] The learned judge found that the cause of the accident remained unexplained; that Mr. Bramble was not negligent and *res ipsa loquitur* did not arise. In relation to the unjust enrichment claim, he held that HRMU intended to pay Mr. Bramble until informed otherwise, but not by him. He concluded that it was not a mistake to pay him from September 2016. He found that Mr. Bramble had been constructively

[2] See Amended Statement of Claim filed on 31st January 2020.
[3] See para. 13 of the Reply to Amended Defence filed on 29th October 2019.
[4] Cap. 1.06 of the Laws of Montserrat, Revised Edition 2019.

dismissed on 27th March 2017 and that his 'extraordinary income remained legitimate between September 2016 and March 2017'.

[9] The appellants are dissatisfied and have appealed. They argued that the judge erred in relation to several findings of fact and law. They submitted that among other things, he erred in failing to construe and apply regulation 30 of the **PSR** or GO 610 and by not finding that they had a right to restitution of the sums claimed to have been overpaid.

[10] Mr. Bramble argued that the learned judge was correct in his decision on the *res ipsa loquitur* and unjust enrichment claims. He submitted that on the evidence and the law, there was neither a causative mistake that he was still a public officer nor that he was still authorised to be absent from work.

[11] In arriving at his decision, the learned judge did not consider regulation 30 of the **PSR** or the alternative pleading as to frustration. For the reasons set out below, the appeal is dismissed in part and the judge's order varied in part.

Grounds of appeal

[12] The Notice of Appeal[5] listed eleven errors of fact and five errors of law. They disclose two main grounds of appeal, namely, that the judge erred in fact and in law. They were primarily focused on the holdings in relation to the doctrine of *res ipsa loquitur* and mistake.

[13] The appellants took issue with, among other things, the factual findings that Mr. Bramble was: (a) rightfully paid between September 2016 and March 2017; (b) not required to report on his medical status; and (c) thought himself to be unwell. They argued that the judge had regard to irrelevant factors including his perception that the claim was brought in retaliation for Mr. Bramble's threat to sue.

[5] Notice of Appeal filed on 6th August 2021.

Issues

[14] The central issues may conveniently be compressed into three, namely:

(i) whether the learned judge erred in fact and/or law in finding that the doctrine of *res ipsa loquitur* did not arise;

(ii) whether the learned judge erred in fact and/or law in holding that the appellants had not made out their case of unjust enrichment based on mistake of fact and law; and

(iii) whether the judge erred in holding that Ashel Bramble was constructively dismissed.

Factual background

[15] It is desirable to elaborate on the factual matrix to provide fuller context for analysis of the issues. The only witnesses were Ms. Hogan and Mr. Daren Greer. Mr. Greer is the Plant Superintendent at the Public Works Department. He became Mr. Bramble's immediate supervisor sometime after the accident. At the time of the accident, Mr. Bramble's immediate supervisor was Mr. Andy Daley. It is worth noting that when this matter went to trial Mr. Daley was still employed by the GoM.

[16] Following the accident, Mr. Bramble prepared a report[6] of how the accident occurred. He recounted that on the morning of the accident, he was dispatched by Mr. Andy Daley to plough certain lands and he set off on the tractor. He wrote that he customarily drives close to his side of the road to avoid oncoming traffic. On his way, he noticed that the tractor was bouncing more than normal. He glanced back as he usually would, to ensure that nothing was happening to the plough attachment. He looked back two more times. It was soon after he had done so for the third time that the tractor fell into the drain.

[17] He described it as follows:

[6] Stamped 8th August 2013, presumably the date of receipt.

> "On passing the gas station, I checked the plough attachment and again it was okay. I checked it again just before Environmental Health Department and the next thing, the tractor fell into the drain which is directly across from the Environmental Health Department. On the impact of the tractor, I was lunged forward, hit my left knee and burnt on the shoulder from the exhaust."[7]

[18] Mr. Daley arrived on the scene soon after. He also prepared a report.[8] It was produced at the trial by Mr. Greer. In it, Mr. Daley stated that he checked and tested the tractor that morning before delivering it to Mr. Bramble. He claimed that it was mechanically sound and in good operating condition at that time. The report did not detail the checks or tests that he conducted.

[19] Mr. Greer testified that the tractor is not fitted with rear-view or wing mirrors and therefore the driver will need to look back if he hears a noise coming from the back. In response to questions from the judge, he said that he did not train Mr. Bramble to drive a tractor, did not see him being trained and did not know if he received any training. He confirmed that no disciplinary proceedings were taken against Mr. Bramble arising from the accident.

[20] The tractor was repaired by Mr. Daley, utilising parts from another tractor in the Ministry. In 2018, an estimate of the parts was prepared, based on Mr. Daley's recollection of what was used in the repairs and current prices quoted by a supplier. Mr. Greer exhibited the estimate. He admitted that it was not created at the time of the accident. The appellants claimed, as damages, the estimated figure of $5,793.56, said to represent the cost of the repairs. They had initially claimed the replacement cost of the tractor said to be $200,000.00, on the ground that it had been written off.

[21] In the months after the accident, Mr. Bramble was repeatedly absent from work, citing ill health from injuries sustained in the accident. He presented no medical certificates in support. By memoranda dated 13th August 2013, 18th September 2013

[7] See page 201 of the Record of Appeal.
[8] See Accident Report of Andy Daley at pages 299 -301 of the Record of Appeal.

and 12th November 2013,[9] Mr. Greer warned him about those unauthorised absences. He was reminded that 'standard practice and General orders' require public officers to be absent from duty only 'due to illness or leave', and that he had to notify his supervisor in each case; and must submit 'a sick note (medical certificate) or a request for leave' in respect of absence from duties for long periods.

[22] Dr. John diagnosed Mr. Bramble with stenosis of vertebrae C3-6 and recommended surgery to his neck. The prognosis was for a 6–8-week recovery period. Following the surgery, a rehabilitative programme was designed for him including physiotherapy and guided gym exercises. Physiotherapist Mrs. Gillis-Gerard, also based in Antigua, administered aspects of the programme. She and Dr. John provided periodic reports to HRMU. They channelled their communications through GoM's Chief Medical Officer ('CMO') who forwarded the reports to HRMU, with her own recommendations, as necessary.

[23] Neither Ms. Hogan nor Mr. Greer asserted that any other arrangement was agreed with Mr. Bramble for such reporting. In fact, Ms. Hogan said that she does not recall that Mr. Bramble was told to provide HRMU with copies of his medical reports.[10]

[24] Throughout 2014 and 2015, Mr. Bramble participated in the thrice-weekly rehabilitative sessions with Ms. Gillis-Gerard and his condition was reassessed from time to time. Of note, is that he unilaterally took two extended breaks in 2015, the first being for a period of four months, the second being described by Ms. Gillis-Gerard as another 'long interruption'. She reported this to the GoM by letters dated 25th May 2015 and 25th November 2015. Ms. Hogan produced both letters at trial. Nothing was said about what, if any, action was taken by HRMU to address Mr. Bramble's unexplained failure to attend his sessions. On recommendation from Dr. John and the physiotherapist, Mr. Bramble's treatment programme was

[9] See Witness Statement of Joycelyn Hogan at paragraph 7.
[10] See pg. 50 of Record of Appeal, lines 21-23 and pg. 51, lines 8-16 of the Notes of Evidence. See also pg. 57 of the Record, lines 11-15 of the Notes of Evidence.

extended up to January 2015,[11] then April 2015[12] and ultimately to September 2016, the latter being expressly endorsed by the CMO.[13]

[25] No evidence was led that Mr. Bramble's discretionary leave was extended beyond 30th November 2014, or that he was granted sick leave or other leave for the duration of his treatment beyond that date. HRMU paid Mr. Bramble's salary and processed the other payments on receipt of bills and invoices. This continued from January 2014 until March 2017. The Chief HR Officer supervised those matters with Ms. Hogan's assistance except for the period March 2016 through October 2016 when Ms. Hogan was out of the country on extended leave. Ms. Hogan explained that she was the Chief HR Officer's deputy and in that capacity was involved in all meetings and discussions including care arrangements, and with making the necessary contacts in Antigua. In her absence, other officers did so.

