IN THE COURT OF APPEAL OF NEW ZEALAND

CA279/2014
[2015] NZCA 46

BETWEEN	SUISSE INTERNATIONAL LIMITED Appellant
AND	BEVERLEY JEAN MONK Respondent

Hearing: 19 February 2015

Court: Randerson, Winkelmann and Venning JJ

Counsel: S A Keall for Appellant
P F Dalkie and D A Watson for Respondent

Judgment: 6 February 2015 at 10:00 am

JUDGMENT OF THE COURT

A The application for leave to adduce further evidence is declined.

B The appeal is dismissed.

C The appellant must pay the respondent costs for a standard appeal on a band A basis with usual disbursements.

REASONS OF THE COURT

(Given by Randerson J)

Introduction

[1] On 21 November 2002 solicitors for the appellant (Suisse) paid $500,000 to the respondent Mrs Monk. Suisse and a number of other companies associated with Mr Reginald Watt had borrowed substantial sums of money from companies

associated with Mrs Monk to assist the Watt group in its business as a property trader. At the time the payment was made, Mr Watt was a bankrupt. Suisse and other companies in the Watt group were being managed by Mr Suren Sharma as their sole director.

[2] The payment was not challenged by Suisse for over five years when a solicitor's letter was sent to Mrs Monk on 11 December 2007. Another four years went by before Suisse brought proceedings in the High Court against Mrs Monk in November 2011. The case eventually went to trial before Goddard J in October 2013. The lengthy delays had a serious impact on documentary evidence available at trial and on the ability of those involved to recall relevant events.

[3] In its second amended statement of claim, Suisse pleaded that it was not until July 2007 that it discovered Mrs Monk had been paid the $500,000. It was alleged the payment had been made without Suisse's knowledge or consent. Suisse further alleged that Mrs Monk and/or Suisse's solicitors had concealed the payment. It was said Mrs Monk had never advanced any money to Suisse and that Suisse did not owe any money to her.

[4] Four causes of action were pleaded:

(a) Money had and received.

(b) Fraudulent breach of trust.

(c) Deceit.

(d) Unlawful means conspiracy.

[5] The focus of the case in the High Court was on the first and third causes of action. Little attention was given in the evidence before the High Court to mistake of fact as the basis for the money had and received claim. Mr Watt, Mr Sharma and Mrs Monk all gave evidence. Suisse also called evidence under subpoena from its solicitor at the time, Mr Bhanabhai and a legal executive from Mr Bhanabhai's firm, then called Dyer, Whitechurch and Bhanabhai.

[6] Goddard J dismissed Suisse's claim.[1] In summary, the Judge found there was no fraud or deceit and that the money was not paid by mistake. She held that the payment was authorised by Mr Sharma in full knowledge of the indebtedness between the Watt group and Mrs Monk. In any event, the Judge found that the claim was statute-barred under the Limitation Act 1950.

[7] On appeal, Suisse, now represented by fresh counsel, submits that the Judge erred in dismissing the claim for money had and received and in finding that the claim was statute-barred. The claims for fraudulent breach of trust and deceit are not pursued.

Background facts

[8] We draw the following summary largely from the Judge's finding and undisputed evidence except where otherwise noted. Mr Watt formed at least 20 companies at various times for the purpose of conducting his business. Until he was adjudicated bankrupt on 25 July 2001, Mr Watt was the sole director of Suisse and the other companies in the group. He was also the sole beneficiary of the family trusts which held the shares in the companies. The day before Mr Watt was made bankrupt, he appointed his financial manager Mr Sharma as sole director of all the Watt companies then in business. Mr Sharma said nothing changed after Mr Watt became a bankrupt. Mr Watt continued to be actively involved in the business. He worked in the office every day and was paid for his services as a manager. Mr Sharma described the continuation of the business in this manner as "seamless". The Judge accepted Mr Sharma's evidence "in its entirety".[2]

[9] The Judge regarded the way the parties conducted their business arrangements as of fundamental importance. She found that the Watt group was run as a single unit. She accepted evidence given by Mr Sharma and Mrs Monk that money advanced to one company was not necessarily repaid by that company. It was repaid from whichever company was in funds at the time repayment was due or demanded. Loans were rolled over and transferred between the companies. Most

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1 *Suisse International Ltd v Monk* [2014] NZHC 853 [High Court judgment].
2 At [19].

loans were secured, often on a collateral basis. Internally, the Watt group transferred money between its own entities.

