The Doctrine of Unjust Enrichment

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1. INTRODUCTION

It is a general principle of contract law that a successful claimant in a breach of contract case is entitled to be put back in the same position it would have held had the breach not occurred. The doctrine of unjust enrichment provides that a person shall not be allowed to profit or enrich himself inequitably at another's expense. Unjust enrichment is defined as, "The retention of a benefit conferred by another, without offering compensation, in circumstances where compensation is reasonably expected."[1] Under unjust enrichment, the defendant (owner) unjustly receives and retains something of value at the plaintiff's (contractor's) expense. Unjust enrichment precedes restitution, which is the restoration of the contractor and owner to a just and equitable state. Unjust enrichment is the act or state of imbalance or inequity and restitution is the return to equity.

The owner might, for example, be in possession of a mineral processing plant that is substantially complete for which it has paid no money to the contractor. This situation is clearly inequitable, and the court may apply what amounts to a *quantum meruit* approach to determine the damages to be awarded to the contractor. In these circumstances, the person(s) determining the award of damages may disregard the specific terms of the contract and look to the value of the work performed.[2]

When unjust enrichment occurs in commercial transactions, restitution can be achieved simply by returning the purchased goods. For example, if a shipment of lumber was not paid for by the recipient, restitution would simply be to return the lumber. In general, restitution cannot be achieved in the construction industry simply by returning materials or items to the contractor if the items were installed or work was performed. The disassembly of a process plant will not give a contractor restitution. Instead, the contractor must seek to recover the reasonable value of the work performed as determined through the dispute resolution process defined in the contract.

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1 *Black's Law Dictionary*, p. 1536. (7th ed. 1999).

2 Restatement (Second) of Contracts § 344 (c) and comment a; c. McCormick, Damages § 164, at 642 (1935); *United States ex rel. Bldg. Rental Corp. v. Western Casualty & Sur. Co.*, 498 F.2d 335, 338 (9th Cir. 1974); *B.C. Richter Contracting Co. v. Continental Casualty Co.*, 230 Cal. App. 2d 491, 499-500, 41 Cal. Rptr. 98, 104 (1964).

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2. DEFINITIONS AND EXAMPLES

Unjust enrichment is determined by three conditions:

- The contractor provides materials or services of value to the owner.
- The owner is benefited or enriched by the materials or services received from the contractor.
- There is reasonable expectation of compensation for the services or materials provided by the contractor.

One example illustrating the circumstances of unjust enrichment is a contractor's claim against a city. The city asked the contractor to submit a proposal on performing street repair work. Unknown to the contractor, the city had failed to properly advertise for bids. The contractor's proposal was accepted and approved by the city and a contract was executed.

The contractor had only received a single partial payment for its completed work when further payment was denied by the city. The denial of payment was based on the contract being illegal due to the city's improper bidding procedure.

The contractor sued for full payment of the work performed. The Court determined that the contractor was unaware of the unfulfilled bidding requirements of the state statute and that the contractor believed a valid contract existed. The Court affirmed that the contractor had the right to be paid the full amount of the services rendered under the theory of unjust enrichment.[3]

The requirements justifying this claim due to unjust enrichment are:

- The contractor provided street repair services to the city.
- The city was enriched by receiving such services.
- The contractor had reasonable expectation that payment would be made for such services.

The fact that the contractor was not at fault and did not participate in the improper actions of the city also is important. For instance, if the city and contractor had consulted one another on the need to fulfill requirements on advertisement of bids, then the contractor could be perceived as being involved in the decision-making process. If the contractor had actively or knowingly contributed to the error, restitution may not have resulted.

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[3] *Construction Law Claims & Liability, Remedies and Damages* § 15.6A (CR.7/87), 1987.

In another example, an owner may have terminated a contract before completion and may be found to be in breach of contract, but at the same time it could be shown that the contractor would have suffered a substantial loss if it would have completed the contract. Following strict application of the principle of contract damages, there would in these circumstances be no loss to the contractor. It would seem, however, particularly in international disputes that go before arbitrators, that the contractual damages rules are sometimes set aside and an approach founded more in equity, rather than contract, is applied. The rationale is that to follow the strict contractual route would leave the defendant enjoying what is sometimes referred to as an unjust enrichment.

3. EXPRESS CONTRACTS

Normally, recovery cannot be made under unjust enrichment through express contracts or contracts implied in fact. If the contractor wanted to make a claim for restitution under unjust enrichment because of a change in the work, then the contractor must verify that there is not an explicit process defined by the contract to provide compensation for changes. If explicit contract provisions exist for compensating changes in the work, then recovery under the doctrine of unjust enrichment is extremely unlikely.[4]

For example, a Board of Contract Appeals ruling rejected the contractor's argument that the government was unjustly enriched because it accepted soil for an environmental remediation project without paying for it because there was a valid contract which required the contractor to perform the work for a fixed price.

