IN THE ROYAL COURT OF GUERNSEY

(ORDINARY DIVISION)

Between **GRAHAM EDWARD HINDLE** **Plaintiff**

-and-

IAN KITCHING **Defendant**

Defendant's Application for leave to amend

Date of hearing: 31st May 2017

Judgment handed down: 12th September 2017

Before: Richard James McMahon, Esq., Deputy Bailiff

Counsel for the Plaintiff: **Advocate M G Ferbrache**
Counsel for the Defendant: **Advocate A M Ozanne**

Cases, Texts & Legislation referred to:

The Royal Court Civil Rules, 2007
Jefcoate v Spread Trustee Company Limited [2013] GLR 220
The Law Reform (Tort) (Guernsey) Law, 1979
Yaddehighe v Credit Suisse Trust Limited [2007-08] GLR 282
The Limitation Act 1980
Morton v Paint (1996) 21.GLJ.61
The Sale of Goods Act 1979
Mendonca v Le Boutillier 1997 JLR 142
Letang v Cooper [1965] 1 QB 232
Alpha Developments Ltd v Barclays Wealth (Guernsey) Limited (unreported, 19 June 2014)
Cherub Investments Ltd v The Channel Islands Aero Club (Guernsey) Ltd (unreported, 13 January 1982)
The Torts (Interference with Goods) Act 1977
Battersby, *The Sale of Stolen Goods: A Dilemma for the Law* (2011) 54 MLR 752
National Employers' Mutual General Insurance Association Ltd v Jones [1990] AC 24
Sachs v Miklos [1948] 2 KB 23
McGregor on Damages, 19th ed.

Introduction

1. By an Application dated 10 April 2017, the Defendant seeks leave to amend Les Defenses in the form annexed to the Application. What was annexed to the Application was amended at the hearing on 31 May 2017. The Defendant was obliged to make amendment to his Defenses, whether by agreement from the Plaintiff or by seeking leave, as he has now done, as a result of the condition that I imposed on 20 March 2017 when dismissing the Plaintiff's application for summary judgment on the question of ownership of the disputed motor vehicle, which is at the root of this action (see para. 49 of my previous judgment). I do not propose to repeat much of the background to the action because of what I set out in that judgment.

2. The Defendant wishes to argue that he has acquired good title to the Jaguar XK 150, registration mark 68 EAL, of which he is now the registered keeper. The Plaintiff contends that he has never parted with his ownership of the vehicle and that the facts and the law do not support the Defendant's contention. The Plaintiff claims that the vehicle has been converted by the Defendant and seeks its return or, in the alternative, damages.

3. I reserved judgment because some elements of the Application raise questions of law on which I felt further reflection was desirable. I had not envisaged that other commitments prior to the vacation period would delay the preparation of this judgment as much as has actually happened, for which I apologise to all concerned.

The amendments sought

4. The amendments for which the Defendant seeks leave pursuant to rule 59 of the Royal Court Civil Rules, 2007 seem to me to fall into five distinct categories. The introduction of an *exception de fond* pleading that the Plaintiff's claim is prescribed is opposed on behalf of the Plaintiff. The substitution of para. 1 of the niances et pretensions, which is now proposed to contain a denial of the Plaintiff's ongoing ownership of the vehicle, is opposed as well. The introduction of a paragraph dealing with the duty to mitigate is also opposed. The introduction of a Counterclaim contending unjust enrichment arises because of the improvements made to the vehicle since it was last in the Plaintiff's possession is opposed. The final category of amendments relates to minor elements of tidying up.

5. The legal principles to apply to applications for leave to amend were helpfully summarised by the Bailiff at para. 52 of his judgment in *Jefcoate v Spread Trustee Company Limited* [2013] GLR 220. I have had regard to all of the applicable principles listed, paying particular attention to (e) and (l):

> "*in general, amendments should be allowed so that the real dispute between the parties can be adjudicated provided that any injustice to the other party can be compensated for in costs. ...*
>
> *an amendment will not be allowed if the case introduced by it has no realistic prospect of success.*"

6. Advocate Alison Ozanne, on behalf of the Defendant, has highlighted that the assessment to be made at this stage is whether the Defendant should be able to pursue a revised pleaded case and not to determine whether the arguments he now wishes to deploy will or will not succeed at the trial. Advocate Mark Ferbrache, on behalf of the Plaintiff, has re-visited some of the contentions he made when the application for summary judgment was heard and submits that the overall pleading remains inadequate and so should be rejected. Apart from the minor amendments, with which he takes no issue, he suggests that each of the other categories of

amendment should be rejected because the Plaintiff can show that they have no realistic prospect of success. In that regard, whether the test to apply is the same as that for summary judgment or through approaching the issue by reference to whether the pleading, or part of it, is susceptible to being struck out under rule 52 of the 2007 Rules, the outcome is the same.