[10] The advances made by Mrs Monk through her companies Richelieu Investments Ltd and Monk Investments Ltd are best captured in the Judge's own words:

> [23] The companies owned by Mrs Monk and her late husband, namely, Richelieu Investments Limited and Monk Investments, were a main source of funding for the Watt group of companies, especially where second or third tier lending was required. By the time of Mr Watt's bankruptcy in 2001, there was an established relationship between Mrs Monk's companies and the Watt group as lender and borrower. The loans were generally on an interest only basis. Automatic payments for the interest were nominally to have been made by one particular company but that did not prove to be the rule. Interest payments, when made, simply emanated from whichever company in the Watt group was in a position to make payment at the time. Thus, repayment of the loans could come from any company within the Watt group. The same was so with repayments of loan capital. This pattern and the modus is crystal clear from the schedules of borrowing and lending over the period 2000 to November 2002, the critical period in this case. It was also the pattern and modus that continued after November 2002, right up until late 2004/2005, during which many more loans were made by Mrs Monk and her companies to the Watt group of companies and on the same basis.

[11] The Judge found that Mrs Monk and her companies operated like an overdraft facility for the Watt group. We will refer to Mrs Monk's companies as Richelieu and Monk Investments. Loans were repaid out of whichever Watt project was in funds at the time that any repayment of interest was due or sought. Mr Keall for Suisse challenged the Judge's findings in this respect but we are satisfied her findings were justified on the evidence. The fact that loans were generally made to specific companies in the Watt group with specific securities does not detract from that finding. There was a pattern of advances and repayments in the way described by the Judge. Her conclusion in this respect was supported by the evidence of both Mr Sharma and Mrs Monk. Their evidence on that topic was not seriously disputed at trial and was accepted by the Judge as correct.

[12] During 2001 and 2002 there were a number of lending transactions. One such transaction related to a property in Willis Street, Wellington owned by Suisse. We will refer to this transaction in more detail below. For the present, it is sufficient

to state that Richelieu held collateral securities over the property securing debt on another Watt project. Under a deed of priority amongst secured creditors, Richelieu was a fifth mortgagee with a priority sum of $500,000. When the property was sold, Suisse received a total deposit of $510,945 by payments made into Mr Bhanabhai's trust account on 14 October 2002 and 18 November 2002. The undisputed evidence is that Mr Sharma, as the sole director of Suisse, instructed Mr Bhanabhai to pay $500,000 of this sum from his trust account to Mrs Monk personally. The payment was made on 21 November 2002 as earlier noted. It is not now in dispute that for the purposes of loan repayments, there is no material distinction between Mrs Monk and her companies.

[13] Mr Bhanabhai's instructions were recorded in a handwritten file note he made of a telephone conversation with Mr Sharma on 19 November 2002 in relation to the sale of the Willis Street property. This recorded that the deposit was to be paid on that date and that he was to:

> Pay $500 to Bev Monk on a/c repayment to her of her loans.

[14] Mr Bhanabhai explained that the reference to $500 was shorthand for $500,000 and that is not in dispute. In evidence, Mr Sharma confirmed these were his instructions to Mr Bhanabhai at the time. Mr Keall accepted that trial counsel did not at any stage put it to Mr Sharma, Mr Bhanabhai or Mrs Monk that a mistake had been made in making the payment. Rather, the focus of the case for Suisse at trial was that it did not owe any money to Mrs Monk or her companies.

[15] Settlement of the sale of the Willis Street property was delayed and did not proceed until January 2003. Mr Bhanabhai's firm prepared a statement of account for Suisse dated 20 January 2004 relating to the sale. This showed, amongst many transactions, a payment of $500,000 with the narration:

> Bank Transfer to B J Monk part loan repayment

[16] It is not in dispute that up to November 2002, Mrs Monk through her companies had advanced to the Watt group sums of between $2 million and $3 million although Suisse disputed how much (if any) of this remained outstanding at the time the impugned payment was made. After settlement of the sale of

Willis Street further advances were made to Watt group companies and sums repaid for a period of several years.

[17] When Mr Watt was discharged from bankruptcy on 25 July 2004, he did not immediately reappoint himself as director of his companies although he accepted under cross-examination that he could have done so. Mr Watt's brother was appointed for a period of time as a director until Mr Watt elected to resume directorship of the companies on 14August 2006.

