Unjust Enrichment and Construction Contracts – A Cinderella Story?

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Two decades ago, unjust enrichment was described as *"the Cinderella of law, barely 10 years old but growing up rapidly. Until recently unrecognised and overshadowed by the ugly sisters, Contract and Tort, Cinderella's day has arrived."*[1] In England a claim for unjust enrichment was initially referred to as a claim in 'quasi contract'. This language has now been abandoned and unjust enrichment has a strong foothold in the landscape of commercial law and its role and limits are becoming more clearly defined. Despite this, it is only infrequently pleaded in construction cases and when argued it is often set out in broad terms where the facts do not support such a claim. However, this is cause of action that should not be overlooked by a contractor or employer – especially if they have claims that fall outside the four corners of their construction contract.

The Principle of Unjust Enrichment

The principle of unjust enrichment under English law[2] is that no one should receive a benefit at another person's detriment without being required to pay a reasonable value for that benefit. The court needs to ask itself four questions: (a) Has the Defendant been enriched? (b) Was the enrichment at the Claimant's expense? (c) Was the enrichment unjust? (d) Are there any defences available to the Defendant? In the recent case of *Bank of Cyprus UK Limited v Menelaou*[3] the Supreme Court applied these principles to a claim by a bank that it should have a charge over a property where the bank had lent money for the purchase of that property but had not exercised a valid charge against the owner.

The Defences

There are a number of defences to a claim for unjust enrichment. The first, and perhaps the most significant, is that the parties' rights and remedies are set out within a contract. If the parties have agreed to a contract then they will be bound to the terms and conditions of that contract and the law will not permit a claim for unjust enrichment to be used to avoid the consequences of that contract. The second defence is where restitution would be impossible; for example, where goods have been destroyed.[4] The third defence is where one party has changed its position following his enrichment;[5] for example, where a party has spent the monies it received in good faith.[6] The fourth defence is that of illegality.

Unjust Enrichment and Construction Contracts

As stated above, a claim for unjust enrichment will fail where the rights and remedies of the parties are determined by a valid contract. So, for example, where a variation to a contract occurs, the contractor must claim under the variation provisions of the contract. Only in cases where there are no variation provisions in the contract or the variation falls outside of the variation provisions may a claim for unjust enrichment succeed.

In cases where there is no contract,[7] or where the contract is subsequently held to be illegal, a claim for unjust enrichment may be successful.[8] However, while the construction industry is notorious for carrying out works where contracts have not been signed or where there is a letter of intent, it does not follow that there will be no contract. Recent case law has shown that the courts are ready to construe that a contract has come into existence by conduct, even where not all

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terms are agreed. In the recent case of *Reveille Independent LLC v Anotech International*[9] the Court of Appeal held that there was a contract, despite the fact that a written document stated that a contract would not come into existence until the document was signed, which the parties never did. In this case the acceptance of the contract was evidenced by the clear performance of the obligations under the contract that showed that the parties intended to be bound by the contract.

In the case of *ISG Retail Ltd v Castletech Construction Ltd*[10] the court had to consider whether a claim for unjust enrichment could succeed where there had been a total failure of consideration by one party. In this case one party was claiming back by way of restitution a deposit paid where the other party had failed to provide any consideration under the contract. The court held that *"restitution is based on unjust enrichment, and that that is a different cause of action from breach of contract... But... there is a type of breach of contract (total non-performance) that can give rise to an alternative remedy by way of restitution. There is nothing in the Scheme [for Construction Contracts] that deprives an adjudicator of the power to grant relief by way of restitution if that is an available remedy for the breach of contract in question."*

However, although claims for unjust enrichment rarely succeed where a contract is in place, the use of unjust enrichment is becoming more relevant to the construction industry. There are a number of situations that can arise where one party may be unjustly enriched. The first example relates to where an adjudicator or DAB awards a sum to one party which is greater than the actual loss incurred. The recovery of the money paid can be claimed by way of unjust enrichment. The second example is where a call is made on a bond and where the amount paid under the bond is more than the loss incurred.

Unjust Enrichment and Adjudication

Claims for unjust enrichment have been successfully made in cases relating to an overpayment made under an adjudicator's decision.

In the case of *Aspect v Higgins*[11] the Supreme Court held that a claim for the recovery of monies paid under an adjudicator's decision could be advanced by *"contractual implication or, if not, then by virtue of an independent restitutionary obligation."* Here the claim is not being made under the construction contract but under the terms of the adjudication agreement which requires or infers that a party is entitled to re-payment if he proves that the adjudicator awarded more than was due.