7. I propose to deal with each of these categories of amendment separately, starting with the Defendant's wish to introduce a claim that the action is prescribed.

Prescription

8. The form of the *exception de fond* that the Defendant seeks to rely upon is as follows:

> "*If, which is not admitted, the car was converted by Mr Freitas, the date of the first conversion is admitted by the Plaintiff to be September 2008. Accordingly, the claim in conversion is now prescribed under section 4 of the Law Reform (Tort) (Guernsey) Law 1979 and general customary law and/or alternatively sections 2 and 3 of the Limitation Act 1980 and the Plaintiff's title to the car is extinct on the basis that time starts running from the date of the first conversion where possession has not thereafter been recovered by the Plaintiff and no action may be brought in respect of further conversions after the expiration of six years from the cause of action arising in respect of the original conversion, which period expired in this matter in September 2014.*"

9. The current proceedings were commenced by way of an application for leave to serve a summons out of the jurisdiction on the Defendant. That application was dated 4 May 2016 and determined by me on 6 May 2016. In accordance with rule 89(2) of the Royal Court Civil Rules, 2007, the action commenced on 4 May 2016. Accordingly, if the cause of action on which it is based can be argued to have arisen before 3 May 2010, the prescription defence has a realistic prospect of success.

10. In the proposed *exception*, the Defendant refers to an admission from the Plaintiff that the first conversion of the Jaguar took place in September 2008. The Cause does not say that. The Cause refers instead to a contract of repair that the Plaintiff entered into with Mr Freitas on or about July 2008 (para. 2) and the failure of Mr Freitas to return the car despite requests (para. 5). In the replies given by the Plaintiff to the Defendant's *exceptions de forme* in August 2016, it was acknowledged that "*Numerous requests for the return of the Car to the Plaintiff were made between September 2008 and April 2011, which included telephone calls and visits to Mr Freitas' premises*." It appears that the Defendant now seeks to rely on the earliest of those dates to base his contention that this amounted to a conversion. However, para. 6 of the Cause pleads that, rather than returning the car "*Mr Freitas wrongly pledged and/or delivered the Car to either the Defendant or a third party.*" It now seems clear that the car was not passed directly from Mr Freitas to the Defendant, but went through the hands of others. Indeed, even para. 1 of the Defendant's unamended niances et pretensions relies upon a Mr Steven Day having purchased the car in Guernsey in or around September 2011, although the documentation now points towards this purchase having been earlier than that, a DVLA document indicating that Mr Day became the registered keeper with effect from 14 April 2011.

11. The Plaintiff became aware of these matters when contacted by the DVLA by way of letter dated 26 April 2011. He did not at that time know all the details, but he was put on notice that some unidentified person was attempting to be registered as the keeper of the vehicle then registered in the Plaintiff's name. The implication is that someone had appropriated the car before that time and, on the Plaintiff's case, had done so unlawfully. However, this appears to be the earliest time at which the Plaintiff became aware that something was amiss, although

he may have been frustrated by the repeated reluctance of Mr Freitas to be more forthcoming when the Plaintiff sought an update about the repair work.

12. Section 4(1) of the Law Reform (Tort) (Guernsey) Law, 1979 provides the general rule for limitation of actions in tort (and the exception to it in section 5 clearly does not apply):

> "*Notwithstanding the provisions of any enactment or any rule of law, an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued.*"

In *Yaddehighe v Credit Suisse Trust Limited* [2007-08] GLR 282, the Court of Appeal inclined towards the view that a "reasonable discoverability" test for the accrual of an action in tort is applicable, although without coming to a firm conclusion on the issue (see para. 35). In the alternative, the applicable test would be the date when relevant actionable damage occurs, regardless of knowledge.