[18] In that year, Mr Watt and others commenced High Court proceedings against Mr Sharma and other parties alleging Mr Sharma had breached duties to Mr Watt in Mr Sharma's role as the Watt group's business accountant and financial manager. In July 2007 Mr Watt's then counsel received various documents including a settlement statement from Mr Bhanabhai's firm showing the payment of $500,000 to Mrs Monk. This led ultimately to a letter of claim being sent by Mr Watt's then solicitors Ellis Gould on 11 December 2007. These proceedings were abandoned in 2007.

The judgment in the High Court

[19] The Judge regarded Suisse's case as "simplistic" and "totally untenable".[3] She said:

> [47] The start and end point is that the plaintiff had actual knowledge of the payment of $500,000 to Mrs Monk on 21 November 2002, the payment having been duly authorised by its sole director, Mr Sharma. Mr Sharma was appointed by Mr Watt and was acting well within his responsibilities and in line with the customary practice of the Watt group when he authorised the payment. Mr Bhanabhai received the authorisation as the plaintiff's solicitor and actioned it accordingly.

[20] Goddard J accepted a submission made on Mrs Monk's behalf that Mr Sharma, as the sole director of Suisse at the date of the payment, was the controlling mind of the company at the time the payment was made. His instruction to Mr Bhanabhai to make the payment was to be treated as the action of the company. The Judge also found that Mrs Monk was entitled to regard Mr Sharma as

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3 At [46].

fully authorised to act on behalf of Suisse in settling indebtedness owed by the Watt group to Mrs Monk's companies. Given the history of dealings between the Watt group and Mrs Monk's companies, there was nothing unusual about repayment of the funds in issue. It was, the Judge found, in line with the pattern of lending established over the previous two year period which continued for a further two to three years after the payment was made.[4]

[21] The High Court Judge went on to find that during the period of his bankruptcy, Mr Watt continued to conduct "business as usual".[5] She accepted Mr Sharma's evidence that Mr Watt was in the office every day and was being paid as a manager.[6] Goddard J found that the arrangements between the parties operated in effect as a running account of all outstanding loans and the balance of the loans. We have some reservations about the use of the term "running account" if, by that, the Judge meant the sort of account a trading company might operate for the supply of goods and services. For present purposes, it is sufficient to record that we uphold the Judge's finding that there was a pattern of repaying indebtedness from whatever source within the Watt group of companies was available, irrespective of the identity of the borrowing company.

[22] The Judge rejected the proposition that the payment was unauthorised or paid out on any mistaken basis. She found the money was owing and that it was immaterial whether it was paid under a mortgage covering existing and future advances or whether it was simply paid out on Mr Sharma's authority in reduction of Watt group indebtedness.[7] She also rejected the claim in deceit. This was not only meritless she found, it was also "entirely misconceived and verging on the vexatious".[8] She accepted a submission made on Mrs Monk's behalf that Suisse had conducted the case as though there were only ever one transaction between Mrs Monk and her companies and the Watt group. She observed that Suisse had

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4 High Court judgment, above n 1, at [50].
5 At [51].
6 At [51].
7 At [53].
8 At [55].

attempted to pluck out this one transaction from four years of similar trading and to characterise it as a "fraudulent or mistaken blip".[9]

[23] Finally, the Judge found there was no credible basis for the assertion that Mr Watt could not with due diligence have discovered the payment earlier than 2007.[10]

[24] The Judge summarised her overall conclusions in this way:

> [58] In summary, the plaintiff has failed to establish that the money was not paid to Mrs Monk in discharge of obligations owed by the Watt group of companies to Mrs Monk and her companies. The evidence is that the money was not wrongly paid out, was not paid by mistake, and was authorised by Mr Sharma in full knowledge of the situation of indebtedness between the Watt group and Mrs Monk.

Suisse's argument on appeal

[25] Mr Keall contended on Suisse's behalf that the impugned payment was paid to Mrs Monk under the mistaken belief that it had the effect of discharging a debt collaterally secured over the Willis Street property. It was not until 2007 that the mistake was discovered and it could not have been discovered earlier than that with reasonable diligence. As the proceedings were commenced in 2011, Mr Keall submitted the claim was not out of time because a six year time limit applied with time running from 2007.