[26] In his Defence and Counterclaim, Mr. Bramble acknowledged that Dr. John advised that he could return to work in September 2016, but he asserted that he was still experiencing considerable problems. He pleaded that he is unable to drive a tractor and that no alternative employment was offered to him. He pleaded that the police took no action against him because they did not find that he was driving without due care and attention. He filed an ancillary claim for general, special, exemplary and aggravated damages for what he described as malicious falsehood and arbitrary and oppressive conduct by the appellants. He excised the counterclaim from his Amended Defence.[14]

Issue 1 – Res ipsa loquitur
Appellants' submissions

[27] As to whether the learned judge erred in law or fact in arriving at his decision on the *res ipsa loquitur* issue, the appellants argued that the evidence demonstrated that

[11] See Dr. John's letter dated 16th December 2014, at pg. 218 of the Record of Appeal.
[12] See Mrs. Gillis-Gerard's letter dated 8th February 2015, at pg. 220 of the Record of Appeal.
[13] See the CMO's memorandum dated 9th September 2015, pg. 229 of the Record of Appeal.
[14] See Amended Defence filed on 14th October 2019.

Mr. Bramble was driving the tractor at the material time and that it was under his control when it fell into the ditch causing damage. They submitted that the doctrine applies where, as in the instant case, the claimant cannot show the precise mechanism whereby the accident happened but is able to demonstrate that the event causing the damage was under the defendant's control and that in the normal course of things, the accident would not have happened without negligence. They pointed to Mr. Bramble's admission that he was looking back to check the plough attachment on the tractor when the accident happened. They contended that no evidence existed to refute the clear inference of negligence. In the circumstances, the only reasonable explanation for the accident was his negligent driving.

[28] They argued that the judge erred in his insistence that they must prove how the accident happened in order to succeed in their claim in negligence. They highlighted his statement that stated:

> "[T]hey cannot meet the burden of proof, absent any evidence of the cause of the accident … [and they] cannot show on balance negligence by Bramble was probably its cause."[15]

The appellants reasoned that he thereby misapplied the maxim *res ipsa loquitur* and arrived at a wrong determination.

[29] The appellants submitted further that there was no basis for the judge's finding that the evidence quantifying the loss was hearsay, no argument having been advanced on that point and therefore no sufficient reason for the estimate to be disregarded. The judge therefore erred in so finding. They also took issue with the fact that the judge questioned Mr. Greer regarding whether Mr. Bramble was trained by the GoM to drive a tractor and referred to lack of training in the judgment. They contended that this was not pleaded or argued and was an irrelevant consideration.

[15] See para. 5 of MNIHCV 2017/0032 (delivered 25th June 2021, unreported) ("the judgment").

Respondent's submissions

[30] Citing **Halsbury's Laws of England**,[16] Mr. Bramble submitted that in order for a claimant to succeed on an assertion of *res ipsa loquitur*, he must establish a *prima facie* case of negligence by leading evidence that it is more likely than not that the effective cause of the accident was an act or omission by the defendant. However, the onus rests on the claimant to put forward reasonable evidence of negligence and the appellants failed to do so. In this regard, he stressed that Mr. Greer was unable to say that the tractor was in normal working condition at the time of the accident.

[31] He concluded that the judge's findings and determination were not plainly wrong and therefore cannot be impugned. He cited **Beacon Insurance Co Ltd v Maharaj Bookstore Ltd**.[17]

Discussion

[32] This issue engages the Court in the review of findings of fact by the trial judge and his application of the principle of *res ipsa loquitur*. The principles by which an appellate Court is guided in the review of a lower court's findings of fact are well-established and well-known. It is settled law that an appellate court must exercise extreme caution and be slow to overturn findings of fact made by a trial judge, or inferences drawn from such findings. It would interfere with such findings only if satisfied that the lower court's conclusions on the facts were plainly wrong; or if there is little or no adequate evidence to support them; or if the judge did not properly analyse the evidence in its entirety. Among the reasons for this caution is the reality that having seen the witnesses the trial judge possesses certain advantages over the appellate court in assessing credibility and had a firsthand appreciation of the breadth of the evidence, that is not usually available to the appellate court.

[16] Halsbury's Laws of England Vol. 78 (2018) at para. 64.
[17] [2014] UKPC 21.

[33] As pointed out in **Biogen Inc v Medeva plc***:*

> "… the specific findings of fact, even by the most meticulous judge, were inherently an incomplete statement of the impression made upon him by the primary evidence. His expressed findings were always surrounded by imprecision as to emphasis, relative weight, minor qualification and nuance of which time and language did not permit exact expression, but which could play an important part in the judge's overall evaluation."[18]

[34] This Court has repeatedly expounded the applicable principles, including in **Flat Point Development v Mary Dooley**.[19] In that case, Blenman JA opined:

> "[37] The law on the appellate court's ability to interfere with the findings of fact of a trial
> judge is settled. There is a strong stream of jurisprudence from this Court which has been consistently applied. The principles were first laid down in **Watt (or Thomas) v Thomas** ([1947] AC 484). Indeed, in **Yates Associates Construction Company Ltd v Blue Sand Investments Limited** (BVIHCVAP2012/00287 delivered 20th April 2016) this Court stated as follows:
>
> > '1. An appellate court reviewing the findings of a trial judge on the printed evidence in relation to a question of fact tried by the judge without a jury and where there is no question of the judge misdirecting himself, should not interfere with the trial judge's decision unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the judge's conclusion. In the circumstances, the appellate court may consider that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence. However, either because the reasons given by the trial judge are unsatisfactory, or because it is (sic) clearly appears so from the evidence, an appellate court may be satisfied that the trial judge has not taken proper advantage of his having seen and heard the witnesses and the matter will then become at large for the appellate court.
> >
> > …
> >
> > 2. Appellate court restraint against interfering with findings of fact, unless compelled to do so, applies not only to findings of primary fact, but also to the evaluation of those facts and inferences to be drawn from them. Where a judge draws inferences from his findings of primary fact which have been dependent on his assessment of the credibility or reliability of witnesses who have

[18] [1997] RPC 1 at 45, per Lord Hoffman.

[19] ANUHCVAP2015/0029 (delivered 13th March 2019, unreported).

> given oral evidence, and of the weight to be attached to their evidence, an appellate court has to be similarly cautious in its approach to his findings of such secondary facts and his evaluation of the evidence as a whole. It is only in exceptional circumstances that an appeal court is entitled to take a different view on credibility from that of the judge who has seen the witness, particularly when the judge has referred favourably to the demeanour of the witness concerned.
>
> …
>
> 3. Where the trial judge fails to make proper use of the advantage he or she possesses in analyzing and carrying out an evaluation of the evidence, the judge's decision cannot stand if the decision does not comport with the evidence that was adduced. The critical question before an appellate court is whether there was evidence before the trial judge from which the judge could properly have reached the conclusions that he or she did or whether, on the evidence, the reliability of which it was for the judge to assess, that the judge was plainly wrong.'"[20] (Emphasis added)

[35] Those principles have been enunciated by the Board in **Beacon Insurance Co Ltd v Maharaj Bookstore Ltd**.[21] They have been reiterated by this Court in numerous cases, such as **Dooley** and **St. Kitts Marriott Resort v Deborah Stevens**.[22] I shall bring them to bear in considering the appellants' several contentions that the learned judge committed errors in his fact finding.