13. Whichever of these tests falls to be used, the problem that the Defendant faces is that the material that has already been deployed at these interlocutory stages of this action do not support the contention that the first conversion of this Jaguar motor vehicle occurred before 3 May 2010. Realistically, the earliest date available on which to start time running against the Plaintiff would be in or around April 2011, and I take the view that it is more likely to be a later date anyway. Whether it is as late as the Plaintiff contends is debatable, but the precise date is immaterial if it is after May 2010.

14. The way that it is proposed to plead the *exception* also relies on sections 2 and 3 of the Limitation Act 1980. Section 2 is in similar form to section 4(1) of the 1979 Law. Section 3 provides:

> "*(1) Where any cause of action in respect of the conversion of a chattel has accrued to any person and, before he recovers possession of the chattel, a further conversion takes place, no action shall be brought in respect of the further conversion after the expiration of six years from the accrual of the cause of action in respect of the original conversion.*
>
> *(2) Where any such cause of action has accrued to any person and the period prescribed for bringing that action has expired and he has not during that period recovered possession of the chattel, the title of that person to the chattel shall be extinguished.*"

Again, the Defendant seeks to rely upon this provision as a means of demonstrating that the title to the Jaguar that the Plaintiff had, albeit that Advocate Ozanne has continued to question whether or not the Plaintiff had such title, must now be regarded as extinguished.

15. Before that contention can be developed, it is necessary also to have regard to section 4 of the 1980 Act:

> "*(1) The right of any person from whom a chattel is stolen to bring an action in respect of the theft shall not be subject to the time limits under sections 2 and 3(1) of this Act, but if his title to the chattel is extinguished under section 3(2) of this Act he may not bring an action in respect of a theft preceding the loss of his title, unless the theft in question preceded the conversion from which time began to run for the purposes of section 3(2).*

(2) Subsection (1) above shall apply to any conversion related to the theft of a chattel as it applies to the theft of a chattel; and, except as provided below, every conversion following the theft of a chattel before the person from whom it is stolen recovers possession of it shall be regarded for the purposes of this section as related to the theft.

If anyone purchases the stolen chattel in good faith neither the purchase nor any conversion following it shall be regarded as related to the theft.

(3) Any cause of action accruing in respect of the theft or any conversion related to the theft of a chattel to any person from whom the chattel is stolen shall be disregarded for the purpose of applying section 3(1) or (2) of this Act to his case.

(4) Where in any action brought in respect of the conversion of a chattel it is proved that the chattel was stolen from the plaintiff or anyone through whom he claims it shall be presumed that any conversion following the theft is related to the theft unless the contrary is shown.

(5) In this section "theft" includes –

(a) any conduct outside England and Wales which would be theft if committed in England and Wales; and

(b) obtaining any chattel (in England and Wales or elsewhere) in the circumstances described in section 15(1) of the Theft Act 1968 (obtaining by deception) or by blackmail within the meaning of section 21 of that Act;

and references in this section to a chattel being "stolen" shall be construed accordingly."

16. Advocate Ozanne has accepted that these provisions of the 1980 Act cannot be relied upon by the Defendant directly. They do not form part of Guernsey law. Instead, she points to there being a lacuna in the principles that should be applied in Guernsey in a situation such as this and that, because of the way Guernsey's law of tort looks to English law, as shown by ***Morton v Paint*** (1996) 21.GLJ.61, as further explained by that case, and using the aids to navigation referred to therein, Guernsey's bare provisions in the 1979 Law can be regarded as subject to these same principles in relation to conversion.

17. I do not find that argument particularly attractive. Whether it is regarded as a limitation period (adopting the terminology of the 1979 Law) or that the cause of action is prescribed, it is in principle a matter of procedure, in respect of which regard is had to the *lex fori*. There may be questions about the impact of legislation having effect in England and Wales and in Scotland, eg, the Sale of Goods Act 1979, on the title that the Defendant now has. They will have to be resolved in the light of the Guernsey customary law positon, which may well follow what was explained as a matter of Jersey law in ***Mendonca v Le Boutillier*** 1997 JLR 142 and to which I referred in my previous judgment. However, such questions of substantive law do not affect the procedural question of whether or not the Plaintiff is out of time. That question is governed by Guernsey law. It is not governed by a special time limit for actions in conversion and particularly in cases of theft as set out in sections 3 and 4 of the 1980 Act. I struggle to see any basis for supplementing section 4 of the 1979 Law with these additional principles. That would be an attempt to develop a statutory regime rather than the customary

law, which the 1979 Law replaced, and to attempt to do that is quite different from the situation in *Morton v Paint*.