[26] Mr Keall said Mrs Monk had been unable to recall with precision what the $500,000 payment was for. She had offered several explanations: that the payment was to repay a loan of $479,000 made on 26 September 2002; that it was to repay loans of $200,000 and $260,000 to a Watt group company called Beresford Apartments Limited (Beresford); and that it was made to reduce overall indebtedness by the various Watt group companies on the basis of the running account accepted by the Judge as characterising the pattern of business between the Watt group and Mrs Monk's companies.

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9 At [56].
10 At [57].

[27] Mr Keall then set out a careful analysis of the evidence designed to show that, at the date of the relevant payment, there was in fact no indebtedness by Suisse or any other Watt group company to Mrs Monk or her companies. Mr Keall pointed in particular to Mr Sharma's evidence that he regarded the payment as being made within the $500,000 priority sum due by Suisse and collaterally secured over the Willis Street property. Mr Keall submitted that the debt secured over Willis Street had in fact been paid prior to the payment of 21 November 2002.[11]

Application for leave to adduce further evidence on appeal

[28] Shortly before the hearing of the appeal, Suisse applied to adduce further documentary evidence. The documents related to advances made by Mrs Monk's companies to two companies in the Watt group: Pannive Nominees Ltd and Supersizes Ltd for $55,000 and $218,000 respectively.

[29] The introduction of these documents was opposed by Mrs Monk and we declined the application at the hearing. In brief, Mr Keall responsibly accepted that the documents at issue were not fresh since Mr Watt admitted he had had the documents in his possession from 2007 onwards. We are satisfied there is no reason why these documents could not have been produced at the trial. We add that, on the view we take of this appeal, the introduction of the further documents would not have assisted Suisse.

Discussion

Appellate approach

[30] Counsel agree that the correct approach on appeal is that adopted in the Supreme Court's decision in *Austin, Nichols and Co Inc v Stichting Lodestar*.[12] On a general appeal, the appellant is entitled to judgment in accordance with the opinion of the appellate court even where that opinion is an assessment of fact.[13] However, as the Supreme Court also acknowledged the appellate court should exercise the

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[11] Mr Keall submitted that the indebtedness secured over the Willis Street property related to two loans of $252,000 and $274,000 but were repaid by the settlement of a property at Grey's Avenue, Auckland on 28 August 2002.

[12] *Austin, Nichols and Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141.

[13] At [16].

customary caution appropriate in cases where credibility is important.[14] In cases of that type, it is acknowledged that seeing and hearing the witnesses can provide an advantage to the trial court that the appellate court does not have.[15]

[31] In the present case, Goddard J did enjoy the advantage of seeing and hearing the witnesses not easily replicated on appeal. The credibility of the account given by Mr Sharma and Mrs Monk was at issue. While the Judge accepted their account of the relevant events, we have nevertheless conducted our own survey of the evidence presented in the High Court.

Mistake of fact – principles

[32] The conceptual basis for the recovery of money paid under mistake was discussed in detail in this Court's decision in *Commissioner of Inland Revenue v Stiassny*.[16] It is unnecessary to repeat all that was said on that occasion. It is sufficient to note that if a person pays money to another under a mistake of fact which causes him or her to make the payment, he or she is prima facie entitled to recover it as money paid under a mistake of fact.[17] Conceptually this is on the basis that the recipient has been unjustly enriched. However, relevant to the present context, the claim may fail if a payment is made for good consideration such as to discharge a debt. In the *Stiassny* case, the Court went on to note that relief may be denied if there has been a lack of good faith on the part of the recipient. A lack of good faith could arise, for example, if the recipient induced the payment with knowledge that it was not due or that it was paid under mistake.

Mistake of fact – this case

[33] Applying these principles to the present case, we agree with the Judge that the short answer to Suisse's claim is that there is no evidence that Suisse was mistaken in any way when it made the payment. Critically, Suisse's second amended

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14 At [13].

15 *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 197 and 199; *J(CA475/2013) v J* [2014] NZCA 445 at [22][23].

16 *Commissioner of Inland Revenue v Stiassny* [2012] NZCA 93, [2013] 1 NZLR 140 at [85]–[104], affirmed by the Supreme Court: *Stiassny v Commissioner of Inland Revenue* [2012] NZSC 106, [2013] 1 NZLR 453 at [64]–[66].