[36] The doctrine of *res ipsa loquitur* is one with which legal practitioners are familiar. It is almost trite law that *res ipsa loquitur* allows a claimant to make out a *prima facie* case of negligence against a defendant even if the claimant is unable to show exactly how an accident happens, but can nevertheless demonstrate through evidence, that the accident was more than likely caused by the defendant's failure to use appropriate care for the claimant's safety, unless there is some other explanation. In **Grenada Electricity Services Limited v Isaac Peters**,[23] Byron CJ adopted from **Halsbury's Laws of England** the following explanation of the maxim:

---

[20] Ibid at para. [37].
[21] [2014] UKPC 21 at para. [15] to [17].
[22] SKBMCVAP2016/0001 (delivered 30th October 2020, unreported).
[23] Civil Appeal No. 10 of 2002.

> "Under the doctrine of *res ipsa loquitor* a plaintiff establishes a prima facie case of negligence where (1) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; and (2) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety. **There must be reasonable evidence of negligence**. However, where the thing which causes the accident is shown to be under the management of the defendant or his employees, and the accident is such as in the ordinary course of things does not happen if those who have management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."[24] (Emphasis added)

I shall apply this learning to the case at the appeal bar.

[37] In relation to the cause of the accident and the assertion of *res ipsa loquitur*, the judge found:

> "5. As to the accident its cause is unexplained. No one saw it, except Bramble. There is no explanation, other than Counsel Morgan not being a tractor driver conjecturing Bramble should have stopped every time he looked back, which for a vehicle without mirrors seems not expected, nor is there evidence so stopping has been shown required, and offered as training, nor that glancing back caused the accident. In short, Counsel Morgan cannot meet the burden of proof, absent any evidence of the cause of the accident, so she cannot show on balance negligence by Bramble was probably its cause, acting outside unevidenced, supposed, tractor driving norms, no matter her suspicion.
>
> 6. Moreover, in my judgment, this claim has been unrealistic on its facts, in all the circumstances, where the evidence of the cost of the repair is hearsay, against a background of having wrongly claimed for the whole value of the tractor at first, and for more than two years, there being no evidence of training, which if lacking as unproven would likely make the GoM wholly vicariously liable for any accident if Bramble had indeed been negligent, rendering the proceedings academic, ...
>
> 7. Counsel Morgan's only hope has been to reverse the burden of proof under the *res ipsa* doctrine, as pleaded at para. 8 of the amended statement of claim. To do so, she has relied on **Ng Chin Pui v Lee Cheun Tat** (Privy Council appeal no. 1 of 1988), and **McGeough v**

[24] Vol. 33 4th Ed. (Reissue) paragraphs 664-668 at para. 664.

> **Thomson Holidays** [2007] EWCA Civ 1509. The case of *Ng Chin Pui* is readily distinguishable on its facts … Similarly the facts in the case of *McGeough*, in part reviewing the Hong Kong case, also a coach, but in Turkey, veering onto the wrong side of the road and hitting an oncoming car head on. In my judgment on the facts of this case, *res ipsa loquitur* does not arise, whereupon Counsel Morgan is left lacking any positive evidence Bramble was negligent." (Underlining added)

[38] From the foregoing, it can be seen that the judge considered the allegations of negligence and concluded with his findings on *res ipsa loquitur* and negligence at paragraph 7. He had regard to the cases cited by counsel in which *res ipsa loquitur* was considered. At paragraph 4, he summarised the meaning of the maxim as follows:

> "… the GoM has largely pleaded *res ipsa loquitur*, meaning 'the thing speaks for itself' there must have been negligence for there to have been an accident, citing this can be a proper approach based on some case law, essentially reversing the burden of proof onto Bramble to show there was no negligence."

[39] There is common ground between the parties that the cause of the accident was unknown and this was taken into account by the judge. This supplies the first element in the *res ipsa loquitur* maxim. As to whether the effective cause of the accident was most probably attributable to Mr. Bramble's conduct because he failed to take reasonable care for and protect the tractor from damage, the judge found that it was not, for those several reasons.

[40] Firstly, he found that there was no evidence that the accident was caused because Mr. Bramble looked back. Secondly, he reasoned that it was not proved that driving norms required him to stop to check the plough attachment. Thirdly, the only evidence as to the tractor's working condition that morning was hearsay. In this regard, he noted:

> "b. *By an exhibited report on 09.09.13, Tractor Supervisor Andy Daley (not a witness) said, 'prior to the accident the tractor was checked and tested by me personally before it was handed over to the tractor driver and it was mechanically sound and in good operating condition'.*"[25]

[25] Para. 4 b. of the judgment.

[41] By noting that Mr. Daley was not a witness, he implicitly expressed reservation about acting on the hearsay material in his report as to the condition of the tractor. He was right to conclude that there was no direct evidence about the condition of the tractor. He clearly did not accept Mr. Daley's report as being probative. He obviously appreciated that while hearsay is admissible[26] he was entitled to attach little or no weight to it[27] (as he apparently did). This was a reasonable posture since no reason was given why Mr. Daley was not presented as a witness.

[42] His fourth reason for finding that *res ipsa loquitur* did not arise was that the tractor had no mirrors, so it was not unreasonable for Mr. Bramble to look back. The judge took into account that Mr. Bramble received no training from the GoM to drive the tractor. This information was elicited by him.[28] He was criticised for doing so and for taking the testimony into consideration. The appellants submitted that the matter of training was neither pleaded nor argued. This criticism ignores the fact that rules of court permit the judge to ask questions.

[43] Moreover, although training or lack thereof was neither pleaded expressly nor argued, it must be borne in mind that inherent in the *res ipsa loquitur* maxim, is the idea that barring any reasonable explanation to the contrary, negligence in such cases is inferred from the circumstances of the accident. It follows that the pleading of *res ipsa loquitur* places a court on inquiry as to all of the relevant circumstances surrounding the event and not only those that are expressly pleaded.

[44] The appellants' reliance on the maxim necessitated a comprehensive assessment of the pertinent factors that could result in an accident of that nature, in the ordinary course of things, if proper care is used by the person operating the vehicle. Only if

---

[26] Pursuant to section 12 of the Evidence Act, Cap. 2.08 of the Revised Laws 2019, by virtue of which section 1 of the UK Civil Evidence Act 1995 applies.
[27] In accordance with section 4 of the UK Civil Evidence Act 1995.
[28] See Notes of Evidence at pg. 38 – lines 19 to 23 and pg. 39, lines 1 to 4 of the Record of Appeal filed on 29th September 2022.

such causative factors are all accounted for and excluded could a court justifiably make a finding that *res ipsa loquitur* arose. That is the essence of *res ipsa loquitur*. The learned judge was alive to the fact that training is a relevant consideration when an accident arises in the ordinary course of driving, even if proper care is being exercised by the driver. In my opinion, the parties must certainly have appreciated that it was a relevant consideration, having regard to the circumstances of the case.

[45] It was therefore well within the bounds of rational inquiry for the judge to elicit information regarding any relevant training. Importantly, he quite properly took the added precaution of permitting each counsel to pose further questions arising from his intervention. In the final analysis, his questions were relevant to and probative of the factual and legal elements of the *res ipsa loquitur* maxim. Those details would necessarily inform his findings. The criticisms levelled at him in this regard, are unfair and unfounded, in my opinion. The judge's evaluation of those matters is logical and reasonable and cannot be faulted as being plainly wrong.