18. Even if it did apply, I do not think it assists the Defendant in this case. Section 3(1) of the 1980 Act deals with successive conversions. It makes provision for the time running against the claimant to be aggregated and dated back to the first conversion. If that first conversion post-dates 3 May 2010, section 3 does not have the effect of preventing the Plaintiff bringing this action nor of extinguishing his title to the Jaguar. There are various definitions of what a cause of action is to which reference could be made, but I have noted that in *Jefcoate v Spread Trustee Company Limited* (*supra*) there is passing reference to how it was described by Diplock LJ in *Letang v Cooper* [1965] 1 QB 232, 242:

> "*A cause of action is simply a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person.*"

As Advocate Ferbrache submits, referring to para. 28 of *Alpha Developments Ltd v Barclays Wealth (Guernsey) Limited* (unreported, 19 June 2014), one of the elements of a tort is damage. In conversion, there needs to be an unlawful appropriation of another's chattel. Although I appreciate that the evidence in the case has not yet been tested, and that I am only being asked to consider whether the amendment to plead this prescription *exception* should be allowed, the test for an *exception* (taken from *Cherub Investments Ltd v The Channel Islands Aero Club (Guernsey) Ltd* (unreported, 13 January 1982)) is whether there are no admissible facts consistent with the pleadings that could be proved at the trial which would allow the plaintiff to succeed in his action. The test for permitting an amendment must, in my view, be read in the light of that test for the *exception*. The case of the Defendant relies on a conversion taking place in September 2008 in respect of which there is no support that all the elements of a conversion existed by then. There is no suggestion that the Plaintiff had the requisite knowledge or even that damage to him had occurred by then, otherwise the Plaintiff would not have been reporting matters to Guernsey Police as late as 2011. The factual situation giving rise to a cause of action in conversion had not crystallised to the extent required. In short, the Defendant's contention that there was in September 2008 an admitted conversion of the Jaguar seems to me to lack any foundation. In relation to when any alleged theft took place, if proved, section 4(1) of the 1980 Act disapplies sections 2 and 3(1) anyway unless the date of the theft was so long ago that it precedes the first conversion. The Plaintiff's position is that his knowledge of the likely theft of the Jaguar arose no earlier than when he made further enquiries on receipt of the first letter from the DVLA in April 2011. I do not think that the Defendant can properly take that date back in time to September 2008. In any event, if the cause of action in conversion existed at that time, there is no need for these provisions of English law to be considered because section 4(1) of the 1979 Law provides a complete answer.

19. In the light of those conclusions, I can skim over the way that Advocate Ferbrache further submits that the Plaintiff is also raising his action based on detinue, and Advocate Ozanne's submissions thereon, including that detinue has been abolished in the United Kingdom by section 2 of the Torts (Interference with Goods) Act 1977. Once again, these may become relevant at the trial, but they do not, in my view, have any impact on whether or not the Plaintiff's action can be defeated by a limitation argument.

20. For these reasons, I am not persuaded that a prescription *exception* has any realistic prospect of success. All the Defendant needed to do was to show that there is some basis on which the Plaintiff's cause of action could be demonstrated to have arisen before 3 May 2010. I take the view that the Defendant has failed to show that. Referring to the first conversion being in September 2008 appears to me to be incapable of being demonstrated on the material that has already been adduced. I do not think that the Defendant has any realistic prospect at trial of

establishing facts to support that contention, or the contention that the first conversion and the Plaintiff's knowledge of it mean that his cause of action crystallised on a date sufficiently early that the Plaintiff's Cause will be dismissed on the basis of being out of time. Accordingly, I do not give leave for the paragraph containing this *exception* to be added to Les Defenses.

Substitution of para. 1, niances et pretensions

21. The removal of para. 1 of the original niances et pretensions, which had done no more than not to admit certain contentions of the Plaintiff, and its replacement with a more positive case was the primary change that needed to be considered on behalf of the Defendant following the previous judgment. The proposal now is to deny that the Plaintiff is the owner of the Jaguar and to plead the facts that the Defendant says lead to him being the owner and so entitled to possession of the car.