17 See the judgment of Robert Goff J in *Barclays Bank v W J Simms Ltd* [1980] 1 QB 677 (QB) at 695–696.

statement of claim did not give particulars of any mistake and it was not put to Mr Sharma in evidence that he was mistaken. We agree with the Judge that Mr Sharma made the payment as the sole director of Suisse. His knowledge and actions were to be imputed to Suisse. Mr Sharma had authority to instruct Mr Bhanabhai to make the payment to Mrs Monk in discharge of any liability Suisse or other companies in the Watt group might have had at the time.

[34] We have not found it necessary to review each of the loan transactions detailed in Mr Keall's submissions. That is because we are satisfied that the Judge's findings as to the pattern of dealings between the parties was justified on the evidence. In particular, for the reasons we have set out earlier,[18] we agree with Goddard J that it did not matter whether the impugned payment was intended to discharge or reduce a loan liability of Suisse or some other company or companies in the Watt group. In order to justify the payment, it was sufficient to establish that there was an amount of not less than $500,000 owing at the time of the payment by one or more companies in the Watt group to either of the two companies through which Mrs Monk made loans to the group. In that respect, a key focus on the appeal was on any sums due by Beresford to Richelieu and Monk Investments at the time of the payment.

The debt to Beresford

[35] On 3 May 2002 Richelieu and Monk Investments advanced $260,000 to Beresford. Interest was payable at 18 per cent per annum with a default rate of 26 per cent per annum. The loan was due for repayment on 3 November 2002. Richelieu and Monk Investments made a further loan of $200,000 to Beresford on 6 September 2002. The interest rate was 18 per cent per annum with a default rate of 23 per cent per annum. The loan was short term with repayment due on 6 November 2002.

[36] Mr Keall accepted that both of these loans remained outstanding and were overdue at the date of the impugned payment on 21 November 2002. Together with the interest then due, the total amount owed to Richelieu and Monk at that time

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[18] At [11] above.

would have exceeded $500,000.[19] However, Mr Keall submitted that both these loans were repaid the following year on 1 April 2003 from the proceeds of the sale of the property owned by Beresford at Blockhouse Bay Road in Auckland. On that date, $440,000 was repaid to Richelieu. He submitted that if the impugned payment was intended to satisfy the loans due by Beresford, then the payments made to Richelieu on 1 April 2003 could not be justified.

[37] There are two answers to this submission. First, if there had been a mistake on the part of the Watt group in paying Richelieu $440,000 on 1 April 2003, then Beresford could possibly have had some sort of claim against Richelieu. However, Beresford was not a party to the proceedings and, in any event, there was no pleading by Suisse of mistake in relation to the payment on 1 April 2003. The issue was simply not before the High Court. Secondly, there was evidence that a further loan of $400,000 was made by Richelieu to Beresford on 25 February 2003. The existence of the $400,000 loan to Beresford was confirmed not only by Mr Bhanabhai, Mr Sharma and Mrs Monk but also by Mr Brendan Lyne, a court-appointed expert in the proceedings brought by Mr Watt against Mr Sharma and others in 2006. The evidence was that the payment of $440,000 paid to Richelieu by Beresford on 1 April 2013 only partially satisfied the loans outstanding to Richelieu. By that date, the total of the loans to Beresford was $860,000. The repayment made on that date was simply part of the ongoing pattern of loans and repayments between the Watt group and Mrs Monk's companies.

[38] Mrs Monk also gave evidence that on 26 September 2002 she made a further loan to one of the companies in the Watt group of $479,000. She had no record of which Watt group company the money was paid to but she was able to produce a record of a payment from her personal bank account showing a payment of $479,000 on that date. We accept that the documentary evidence supporting this loan was scant but Mrs Monk's evidence on this point is not decisive.

[39] Mr Keall was critical of the inability of Mrs Monk and Mr Sharma to recall details. The Judge found this was understandable given the lengthy delay in first

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[19] The principal alone was $460,000 and the interest at the default rate would have been sufficient to bring the total to at least $500,000.

bringing and then hearing Suisse's claim. Mrs Monk was frank in her statement in her written brief of evidence that she had no actual recollection of precisely why she received the $500,000 from Suisse. She explained the absence of many of the available records in these terms:

> [7] I have no recollection of the actual details of any one or individual transaction any more than another. To put this statement together, and also for some of my earlier affidavits I have had to try and locate documents that go back more than ten and sometimes twelve years. I have obtained some old transactional files from the archives of Holmden Horrocks which was the law firm I mainly used from about 1999 through to at least the end of 2002, and maybe in to part of 2003. This has been the largest source of information about this case that I have located. I have also attempted to get copies of old bank statements for Richelieu and Monk Trust from the banks I used for them, with no success. I have recently located some old personal bank statements, including bank statements of a joint account I held with Des, and some cheque stubs.
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> [8] I kept a separate file in my office at Papatoetoe for each loan transaction I entered into. The file would contain the documents that related to the loan contract, and the securities and notes I made that concerned the loan. This would include things such as when interest payments were made, and any changes to the loan, details of repayment, or whether the loan was moved over into other Watt group companies. I have not kept any of these files. Over time I have discarded them. As well, the financial accounts of both Richelieu and Monk Trust from back in 2002 and 2003 no longer exist.

[40] Mr Keall also raised a number of points which he submitted cast doubt on Mrs Monk's credibility. For example, he pointed to a document dated 13 December 2002 in which she stated that $540,000 was due by Suisse upon the sale of her property. And, he relied on evidence from Mr Sharma in which he appeared to believe the $500,000 payment was to meet the amount due under the collateral security over Willis Street when it appears the amounts due under that security had been paid.

[41] We agree with the Judge that it is not surprising that neither Mrs Monk nor Mr Sharma were able to recall the relevant events with precision or to locate all the relevant documents. The solicitor's letter of claim was not sent to Mrs Monk until five years after the payment was made and Suisse did not bring the proceedings for four years after that. By the time of trial, nearly nine years had elapsed since the payment was made.

[42] Despite these difficulties, we are satisfied on the basis of the oral and documentary evidence that was able to be produced that sums in excess of $500,000 were due by one or more of the companies in the Watt group to Richelieu or Monk Investments. In these circumstances, there is no evidential basis to support the claim of mistake nor to suggest that Mrs Monk acted in bad faith by, for example, inducing or receiving the payment knowing that it not due.

[43] We also agree with the Judge that it was not possible to isolate the payment made by Suisse from all the other dealings between the Watt group of companies and Mrs Monk's companies, both before and after the payments were due. In order to show there had been an overpayment, it would have been necessary in the circumstances for a complete analysis to be made of all relevant transactions involving the Watt group and Mrs Monk's companies. Only then could it be determined whether any payment was due in one direction or the other. Suisse made no attempt to place evidence of that kind before the Court.

[44] For the reasons we have given, we are satisfied that the Judge was correct to dismiss Suisse's claim for money had and received in consequence of a mistake of fact.

The limitation issue

[45] It is not strictly necessary for us to consider whether the Judge was correct to find that Suisse's claim was statute-barred. However, we will address this issue briefly.

[46] In their written submissions filed prior to the hearing of the appeal both counsel agreed that there was a six year time limit for bringing proceedings running from the date on which the cause of action accrued. It was further agreed that the cause of action would ordinarily accrue on the date the payment was made on 21 November 2002. Counsel agreed that the six year time limit for actions founded on simple contract applied under s 4(1)(a) of the 1950 Act. Prima facie, the claim was out of time since the proceedings were not brought until November 2011.

[47] Suisse sought to overcome this problem by relying on s 28 of the 1950 Act in terms of which the relevant period of limitation does not begin to run in an action for relief from the consequences of a mistake until "… the plaintiff has discovered the … mistake … or could with reasonable diligence have discovered it".[20]

[48] On the assumption that the six year time limit under s 4(1)(a) of the 1950 Act applied from 21 November 2002, we are satisfied that the claim was out of time and that there was no prospect of Suisse being able to rely upon s 28(c). Put simply, reliance on the reasonable discoverability provision could have no application. For the purposes of that provision, it is not Mr Watt's knowledge that matters. It is the knowledge of Suisse as the plaintiff. Suisse knew the payment had been made on 21 November 2002. Suisse knew that because Mr Sharma's knowledge of the payment in his capacity as the sole director of Suisse must be imputed to Suisse. Suisse also knew through Mr Sharma about the overall state of the loan transactions between the Watt group and Mrs Monk. Mr Sharma and Suisse had that knowledge at the time the payment was made. It follows that the date of reasonable discoverability of a mistake (if there was one, contrary to our finding) was at that time. We are satisfied therefore that s 28 had no application and that time began to run for limitation purposes on 21 November 2002 when the payment was made.