[46] The learned judge's ultimate conclusion was reasonable in view of the evidence and the law. Having

(a) found that there was no factual basis for attributing any type of negligent conduct to Mr. Bramble;

(b) he was entitled to distinguish this case from **Ng Chin Pui v Lee Chuen Tat** and **McGeough v Thomson Holidays**, in which the defendants broke a traffic rule, unlike here, where no traffic infraction was alleged or proven. Taking everything together, the judge made it clear that he was not satisfied that the appellants had discharged the burden and standard of proof in relation to the *res ipsa loquitur* aspect of their claim. It was a reasonable conclusion.

[47] I am satisfied that the judge had ample evidence from which to justifiably and sensibly make the factual conclusions that he did and to conclude as a matter of law that the maxim *res ipsa loquitur* is inapplicable to the facts of the present case. In

my opinion, he was not plainly wrong. His reasoning is unimpeachable, and I would not interfere with his findings on the facts or the law. It follows that the prayer for damages would fall away, and the related arguments do not need to be considered. I would therefore dismiss grounds of appeal (a) iv and (b) i.

Issue 2 - Unjust Enrichment and Mistake
Appellants' submissions

[48] Mistake of fact and of law were put forward as the foundation of the appellants' unjust enrichment claim. With respect to mistake of fact, they submitted that without sight of the May and June 2016 reports from Dr. John and Ms. Gillis-Gerard, HRMU was unaware of the change in circumstances and failed to appreciate that Mr. Bramble was disqualified by GO 610 and regulation 30 of the **PSR** from being paid a salary. They contended that they: (a) laboured under the mistaken belief that he had medical authorisation to be off duty; and (b) failed to appreciate that he was no longer receiving treatment from Dr. John and Ms. Gillis-Gerard. Consequently, HRMU continued to mistakenly authorise the payments although there was no legitimate basis for so doing.

[49] As to mistake of law, they maintained that they were of the erroneous view that Mr. Bramble was: (a) still a public officer when in reality, by operation of law, he was deemed by regulation 30 of the **PSR** to have abandoned his post because, he was absent from duty without leave, for over 30 days; and (b) in violation of GO 610, he did not return to work when he was due to do so and was therefore absent without leave. Alternatively, they failed to realise that his contract of employment had been frustrated.

[50] On the appellants' behalf, learned counsel Ms. Morgan submitted that there was no evidence that Mr. Bramble thought himself unwell beyond September 2016. The court erred in relying on a medical report from February 2018 to justify his absence from work. Further, the circumstances of his medical authorisation having ceased in September 2016, he received the payments and benefits without a legitimate basis, and therefore no legal basis existed for the court to dismiss the claim that the

payments were made by mistake and hold that Mr. Bramble was not unjustly enriched thereby.

[51] She argued further that the judge erred in finding that there was nothing to show that Mr. Bramble was required to report on his medical status. He also erred by not considering the evidence that discussions were held with Mr. Bramble about the option of a transfer to another role if he was unable to drive tractors.

Respondent's submissions

[52] Mr. Bramble argued that the only payments received directly by him were salary, while other payments were made to third parties for gym fees, accommodation and other expenses in Antigua. He submitted that the judge was entitled to make the impugned findings of fact in relation to the unjust enrichment claim and was correct to dismiss it because there was no causative mistake. He relied on **Barclays Bank v W J Simms Son and Cooke**.[29]

Discussion

Unjust enrichment

[53] A *prima facie* case of unjust enrichment is made out by proving four elements – (a) enrichment of the defendant; (b) at the claimant's expense; (c) the enrichment was unjust; and (d) the defendant has no defence to the cause of action.[30] The first two elements are self-explanatory as is the fourth. The third – unjust enrichment – was described in **Kleinwort Benson Ltd. v Lincoln City Council**,[31] where the court held that proof of unjust enrichment requires the claimant to establish that it would be unjust for the defendant to retain the benefit received.

[54] The learned authors of **Halsbury's Laws of England** explain:

> "In deciding whether or not a particular enrichment is unjust, the court is not given free rein to give effect to its own perception of what is or is not unjust. Thus mistake of fact, mistake of law, duress, undue influence … are all

[29] [1980] QB 677.
[30] Halsbury's Laws of England Vol. 88 (2019), para. 410.
[31] [1999] 2 AC 349 at 409; [1998]4 All ER 513 at 561.

causes of action which can render an enrichment unjust ('unjust factors'). … However, restitution will generally be denied where the benefit was conferred upon the defendant in the form of a valid gift or in pursuance of a valid common law, equitable or statutory obligations owed by the claimant to the defendant."[32]

Mistake as an unjust factor

[55] It has long been recognised at common law that restitution of monies is recoverable if it is established that payment was predicated on a mistake of fact. This was exemplified in **Kelly v Solari**.[33] Parke B explained as follows:

> "If, indeed, the money is intentionally paid without reference to the truth or falsehood of the fact, the plaintiff meaning to waive all inquiry into it and that the person receiving shall have the money at all events, whether the fact be true or false, the latter is certainly entitled to retain it, but if it is paid under the impression of the truth of a fact which is untrue, it may, generally speaking, be recovered back, however careless the party paying may have been in omitting to use due diligence to inquire into the fact. In such a case the receiver was not entitled to it, nor intended to have it."[34]

Similarly, Rolfe B opined:

> "With respect to the argument that money cannot be recovered back except where it is unconscientious to retain it, it seems to me that wherever it is paid under a mistake of fact and the party would not have paid it if the fact had been known to him, it cannot be otherwise than unconscientious to retain it."[35]

[56] More recently, in **Dextra Bank & Trust Co Limited v Bank of Jamaica**,[36] the Board emphasised the requirement for a causal connection between the mistake and the payment, in the following terms:

> "To succeed in an action to recover money on that ground, the plaintiff has to identify a payment by him to the defendant, a specific fact as to which the plaintiff was mistaken in making the payment, and a causal relationship between that mistake of fact and the payment of the money: see *Barclays Bank Ltd. v W J Simms, Son and Cooke (Southern) Ltd.* [1980] 1 QB 677, 694."[37]

---

[32] Halsbury's Laws of England Vol. 88 (2019) at para. 420.
[33] [1835-42] All ER Rep 320.
[34] Ibid at pg. 322.
[35] [1835-42] All ER Rep 320.
[36] [2001] UKPC 50.
[37] Ibid at para. 28.

[57] Until relatively recently, payments under a mistake of law were not recoverable ('the mistake of law rule'). This is no longer the case. By a seminal decision in **Kleinworth Benson Ltd v Lincoln City Council and other appeals**[38] in 1998, the House of Lords ruled that the mistake of law rule was no longer part of English law. It held that when money was paid under a view of the law later proved to be erroneous, the money was paid over under a mistake of law, since the payor believed when he made payment that he was bound to do so. If it is subsequently discovered that when he made the payment he had no legal obligation to do so, although he thought he did, he would be entitled to recover the payment on the basis of mistake of law. It is now settled law that there is a general right to recover money paid under a mistake, whether of fact or law, subject to the defences available in the law of restitution, such as estoppel, limitation, illegality or compromise.