22. Advocate Ferbrache seeks to rebut the presumption that such an amendment should be permitted on the basis that it has no realistic prospect of success. In doing so, he repeats many of the arguments made in support of the Plaintiff's application for summary judgment on the question of ownership of the car. Advocate Ozanne criticises this approach, pointing out that these are matters for evidence and argument at the trial rather than falling to be pre-judged on this application for leave to amend Les Defenses.

23. Although the way the case is pleaded may not be as perfect as Advocate Ferbrache would wish, I am satisfied that I should give leave to the Defendant to re-plead his Defenses in this manner. The basis on which he asserts that the Plaintiff's claim can be defeated is the best that he can do on the material he has available to him. As I have explained previously, there is a gap where the Court will have to wait to see what evidence is actually adduced and, in the absence of any evidence, consider what inferences are properly to be drawn from what is said. The test for an amendment is not whether the case being advanced by the Defendant is likely to succeed, but whether there are realistic, ie, as opposed to fanciful, prospects of success. It will be the testing of these positions that will be central to the issues at trial. The basis on which the Defendant works backwards from his acquisition of the car will come into conflict with the way that the Plaintiff starts with the manner in which he left the Jaguar with Mr Freitas and eventually tracked it into the hands of the Defendant. There are issues here that I cannot resolve at this stage of the proceedings. What is important is that the Defendant has now asserted that the Jaguar belongs to him in the manner he pleads and so that supports his possession of the car and his refusal to return it, when requested to do so, to the Plaintiff. This does not minimise the problems that the Defendant may face at trial, including in relation to the law governing the key transactions, but it recognises that the basis of the way the Defendant resists the Plaintiff's action is now clearer.

24. Another way of looking at this new, substituted paragraph is to consider whether, had Les Defenses been pleaded in this fashion from the outset, the case, or at least the issues raised by it, could have been concluded through an interlocutory application, whether for summary judgment or to strike out Les Defenses or a part thereof. I do not think that it would have been susceptible to such a challenge, which supports my view that leave to amend be given.

25. The various materials put forward by Advocate Ferbrache relating to how the issues of title, eg, the article *The Sale of Stolen Goods: A Dilemma for the Law* (2011) 54 MLR 752 by Graham Battersby, commenting on various cases, including *National Employers' Mutual General Insurance Association Ltd v Jones* [1990] AC 24, will, I imagine, feature in the submissions to be made at trial but they do not, in my opinion, defeat the Defendant's

application for the type of amendment for which leave is sought to be able to present a case based on his assertion that he has purchased and otherwise come to the car in good faith. Accordingly, I will say nothing further about the arguments raised which, as I have indicated, are matters for trial rather than for resolution on an application for leave to amend.

Mitigation

26. The Defendant seeks to include a new para. 10A in his niances et pretensions by which he will refer to the e-mail received by the Plaintiff from his insurers offering to settle his claim in respect of the Jaguar for its insured value, which the Plaintiff did not accept. The Defendant will argue that this amounts to a failure to mitigate any loss. In doing so, Advocate Ozanne has drawn attention to *Sachs v Miklos* [1948] 2 KB 23 and how it has been summarised in *McGregor on Damages*, 19th ed., at para. 9-066, which I accept offer some support for her submissions. The Defendant also wishes to make reference to increase in value of the Jaguar between when it left the Plaintiff's possession in September 2008 and as it now is because of the works undertaken on it by the Defendant and the person from whom he purchased it, Mr Goldie. These issues will only arise if the Defendant fails in his primary contention that the Plaintiff is not entitled to any relief. How they will operate in this case will be a matter for argument at trial and so I prefer not to descend into detail in respect of these on this Application.

27. Advocate Ferbrache has opposed the part of the Application to include para. 10A on the basis that the weight of authority is against there being any obligation to mitigate in the manner suggested.