In *Kitt & Anor v The Laundry Building Ltd & Anor*[12] the court considered what the cause of action was where one party paid an adjudicator for its decision and that party was subsequently awarded the costs of the adjudication. The court suggested that a claim could be made under the adjudication agreement but that if there was no contractual remedy a claim could be advanced for unjust enrichment. The court stated that an adjudication agreement creates a tripartite contract between the parties to the adjudication and the adjudicator in respect of the latter's fees. *"The parties will therefore have agreed that, if the decision required one rather than the other party to pay the adjudicator's fees, that party would pay those fees. Although both parties are jointly and severally liable to the adjudicator in respect of those fees, and, therefore, the adjudicator could sue either party for those fees, in logic, and in law, it must follow that, where the adjudicator has felt it necessary to sue the party which has not been ordered to pay his fees by virtue of the decision, that party must have a legal entitlement pursuant to the tripartite agreement, contractually, to recover what it has been required to pay the adjudicator."* The court then proceeded to set out an alternative position that where two parties owe a common liability and the party who is not primarily liable to pay discharges that liability, then the paying party is entitled to reimbursement by way of a claim for restitution so as to avoid unjust enrichment.[13]

Unjust Enrichment and Bonds

Where a party (for example, an Employer) makes a call on a performance bond which is paid by the

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bank then the question arises whether the other party (the Contractor) can claim part of the monies back from the Employer under the basis of unjust enrichment if it can show that the losses incurred by the Employer were less than the monies paid under the bond. It is well established that a claim can be made under an implied term that the beneficiary will account to the other party where it has been overcompensated. [14] As Staughton LJ stated in the *Cargill* case: *"The general situation as to performance bonds is that they provide that the bank or the other party giving the bond has to pay forthwith, usually on demand. But subsequently there has to be an accounting between the parties to the commercial contract."* Recently in *Wuhan Guoyu Logisitics Group Co Ltd v Emporiki Bank of Greece*[15] Tomlinson LJ held that, in addition to a right to claim under an implied term, there was also a right to claim based on equitable principles of restitution to prevent unjust enrichment.

However, it may be beneficial for a contractor to formulate its claim based on an implied term to account rather than as a claim for unjust enrichment. In many construction contracts there are often caps on liability; for example, a cap on delay damages. In cases where the Employer's losses exceed the cap then a claim for unjust enrichment may fail where the Employer can show that its actual losses exceed the cap and therefore it has not been unjustly enriched by the calling on the bond.[16] In such a case the contractor will be better of framing its claim as an implied term to account having regard to the terms of the underlying contract.

Conclusion

Twenty years ago unjust enrichment was seen as the new Cinderella of the law. Twenty years on unjust enrichment has developed her own place in the law but remains in the shadows of tort and contract. More recently unjust enrichment has been used to fill gaps in the law where no remedy previously existed. It is an equitable right which prevents a person profiting unjustly from another's loss. Unjust enrichment is a cause of action which should not be overlooked especially where there are no express contractual rights or remedies or where there has been a total failure of consideration by one of the parties.

[1] *Unjust Enrichment*, Davenport and Harris (1997) at page 1.s
[2] *Benedetti v Sawaris* [2013] UKSC 50 at para 10.
[3] [2015] UKSC 66.
[4] *Arnold v National Westminster Bank* [1989] 1 Ch 63 at 67.
[5] *Lipkin Gorman v Karpnale Ltd* [1991] 2 AC 58.
[6] *Niru Battery Manufacturing Co v. Milestone Trading Ltd* [2003] EWCA Civ 1446.
[7] *Claymore Services Ltd v Nautilus Properties Ltd* [2007] EWHC 805.
[8] Referenced in *The Doctrine of Unjust Enrichment*, Long R. & Avalon A., Long International Inc at p.2.
[9] [2016] EWCA Civ 443.
[10] [2015] EWHC 1443.
[11] [2015] UKSC 38.
[12] [2014] EWHC 4250.
[13] *Niru Battery Manufacturing Co v Milestone Trading Ltd* (No 2) [2004] EWCA Civ 487, paras 66-72.
[14] *Cargill International SA v Bangladesh Sugar and Food Industries Corp.* [1998] 1 WLR 461 (CA).
[15] [2012] EWCA Civ 1629.
[16] See *The Law of Guarantees*, Andrews & Millett, Sweet & Maxwell 6th edn (2011) at page 682.

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