[58] In explaining the new posture, Lord Goff of Chieveley said:

> "The payer believed, when he paid the money, that he was bound in law to pay it. He is now told that, on the law as held to be applicable at the date of the payment, he was not bound to pay it. Plainly, therefore, he paid the money under a mistake of law, and accordingly, subject to any applicable defences, he is entitled to recover it."[39]

He added:

> "I start from the proposition that money paid under a mistake of law is recoverable on the ground that its receipt by the defendant will, prima facie lead to his unjust enrichment, just as receipt of money paid under a mistake of fact will do so."[40]

[59] This principle was also applied in **Leslie v Farrar Construction Ltd**.[41] Writing for the English Court of Appeal, Jackson LJ stated the law as follows:

> "'If C, because of a mistake, pays money which is not due to D, he can recover that money unless one of the recognized defences applies. The

[38] [1998] 4 All ER 513.
[39] Ibid. at pg. 536.
[40] [1998] 4 All ER 513 at pg. 540.
[41] [2016] EWCA Civ 1041.

courts have formulated, refined and applied that principle through a series of decisions over the last two centuries."[42]

[60] **Kelly v Solari** and **Dextra Bank & Trust** outline the settled position regarding mistake of fact as an unjust factor. It is that, where money is paid to a defendant or valuable resources are expended on his behalf by a claimant who did so solely because of a belief that certain facts exist, when in reality they do not, and where the payor would not have otherwise made such payment or granted such benefit to the defendant, unjust enrichment is made out subject to any available defences.

[61] **Kleinwort Benson Ltd** and **Leslie v Farrar Construction Ltd** have transformed the law in relation to mistake of law. It is now established that mistake of law is a valid cause of action and is an unjust factor in unjust enrichment. It arises when money or services are passed from a payor to a payee in circumstances where the payor made the payment only because, he erroneously believed that the law required him to do so. If he subsequently discovers and establishes that the law which obtained at the time of payment imposed no such obligation to pay, the payor would have proven his claim for unjust enrichment. It would be unconscientious for the payee to retain the payment and a court would order restitution as in the case of mistake of fact. I am guided by those principles and will apply them to the case at the appeal bar.

[62] The learned judge held that the case turns on the facts and not on the law. He accordingly omitted to address the mistake of law aspect of the claim, specifically the contentions that regulation 30 of the **PSR** and the doctrine of frustration were applicable. He erred in not considering this issue. This was an integral part of the appellants' case. It, therefore, falls to this Court to consider those arguments.

[63] A major component of the appellants' appeal has to do with the judge's determination that unjust enrichment was not made out, because Mr. Bramble had

[42] Ibid. at para. 30.

grounds on which to reject Dr. John's medical opinion that he was fit to return to work. They argued that because Mr. Bramble did not testify, there was no evidentiary basis for finding that he thought himself to be ill after September 2016.

[64] The judge attached considerable weight to a medical report by Dr. Sean Smith to arrive at the conclusion that Mr. Bramble thought himself to be unwell beyond September 2016. An excerpt from it is set out in the judgment[43] as part of the factual matrix and that portion of the report informed the judge's decision. He opined:

> "The obvious response on the facts to the analysis of Counsel Morgan is Bramble still considered himself ill; just because a doctor may have said he was fit to work does not mean Bramble agreed, noting the neurosurgeon Dr Smith does identify a persisting injury, while there is little medical detail to justify Dr John returning him to work after so long off it, so that Bramble not volunteering for work is capable of being a completely reasonable response in the context of his persisting symptoms and such a reliably open chequebook to maintaining him on (sic) Antigua."[44]

[65] Dr. Smith's report is dated 10th February 2018 and signed Sean A Smith, Consultant Neurosurgeon. Significantly, although it appears in the Record,[45] it was not produced into evidence. Ms. Hogan was asked whether she got that report and she responded that she did not recall doing so. Mr. Greer was not asked about it. Neither witness endorsed its contents. While the appellants did take the point in their submissions, the Court cannot ignore this crucial misstep. I make the observation that the report is listed in the Record as one of several documents that were not agreed to by the parties. This confluence of evidential slipups confirms the appellants' contention that the learned judge erred by making a finding about Mr. Bramble's mindset without supporting evidence.

[66] Furthermore, it cannot be ignored that Dr. Smith's opinion is the sole reason given by the judge for concluding that Mr. Bramble thought himself to be unwell. It is also one of the main reasons for his ruling that there was no mistake of fact and hence

[43] Para 9 u. of the judgment.
[44] Para. 15 of the judgment.
[45] See pages 377 – 380 of the Record of Appeal.

no unjust enrichment. In those circumstances, his determination that unjust enrichment is not made out is undermined by this reliance on a document that was not part of the evidence. He fell into error in doing so and this led to his further error in relying on it in arriving at his conclusion on the mistake of fact element of the unjust enrichment claim. He thereby erred in arriving at his determination of the mistake of fact element of the unjust enrichment claim. For this reason, I would uphold the ground of appeal[46] but the matter does not end there.

[67] This Court would therefore have to consider afresh the issue of mistake of fact as an unjust factor. I propose to deal with the mistake of fact and mistake of law elements together because of the obvious interlinkages between the underlying factual contentions.

[68] An appreciation of regulation 30 is indispensable to the resolution of the dispute. It states:

> "An officer who is absent from duty **without leave for a continuous period of one month**, unless declared otherwise by the Deputy Governor, is deemed to have resigned his office and thereupon the office becomes vacant and the officer ceases to be an officer." (Emphasis added)

[69] GO 610 featured prominently in the appellants' case. It provides:

> "An officer who absents himself from his duties without leave, or who without an acceptable excuse, fails to resume duty when he is due to do so, will be regarded as absent without permission and will not be entitled to salary during such absence. All such absences will be reported to the Permanent Secretary, Administration and the period of absence may not be set off against any leave eligibility without the approval of the Governor." (Emphasis added)

[70] GO 610 is one of many clauses in the GO. To give context to its relevance, it is important to note that the GO broadly outline the terms and conditions of employment of public officers.[47] They are made by authority of the Governor who

[46] Ground of appeal 3 a. ix.

[47] The also contain instructions for the conduct of public officers and public business and other miscellaneous matters. See GO 101.

has constitutional responsibility for the public service, the functions being largely undertaken by the Deputy Governor.[48] While the GO may be amended from time to time by establishment circular emanating from the Permanent Secretary, Administration as approved by the Governor,[49] they are not made pursuant to any statutory power to make subsidiary legislation. Therefore, they do not have the force of law as contended by the appellants. GO 610 cannot therefore be invoked on its own to establish mistake of law.

[71] The appellants' reliance on GO 610 to undergird its mistake cause of action ignores the fact that Chapter 6 of the GO deals with different types of leave and leave entitlement and contains other Orders which have a bearing on the issue at hand. Although neither party referred to the other Orders,[50] the relevant leave provisions cannot be disregarded in resolving the issue of whether Mr. Bramble absented himself from work without leave between September 2016 and March 2017, so that it could be found on a balance of probabilities that:

(a) his medical authorisation (sick leave) or other leave ceased as of September 2016;

(b) the HR Department was ignorant of this; and

(c) consequently the GoM made payments to him due to a mistake that he was away from duty without authorisation or leave.

[72] Of relevance are GO 602, 604, 621, 623, 626 and 630 which provide respectively:

> "602. "leave" means absence from duty with permission <u>in accordance with the provisions of these Orders;</u>
>
> …
>
> 604. (1) Heads of Departments have authority to grant leave to their staff <u>within the following limits</u> –
>
> (i) <u>earned leave</u> up to the <u>maximum of 27 working days</u> in any one year;

[48] See sections 24 and 28 of the Montserrat Constitution, Cap. 1.01 of the Laws of Montserrat.
[49] GO 103(2).
[50] The General Orders were requested by the Court and were provided subsequent to the hearing.

(ii) sick leave on full pay up to 25 working days in any one year;
(iii) …

(2) All other leave and leave in excess of the limits prescribed in paragraph (1) of this Order will be granted by the Permanent Secretary, Administration, ….