28. The difficulty with that submission is that this case appears to me to be treading new ground in Guernsey. This is apparent from the need to refer to a Jersey decision (the *Mendonca* case) and the way in which United Kingdom legislation and jurisprudence thereon may come into play, depending on the facts to be found in respect of the alleged chain of ownership of this car. I consider that this is an example of a case in which both parties should be able to deploy the arguments they wish to advance on these questions. As is often the case at interlocutory stages, decisions that might otherwise follow where the law is settled are not taken where it is an area of developing law. In my opinion, this case is an example of the development of the law of Guernsey because there is no existing authority on the questions raised on the facts pleaded to which I have been referred.

29. It strikes me that the Defendant did not manage to plead the case as fully as he should have done from the outset. Indeed, I have formed the impression that insufficient thought was given to the case being advanced by the Plaintiff and the various ways in which it might be tackled by the Defendant, including raising arguments about mitigation. The amendments now being sought under rule 59 of the 2007 Rules really amount to a second bite at the cherry, but they are the type of pleading that could have been raised at the outset and so can be permitted now to enable the real questions in dispute between the parties to be addressed. The costs order following may well reflect this view.

30. At the hearing, Advocate Ozanne indicated that the sub-paragraph she had originally wished to include relating to the value of the car should be moved into the proposed new para. 10A. If, upon further reflection, she prefers to plead this issue separately, that may be better than hiding it away in the allegations relating to a failure to mitigate. It appears to me that this is

more relevant to the counterclaim founded on unjust enrichment, to which I will turn in a moment, but in principle I will give leave in respect of the new para. 10A.

Counterclaim

31. The relief sought by the proposed Counterclaim relates to compensating the Defendant for the improvements that have been made to the Jaguar since it was last in the Plaintiff's possession. It is presented as a claim that the Plaintiff should not be unjustly enriched as a result of the monies spent on his chattel by others. In effect, the Defendant wishes to be in a position to argue that any order for the return to the Plaintiff of the Jaguar should require payment to the Defendant of the difference between the current value of the car on return less what its insured value was or less a higher amount reflecting what the Defendant and Mr Goldie have spent in improving it. There is also a claim for those sums to carry pre-judgment interest. Reference is made to the position under English law as set out in section 6 of the 1977 Act.

32. Advocate Ferbrache does not demur totally from that position but argues that raising these matters as a counterclaim is misconceived. However, the amount that should properly be allowed to the improver, in this case the Defendant, is only what that person has expended in improving the car. It is then a matter for the improver to complain against the person from whom he purchased the vehicle if he considers that there are grounds to do so. As such, it is not something directly affecting the relationship between these two parties, but would mean other proceedings against one or more persons in the chain of possessors being needed.

33. At the risk of repeating myself, the part of the Application relating to this proposed Counterclaim is something that should have been addressed from the outset. Proper consideration should have been given to the consequences of the Plaintiff's case succeeding. The primary relief sought in the Cause is an order for the delivery up of the Jaguar. On the Plaintiff's own case, the value of the car in the hands of the Defendant is approximately £90,000 and it was worth considerably less when last in his possession. The insured value was £22,000. The Defendant pleaded from the outset that he spent money repairing the car, which totalled £3,660.82. Paragraph 10 of Les Defenses already deals with the Defendant's contention that he denies "*the Plaintiff is entitled to the value of any enhancement to the Car since it left his possession*". What has been missing is any elaboration from the Defendant as to what he will argue this means.

34. For similar reasoning to the way in which I have dealt with other proposed amendments, I am conscious that these are areas where, although the position might be settled as a matter of English law, there may be scope to argue that a different outcome should be reached in Guernsey. That said, Advocate Ozanne's reliance on the position as it would operate under the 1977 Act rather implies that she does not propose to depart drastically from that position on behalf of the Defendant in this case. However, because these are areas of law that have yet to be determined in Guernsey, I start from the premise of potentially affording some latitude to develop arguments based on the evidence in support of the facts as pleaded and to see where they go without pre-judging whether the position in English law will be followed. However, I am troubled about whether this properly amounts to a counterclaim or whether the appropriate way to address these points is by amending Les Defenses and expanding what is already there in para. 10. As explained in rule 30(2) of the 2007 Rules:

> "*The counterclaim shall have the effect as a cross-action, enabling the Court to pronounce a final judgment in the action both in the plaintiff's claim and on the counterclaim.*"

The counterclaim also might have an independent existence if the Plaintiff's claim were stayed, discontinued or dismissed (rule 30(4)). In the present Application, the proposed

Counterclaim only arises if the Court were to grant the Plaintiff the primary relief he seeks. As such, it is not really a cause of action being pursued against the Plaintiff but an attempt to temper the relief that would be awarded to the Plaintiff if his action succeeds. It is an alternative to the primary position being taken by the Defendant that the Plaintiff's action should be dismissed. It goes to the relief to be awarded to the Plaintiff on the basis that that primary position has not succeeded.