[49] During the hearing we questioned whether the time limit for a claim for money had and received in consequence of a mistake was the six year period under s 4(1)(a) of the 1950 Act. We asked for and have received further submissions on this point. Counsel continue to agree that the six year time limit under s 4(1)(a) applies. Mr Keall referred us to the learned authors of the well-known text *Goff and Jones: The Law of Unjust Enrichment* for the proposition that actions for money had and received are to be treated as actions founded on simple contract in terms of s 5 of the Limitation Act 1980 (UK), a provision in materially similar terms to s 4 of our 1950 Act.[21] Two authorities were cited for this proposition. The first was the

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[20] Limitation Act 1950, s 28(c).

[21] See Charles Mitchell, Paul Mitchell and Stephen Watterson (eds) *Goff & Jones: The Law of Unjust Enrichment* (8th ed, Sweet & Maxwell, London, 2011) at [33–07].

judgment of the English Court of Appeal in *Re Diplock*.[22] The second was the judgment of Hobhouse J in *Kleinwort Benson Ltd v Sandwell Borough Council.*[23]

[50] It appears that, although the analogy with "simple contract" may be regarded as infelicitous, the English courts have nevertheless been willing to treat a claim for unjust enrichment as falling within that phrase. As Hobhouse J explained in *Kleinwort Benson Ltd*,[24] the word "simple" is used to exclude an action upon a speciality for which the time limit is 12 years from the date the cause of action accrues.[25]

[51] Mr Dalkie has also provided helpful submissions in which he traced the history of the conceptual basis for the doctrine of money had and received. That is now firmly based on the concept of unjust enrichment as earlier noted. Mr Dalkie also referred us to the judgment of the House of Lords in *Kleinwort Benson Ltd v Lincoln City Council*.[26] It appears there was no challenge to the proposition that a six year limitation period applied. Rather, the question in the House of Lords on the limitation point was whether the equivalent of our s 28 applied to claims for money had and received on the basis of mistake. On this point, three of their Lordships agreed that the s 28 equivalent applied so as to postpone the limitation period of six years otherwise applicable.[27]

[52] We are aware that texts on limitation have taken the view that claims for money paid under mistake of fact do not fall within s 4(1)(a) of the 1950 Act or its English equivalent.[28] We note too that the Law Commission has expressed the view that no time limit applies under the 1950 Act to proceedings seeking restitutionary

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22 *Re Diplock* [1948] Ch 465 (CA) at 514.

23 *Kleinwort Benson Ltd v Sandwell Borough Council* [1994] 4 All ER 890 (QB) at 942–943.

24 At 942.

25 Limitation Act, ss 4(3) and 20.

26 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349 (HL).

27 Lord Browne-Wilkinson at 523; Lord Goff at 543–544 and Lord Hope at 568–569. Lord Goff and Lord Lloyd did not address the issue.

28 See for example, JC Corry *Limitation Act Handbook* (LexisNexis, Wellington, 2011) at [O.14]; Andrew McGee *Limitation Periods* (7th ed, Thompson Reuters, London, 2014) at [4.007]; and Terence Prime and Gary Scanlan *The Law of Limitation* (Oxford University Press, Oxford, 2001) at 24.

relief.[29] If that is so, it is not easy to follow why Parliament referred in s 28 to actions for relief from the consequences of a mistake in an unqualified way.

[53] We do not need to determine this issue since we have found that Suisse's claim must fail on the merits. We note too that the claim in the present case would clearly fall within ss 11 and 12 of the Limitation Act 2010 which has replaced the 1950 Act. So the issue for the future has been resolved.

Conclusion

[54] We are satisfied that the Judge did not err in dismissing Suisse's claim. A claim for money had and received in consequence of a mistake of fact had no evidential basis to support it.

Result

[55] The application for leave to adduce further evidence is declined.

[56] The appeal is dismissed.

[57] The appellant must pay the respondent costs for a standard appeal on a band A basis with usual disbursements.

Solicitors:
Edwards Clark Dickie, Auckland for Appellant
Bruce Reid Law, Auckland for Respondent

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[29] Law Commission *Limitation of Civil Actions* (NZLC PP39, 2000) at [46] and Law Commission *Limitation Defences in Civil Cases: Update Report for the Law Commission* (NZLC MP16, 2007) at 10.