…

621. (1) Subject to the provisions of Orders 622-629, an officer may be granted sick leave –

(i) if he is ill or injured, provided that the illness or injury prevents him from carrying out his duties and was not caused by his own misconduct or by his failure to take reasonable precaution;

(ii) if he is ill or injured while on earned leave, …,

Provided that in the case of an officer on earned leave, ….

(2) ...

…

623. (1) The maximum amount of sick leave which may be granted by a Head of Department is 25 working days in any year. If an officer, after having taken 25 days sick leave in a year, is still sick or is sick on duty on a further occasion in that year, then any further absence from duty will be deemed to be earned leave and his leave account debited accordingly.

(2) …

(3) Officers appointed on contract terms or to non-pensionable posts may be granted sick leave in accordance with paragraph (1) of this Order. If such an officer after having exhausted his earned leave entitlement, is still sick or is sick on a further occasion, he may be granted extra sick leave on full pay by the Permanent Secretary, Administration. Such extra sick leave shall not exceed 25 days in a year except that the Governor may in his discretion and in exceptional circumstances grant extra sick leave with full or with half pay for a total period not exceeding 75 days.

…

626. (1) The Governor in his discretion, may grant discretionary sick leave on full salary where an officer is suffering from –

(a) an injury sustained when in the execution of his duties; or

(b) an illness caused by or directly attributable to the nature of his duties.

(2) **Sick leave granted under this Order shall not be taken into account for purposes of any other of these Orders**.

…

630. The total cost of any medical, hospital and travel costs of any officer who suffers an injury specifically attributable to the nature of his duty (or who becomes ill or contracts a disease as a result of the nature of that duty) will be met from public funds. But in no case will costs

be so met if the injury (or illness or disease) is caused by, the officer's own culpable negligence or misconduct.
Provided that the costs of travel and treatment overseas will not be met from public funds
unless treatment overseas is recommended by a Medical Board." (Emphasis added)

[73] With respect to the unjust enrichment claim, at issue is: 1) whether Mr. Bramble was required to report to HRMU on his medical status by sharing with them the contents of medical reports from Dr. John or the physiotherapist; 2) whether he was absent without leave under GO 610 or had abandoned his post pursuant to regulation 30 of the **PSR** after September 2016, by failing to report for work and by remaining in Antigua without seeking medical attention from Dr. John and the therapist; and if so, 3) whether HRMU paid a salary to him and benefits to others on his behalf on the mistaken belief that he (a) was on leave seeking medical attention from the referenced personnel; (b) had not abandoned his post; (c) was absent without leave in contravention of GO 610; or (d) was no longer an employee because the contract was not frustrated. I now deal with each in turn.

Reporting requirements

[74] The judge found that HRMU's reporting conduits failed between 2016 and 2017 when no reports were collected from the medical personnel in Antigua. He surmised that this was perhaps attributable to staff absences and changes within HRMU.

[75] Limited details were supplied as to the reporting arrangements between HRMU/GoM and Dr. John and the physiotherapist in Antigua. Ms. Hogan's testimony that this was done through the CMO is uncontroverted, as was her admission that Mr. Bramble was not required to share his medical reports or health status with HRMU. I am so satisfied and would find that he had no such obligation.

Mistake - GO 610 and Regulation 30

[76] Another aspect of the appellants' case is that at some unspecified point after September 2016, Mr. Bramble had abandoned his post, having been deemed to have resigned after 30 days of being out of office without leave. They pleaded:

> "13. … The Second Claimant says that there was no formal request for further information concerning the date on which the Defendant abandoned his office. However, it is the Second Claimant's position that, in the circumstances, where under section (sic) 30 of the Public Service Act, an employee is deemed to have resigned after thirty days of being out of office without leave, that it is not necessary to identify the specific date as the Defendant was out of office without leave and without a reasonable basis for being granted leave far longer than the required statutory period before his salary was ceased."[51] (Emphasis added)

[77] Contrary to the appellants' assertion that the date of effective abandonment is irrelevant, it is central to a determination of whether Mr. Bramble was out of office without leave as alleged. The reason for this is that the alleged mistake that he was no longer employed is linked to the date on which it is alleged that his leave expired. In order to prove that they made the payments through mistake of fact and/or law as to his leave status, the appellants must prove that he was not on leave at the time and that his status did not change after September 2016 or at some other specified or determinable time.

[78] The pleadings are quite instructive as to the parties' respective positions on leave. It is useful to set out the material parts. The appellants pleaded:

> "11. ...The Defendant eventually proceeded on various periods of sick leave **culminating in discretionary sick leave with full salary approved by Her Excellency the Governor until November 30, 2014**.
>
> 12. After November 30, 2014, the Government of Montserrat paid for the Defendant's medical and other expenses in Antigua, and **continued to pay the Defendant's salary in the belief** that the Defendant **would return** to employment with it **when sufficiently recovered to do so**."[52] (Emphasis added)

[79] Mr. Bramble countered:

---

[51] See para. 13 of the Reply to Amended Defence filed on 29th October 2019.
[52] See paras. 11 and 12 of the Amended Statement of Claim filed on 30th January 2020.

> "8. … (14) Dr. John advised that the Defendant could return to work in September 2016 **but the Defendant was still experiencing considerable problems** and was unable to drive a tractor. …" (Emphasis added)

[80] The appellants' reliance on the abandonment mistake is tied inextricably to the leave regime under the GO, which exclusively governs all forms of leave in the public service. Consequently, reference in regulation 30 of the **PSR** to being 'absent from duty without leave' necessarily means earned, sick or discretionary leave approved pursuant to the relevant GO.

[81] The GO allows for earned leave of no more than 27 working days each year and a maximum of 75 working days sick leave during the same period.[53] Discretionary leave could be awarded at the sole discretion of the Governor, without limit.

[82] The facts are that by 30th September 2016, Mr. Bramble was in Antigua undergoing medical care for an unbroken period from January 2014. Excluding the first eleven months in 2014, this equates to over 447 working days. This exceeded all earned or sick leave that could potentially be granted to him unless he had accrued leave above those limits. The fact that he was granted discretionary leave suggests that he did not have any earned leave. I infer this from GO 623(1).

[83] Curiously, no documentary proof of the Governor's authorisation of discretionary leave was produced. No correspondence to Mr. Bramble was exhibited that indicated the length or terms of his discretionary leave. Likewise, Ms. Hogan did not say whether Mr. Bramble was granted and/or notified of any further period of discretionary, sick or other leave for the period after November 2014. Even though the appellants had or should have had all of the relevant records to demonstrate what, if any, leave was approved after November 2014, they failed to produce any or even allude to them. In the absence of reasonable explanation, this leads to the inescapable inference that no such records exist. Of this I am satisfied.

---

[53] GO 604 and 623(2).

[84] Another peculiar aspect of the leave sub-issue, is that it remains unclear and unexplained, what were the terms under which Mr. Bramble was permitted to be in Antigua between 1st December 2014[54] and September 2016 at the GoM's expense. Nothing was said about the conditions under which the payments were approved or the terms or conditions under which he was to receive financial support from the GoM while in Antigua or on which the other payments were to be made. These gaps in the narrative are disconcerting and unhelpful.

[85] At the highest, what can be inferred from Ms. Hogan's testimony is that a decision was made by some unidentified person or authority to continue making the payments, based on a recommendation from the CMO that he would require further treatment up to September 2016, 'when he was required to report for duty'.[55] Ms. Hogan produced a letter,[56] signed by Dr. Tracy Kernanet-Huggins, CMO, in which the author indicated that Ashel Bramble will require another year of care based on the reports received from Dr. John and Ms. Gillis-Gerard. She added that he must continue with his rehabilitation based on 'professional advice.'[57] Remarkably, the appellants led no evidence that Mr. Bramble was granted leave on the basis of that letter or the referenced reports or that the contents were communicated to him.