35. As a result, I am not persuaded by Advocate Ozanne that the proposed Counterclaim is a proper cause of action founded in unjust enrichment. Because it really amounts to a pleading against the relief being sought in the Plaintiff's Cause, I take the view that it properly forms part of Les Defenses, setting out what the Defendant says are the appropriate consequences in the event that the Plaintiff wins. In other words, if the Plaintiff succeeds, any order for the return of the Jaguar to him should be coupled with a requirement that the Plaintiff pays the Defendant an amount of money. There is likely to be a dispute between the parties, as shown in the proposed terms of the Counterclaim, as to how much that amount should be. Equally, if the relief to be granted is limited to an amount of damages, the amount should reflect the loss to the Plaintiff.

36. I will not, therefore, grant leave to the Defendant to include paragraphs 13 to 16 as a Set Off/Counterclaim for these reasons. However, if the Defendant now wishes to expand para. 10 of Les Defenses to incorporate some or all of the facts set out in those paragraphs and identify the way in which those facts affect the relief that should properly flow from the Plaintiff being successful, the Defendant would be pushing at an open door and I would, therefore, hope that it is the type of amendment that could be agreed between the parties' Advocates. Although Advocate Ferbrache has rejected the broader argument that the Defendant wishes to make relating to the improvements undertaken by others, if that is a line that the Defendant still wishes to pursue in these proceedings, when I refer to pushing at an open door, even though I entertain doubts about the availability of such an argument as against this Plaintiff, I would be minded to accept at this stage that the Defendant should be able to pursue them. Because this is uncharted territory, I do not feel I can rule at this stage that they have no realistic prospect of success.

Other amendments

37. The other amendments covered by the Application are minor. The proposed additional wording in para. 9.1 was abandoned by Advocate Ozanne at the hearing. I would have struggled to permit those words anyway. The changes to paragraphs 3.1, 6.2 and 9 (the latter involving changing "Further" to "In the alternative") are, in my view, no more than consequential changes resulting from the substitution of para. 1 of the niances et pretensions or amount to tidying up. They are, therefore, all permitted.

Conclusion

38. For the reasons I have given, the Defendant's Application is partially successful. The amendments to Les Defenses for which leave is sought pursuant to rule 59 of the 2007 Rules will be granted save for the inclusion of a prescription *exception* and the introduction of a Set Off/Counterclaim. In respect of what the Defendant wishes to argue by way of the proposed Set Off/Counterclaim, the way to achieve this will be by way of further amendment to Les Defenses. I hope that that is something that can be agreed between the parties. What should follow now is for Advocate Ozanne to supply a version of Les Defenses to Advocate Ferbrache containing the amendments in respect leave has been granted and, if she wishes to develop how any relief to be granted to the Plaintiff should not extend to improvements made to the Jaguar, she can add that and invite Advocate Ferbrache on behalf of the Plaintiff to agree to any such proposed further amendment.

39. As I have explained, the need to make this Application might have been avoided had the case that the Defendant advanced through Advocate Ozanne's submissions at the hearing of the Plaintiff's application for summary judgment been pleaded from the outset. Indeed, unless and until persuaded differently, the making of that application for summary judgment may not have arisen had the case the Defendant wishes to advance been clearer throughout. Leave to amend is usually given on the basis that the party amending will be responsible for the costs of the other party occasioned through making the amendment. Given the current state of the pleadings, I propose to reserve the costs of this Application and, as with the costs associated with the summary judgment application, leave them to be dealt with at an appropriate stage. Once the Defendant has finalised Les Defenses, the Plaintiff may feel inclined to serve a Réplique, although I realise that will be a matter for him. As soon as the pleadings are recognised to be closed, moving ahead to the next stage of these proceedings should be undertaken as soon as practicable unless the parties wish to engage in some form of alternative dispute resolution, which I would encourage. If not, then working towards a case management conference sooner rather than later should be the parties' aim.