[86] It is noteworthy that GO 630 prescribes the general parameters within which medical and related expenses are approved. In passing, I make the observation that no evidence was led to establish compliance with that Order and no contractual or other legitimate basis for the expenditure to Mr. Bramble was pleaded or articulated. Without such evidence, it is reasonable to infer that HRMU or other functionary utilised some other undisclosed discretionary regime for approving those payments,

[54] After the discretionary sick leave granted to him by the Governor had ended.
[55] See pg. 52 of Record of Appeal, lines 1-4 of the Notes of Evidence.
[56] Letter dated 9th September 2015.
[57] See pg. 229 of the Record of Appeal.

that had no basis in the contract of employment, the GO, the **PSR**, other legislation or a policy document.

[87] It was not asserted that HRMU, Mr. Bramble's Department Head or the PS Administration/Deputy Governor or Governor approved further leave of any kind beyond November 2014, under the GO or otherwise, whether orally or in writing. Accordingly, there is no evidentiary basis on which to find that between November 2014 and September 2016, Mr. Bramble was in Antigua on leave or other official authorisation approved by a relevant government functionary, pursuant to the GO. I am led ineluctably to conclude that no such leave was approved and I would so find. This means that if he was authorised to be absent from work, this was not achieved in accordance with the GO.

[88] The appellants' reliance on GO 610 suggests that they are aware of the other Orders. Undoubtedly, they would have appreciated that Mr. Bramble's authority to be away from work after November 2014 while receiving the referenced benefits, was being handled entirely outside of the protocols in the GO. They nevertheless sanctioned this without protest for almost 2 years, objecting retroactively, only, for some unspecified part of the post-September 2016 period. The absence of specifics negatively impacts their capacity to establish this part of their case to the required standard.

[89] Furthermore, their argument that after September 2016, they operated under a mistake of fact and law that Mr. Bramble was still an employee who was on leave, begs the question what leave expired in or after September 2016. They have not proved that he was on approved leave up to September 2016. They must have known this and cannot truthfully, legitimately or reasonably assert that they were mistaken as to this fact until March 2017. Since abandonment is predicated on the absence of approved leave, the same logic vitiates their contention that he had abandoned his post and is deemed to have resigned pursuant to regulation 30 of the **PSR**.

[90] In reality, nothing about Mr. Bramble's employment or leave status changed between 30th September 2016 and March 2017. The fact that the appellants treated him as a *de facto* employee up to September 2016, notwithstanding non-approval of leave, suggests that they regarded him as an employee who was out of the jurisdiction receiving medical treatment and thereby deemed his absence to be approved, albeit not in accordance with the GO. Their failure to regularise his leave status after November 2014 does not, without more, create a factual or legal distinction in his employment status for the period up to 30th September 2016 as against the period ending March 2017.

[91] Moreover, this mistake contention ignores the appellants' pleaded case that the payments were made with the expectation that Bramble would return to work with the GoM when he was sufficiently recovered to do so. This assertion was not qualified and implies that he was not necessarily expected to return when the referenced personnel in Antigua said that he was recovered, if he believed that he was still unwell. Furthermore, the appellants provided no expert medical evidence that he was recovered to that degree. The absence of medical experts from the case and/or medical opinions as to Mr. Bramble's state of recovery meant that this was not established to the required standard.

[92] In summary, the appellants' assertions that Mr. Bramble remained an employee of the GoM up to September 2016 and that he was away on approved leave, is problematic for them, without evidence as to the terms under which the relevant authority approved an extension of paid leave beyond November 2014. They fell short of discharging the burden to establish those facts on a balance of probabilities. This failure wholly undermined their claim that as a result Mr. Bramble was deemed to have abandoned his post, was disqualified by GO 610 from receiving the payments, and that he had been unjustly enriched by receipt of them.

[93] In the final analysis, the evidence does not support the appellants' contention that the payments after September 2016 were made when by virtue of GO 610 and regulation 30, Mr. Bramble was absent without leave; deemed to have resigned his post and was no longer an employee of the GoM. It follows that there is no evidentiary or legal basis for their assertion that the payments were made due to a mistaken belief that he was still an employee after September 2016. For those reasons, I am satisfied that when they made the payments between September 2016 and March 2017, they were not labouring under any such mistake of fact or law. I would hold that they were not.

Mistake - Discontinued treatment

[94] Another limb of the appellants' mistake of fact cause of action, is that they made the payments on the mistaken belief that Mr. Bramble was still receiving medical care from Dr. John and Ms. Gillis-Gerard between September 2016 and March 2017. The judge did not make a finding on this. I now consider it.

[95] The appellants' entire unjust enrichment claim arises out of the contract between the parties. Accordingly, the terms of the contract must be examined to determine whether this element of the mistake cause of action is made out. As mentioned earlier, one problem that the appellants have is that they failed to plead or provide evidence of the terms under which the payments were made. Likewise, they did not establish that those terms were communicated to Mr. Bramble.

[96] On the pleadings, the only 'condition' for the payments was the appellants' belief that Mr. Bramble 'would return to employment … when sufficiently recovered to do so'. Mr. Bramble did not deny this and is taken to admit it. However, a stipulation that he return to work when fully recovered is different from an expectation that he continue to receive care from Dr. John and Ms. Gillis-Gerard in order to receive the benefits although theoretically it may be implied. This point was not argued and I therefore refrain from considering it.

[97] The appellants are bound by their pleadings. They were required to set out in their pleadings, all of the relevant facts on which they rely to establish unjust enrichment. They never claimed that it was a condition of the arrangement that Mr. Bramble continue to receive treatment from Mr. John and Ms. Gillis-Gerard. I make no findings that it was. Their mistaken belief that Mr. Bramble had continued to receive medical care from Dr. John and Ms. Gillis-Gerard at that time, even if honestly held is shown to be based on the contract of employment or other ancillary agreement. They have therefore failed to establish that they made the payments based on the alleged mistake of fact. I would so hold.

[98] Additionally, it cannot be overlooked that Mr. Bramble insisted that he had not fully recovered. This finds expression not only in his pleadings but also in the evidence. During cross-examination, Ms. Hogan was asked whether she had a conversation with Mr. Buffonge[58] in which he requested that Mr. Bramble be examined by a neurosurgeon to ascertain his fitness to resume work. She replied, 'I recall seeing some communication to that yes.'[59] No such correspondence was produced. Ms. Hogan's answer lends credence to Mr. Bramble's assertion that he was still having medical issues after he was cleared by Dr. John. In my estimation, this has negative implications for appellants' ability to prove to the requisite standard that Mr. Bramble was fully recovered. I would make no finding that he was.

[99] Parenthetically, the parties' course of dealings while Mr. Bramble was in Antigua is, in my opinion, illuminating. On two occasions in 2015, the appellants demonstrated that they were not inclined to discontinue the payment of salary or other benefits to Mr. Bramble even: (a) when he failed to attend the physiotherapy sessions;[60] or (b) when HRMU did not receive medical reports from the medical practitioners in accordance with its established reporting mechanisms. It is arguable that the circumstances on which they now rely to buttress their mistake of fact assertion is identical to those which existed in 2015.

---

[58] Mr. Buffonge was Mr. Bramble's lawyer at some point between 2016 and 2017.
[59] See page 54 of the Record, line 9 of the Notes of Evidence.
[60] See sub-paragraphs 9 a., k. and m. of the judgment.

Doctrine of Frustration

[100] The appellants relied on the doctrine of frustration as an alternative unjust factor. They rested on the submissions made in the court below. They stated simply that the doctrine arises. Mr. Bramble made no counter argument.

[101] Frustration of contract refers to circumstances beyond the control of the parties which render the agreement incapable of being performed. The general concept is described in **Halsbury's Laws of England** as follows:

> "A contract is frustrated where without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. The doctrine of frustration may apply to a contract of employment which is affected by sufficiently drastic external factors, with the effects that:
>
> (1) the contract terminates automatically, without the need for any action by the employer;
> (2) there is no right to any back pay from the date of frustration to any later date; and
> (3) the fact that termination is by operation of law means that there is no dismissal, which in turn means that the employee cannot claim unfair dismissal or a redundancy payment.
>
> It was suggested that the doctrine of frustration should not be applied to contracts of employment which may be terminated in any event by relatively short notice. The orthodox approach that the doctrine can apply has, however, been reasserted …".[61]

[102] The appellants did not by their pleadings or evidence indicate what aspect of the employment contract was incapable of performance after September 2016. On the evidence, the GoM remained ready to assimilate Mr. Bramble into any suitable post for which he was qualified. Neither Ms. Hogan nor Mr. Greer said that no such post was available. Mr. Bramble did not contend that he was not interested in returning to work. He pleaded merely that he could no longer serve as a tractor driver[62] and that he was not yet fully recovered.

---

[61] Vol. 41 (2021), at para. 735.
[62] See para. 10 of the Amended Defence.

[103] Evidently, the parties were willing to perform their respective obligations under the contract, albeit with the caveat by Mr. Bramble that he be re-assigned to another role. I fail to comprehend why it is alleged that the contract was frustrated. In my opinion, there is no or very little evidentiary support for such a finding. I would hold that the contract was not frustrated.

[104] For the above reasons, I would find that the appellants have not established mistake of fact or law, or frustration of contract as unjust factors. Accordingly, although the complaint relating to the judge's treatment of the unjust enrichment claim is well founded, based on my assessment, the unjust enrichment claim fails. I would therefore dismiss the related grounds of appeal.[63]

[105] Finally, as to the appellants' contention that the learned judge erred by not considering evidence that Mr. Bramble's terms of employment allowed for a transfer to another role, if he was unable to drive tractors, it suffices to reiterate that a court is not required to engage with every legal argument presented in a case. This Court has said repeatedly that a judge's duty is to address those issues that are indispensable to resolving the dispute and give his reasons.[64] In view of his holdings and the reasons for decision, it was unnecessary for the learned judge to delve into that sub-issue. He was not blatantly wrong for making no ruling on this issue. I would therefore dismiss this ground of appeal.[65]

Constructive Dismissal
Appellants' submissions

[106] The appellants submitted that it was neither pleaded nor argued that Mr. Bramble was constructively dismissed and there was no evidence to support the court's finding that he was.

---

[63] Grounds of appeal 3 a. iv., v., vi., viii., ix., b. ii., iv., and v.
[64] See for e.g. Emerson International Corporation v Renova Industries Ltd and others, BVIHCMAP2016/0029, (delivered on March 23rd 2017).
[65] Ground of appeal 3 a. x.

Respondent's submissions

[107] Mr. Bramble did not address those contentions.

Discussion

[108] Constructive dismissal was not raised in the pleadings. However, the judge opined:

> "17 The regret is HRMU did not gather the medical reports when they should. In this sense, Bramble's situation is perhaps similar to being an employee about whom there was no appraisal at the required time, which would have led to sacking, but instead later, where the decision to sack him is then backdated to when the appraisal should have taken place, with demand money be repaid received after when the appraisal should have happened. Intrinsically that would be wrong. Bramble was constructively sacked on 27.03.17, not before."[66]

[109] It is trite law that a judgment should be confined to the issues which are vital to the resolution of the dispute and that the determination should be restricted to material factual and legal matters. Consideration of constructive dismissal was not essential for resolution of the issues. The learned judge erred in making a finding on a legal matter that was not in dispute. I would uphold this ground of appeal[67] and set aside that finding.

Miscellaneous

[110] The appellants described aspects of the learned judge's judgment as being extraneous. In this regard, they highlighted his statements at paragraph 20 that:

(i) there was no meaningful cost to the GoM in bringing the claim;

(ii) the GoM had salaried lawyers;

(iii) the claim was in the GoM's view 'punishment for being thought cheeky'; and

(iv) his view was that the claim was a dogged pursuit of a now prisoner.

[66] At para. 17 of the judgment.
[67] Grounds of appeal 3 a. vii, 3 b. iii.

[111] The appellants also criticised as being irrelevant, the judge's opinion, voiced at trial and in the judgment, that the claim was being brought without prospect of recovery (as Mr. Bramble was indigent and unable to repay the sums); that it was in retaliation for Mr. Bramble's threats to bring a claim in respect of his stopped salary and that Mr. Bramble had discontinued his countersuit. They argued that there was no evidence of these matters. I note that in his Amended Defence Mr. Bramble excised his counterclaim in its entirety.

[112] In determining what costs award to make, the learned judge did in fact allude to the GoM's lawyers being salaried, and other matters which attracted criticism on appeal. Those are clearly not matters which need to be considered in relation to an award of costs. The judge ultimately utilised the correct costs regime (prescribed costs) when making the costs order. The appellants did not take issue with the award of costs and nothing turns on it. This argument is of no assistance to them as nothing turns on it.

[113] Apart from paragraph 20, the reference to limited prospect of recovery and indigence appears only in the introductory paragraph of the judgment, in the summary of the factual background and in the judge's preliminary observations. He also mentioned there that Mr. Bramble had discontinued his countersuit. Those remarks do not appear elsewhere in the judgment. All in all, I am of the considered view that the judge's remarks on those matters constitute permissible commentary, are not objectionable and do not invalidate his findings of fact or law as contended. He did not err and was not blatantly wrong in giving expression to those thoughts. I would therefore dismiss the related grounds of appeal.[68]

Costs

[68] Grounds of appeal 3 a. i., ii., iii. and xi.

[114] Although the appellants are successful in some areas of the appeal, that did not change the outcome. Having substantially prevailed, Mr. Bramble is entitled to his costs pursuant to CPR 65.13.

Disposition

[115] I would accordingly make the following orders:

(1) The appeal against the judge's order dismissing the appellants' claim in negligence based on the doctrine *res ipsa loquitur* is dismissed and the judge's order is affirmed.

(2) The appeal against the judge's determination that the respondent was constructively dismissed is allowed and the judge's pronouncement at paragraph 17, to wit, 'Bramble was constructively sacked on 27.03.17, not before' is set aside.

(3) The appeal against the judge's reliance on the February 2018 medical report authored by Dr. Sean Smith, is upheld.

(4) The appeal against the judge's findings of fact and law regarding mistake as an unjust factor in unjust enrichment, is upheld.

(5) The appeal against the learned judge's order dismissing the appellants' claim in unjust enrichment is dismissed.

(6) Mr. Bramble shall have his costs of the appeal in the sum of $5470.00, being two-thirds of the prescribed costs awarded in the High Court. [69]

[69] The sum of $8205.00 having been awarded by the judge as prescribed costs. See paragraph 20 of the judgment.

[116] Finally, I wish to thank counsel for their submissions.

I concur.
Dame Janice M. Pereira, DBE
Chief Justice

I concur.
Paul Webster
Justice of Appeal [Ag.]

By the Court

Chief Registrar