> *… an argument that the government was unjustly enriched by accepting soil without paying for it was rejected because a valid contract required the contractor to perform the work for a fixed price. The dispute arose from a contract to provide environmental remediation services. The contractor sought additional payment for the cost of fill required by a task order modification. The doctrine of unjust enrichment applies when the rights and remedies of the parties are not defined in a valid contract. Here, there was a valid contract and, therefore, the theory of unjust enrichment did not apply.*[5]

All avenues for recovery through the express contract must be exhausted before the theories of implied law or quasi-contracts can be implemented. The courts will uphold the language and intentions of the express contract if the parties comply with its provisions. For example, the United States Court of Appeals denied a contractor's claim recovery because there was an express contract that was fully understood by both well-experienced parties. There was no misrepresentation on the part of the owner, and the contractor simply underestimated the work required:

> *...where the parties enter into a valid contract allocating risk and reward, courts should be reluctant to overturn that allocation simply because one party underestimated its risk.*[6]

The contractor, before making a claim under unjust enrichment, should carefully review the contract language to determine whether or not the situation is covered expressly by the contract. Express contracts and implied contracts cannot be applied simultaneously to a given situation.

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4 *Change Provision Defeats Contractor's Claim for Extras*, Construction Claims Monthly July 1983, 4.
5 CBCA, 08-1 BCA ¶33,807 Arcadis U.S., Inc. v. Department of the Interior, March 4, 2008.
6 *Construction Law Claims & Liability, Remedies and Damages* § 15.6A (CR.5/88) 1, 1988.

Also, express contracts or contracts implied in fact preclude quasi-contracts or contracts implied in law. In other words, a contractor should not disregard what is expressly written in the contract and attempt to use other theories and implications outlined in law to recover damages from the owner. Normally, if the owner does not fulfill its contractual obligations, then the procedure to follow would be to claim damages allowable under the contract.

4. QUASI-CONTRACTS OR CONTRACTS IN IMPLIED LAW

The most appropriate avenue to pursue recovery or restitution under unjust enrichment is through quasi-contracts or contracts implied in law. When the express contract under which the parties are directed is inadequate, incomplete or absent, then implied law can be used to establish an agreement. In addition, if there is a breach or abandonment of the contract on the owner's part or if the contract is rescinded, then implied law can be imposed.

When working with actual contracts, the agreement defines the duty. In implied or quasi-contracts, the duty defines the agreement. "The duty, which thus forms the foundation of a quasi-contractual obligation, is frequently based on the doctrine of unjust enrichment."[7] Even if parties have attempted to make an express contract workable but fail, then the door is opened for implied law.

The term "*quantum meruit*" is often used in the contractor's attempt to recover from the owner through unjust enrichment. *Quantum meruit* means "as much as one deserves." The contractor normally cannot recover its full cost of a particular item in dispute by simply repossessing the item. The claim must also consider the reasonable value of the work performed. *Quantum meruit* allows the contractor to recover "as much as it deserves" from the owner according to the reasonable value of services.

In one case, the contractor sued to recover costs on requested extra work and more expensive materials to complete a tiling project. The parties had not agreed to the cost and the method of compensation for the extra tiling work. Since no specific payment schedule or method was covered in the actual contract, implied law could be enforced. The contractor, under quasi-contracts, is due the reasonable value of the services rendered that are requested and accepted by the owner.[8]

In this situation, the contract did not adequately cover the terms of payment. Also, the contractor had conferred the services of extra tiling work with a reasonable expectation for payment. The owner had accepted and retained the services of the contractor without sufficient payment and, therefore, was unjustly enriched. In this case, the contractor could claim for *quantum meruit* under unjust enrichment.

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7 *Am. Jur. 2d 944, Restitution and Implied Contracts*, § 2, 66.
8 *Construction and Design Law Digest*, 413 § 23 1988.

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5. OBSTACLES

Obstacles or key issues that prevent the ability to gain restitution through unjust enrichment under quasi-contracts include officiousness, acceptance, reasonable expectation, tortuous conduct, and authority.

Officiousness. To officiously confer services is to enrich but not to unjustly enrich. If one volunteers services or simply performs them at no request, compensation for those services is not inferred. The purpose behind this theory is to protect those who have "benefits thrust upon them" and to penalize "those who thrust benefits" upon others. If no request for services is made by the owner, these services can be considered as volunteered. Circumstances that present an immediate threat of loss of property, goods or investments, however, may not require a request from the owner if the contractor is acting in good faith to protect the owner.

Acceptance. Acceptance of the work performed or services rendered should be made before the owner is considered enriched. This gives the owner the freedom to reject or accept the work performed by the contractor. If the owner rejects the work, enrichment may not have occurred. This protects the owner from being required to compensate for faulty or incomplete work of no value. The contractor, in order to pursue unjust enrichment without acceptance, should prove that the owner withheld approval or acceptance without cause.

Reasonable Expectation. Reasonable expectation of compensation is another test that justifies restitution under unjust enrichment and implied law. The circumstances under which the services were rendered must reasonably show the intention and understanding that the owner was to make payment to the contractor. If the intent and understanding of the specific parties cannot be shown, the point could also be proven by what "reasonable" people would do under the same circumstances. If reasonable expectation of compensation cannot be proven, then the work performed by the contractor may be considered gratuitous.

Tortuous Conduct. Full restitution of work performed by the contractor may not be awarded if the owner's conduct is not tortuous. If the owner is not at fault and has acted reasonably, and if changes are such that the owner would suffer a loss in giving full restitution, then full restitution may not be awarded. Also, if the contractor contributed to the wrongful acts, then restitution may not be given. If the contractor is less guilty than the owner or if the conduct of the contractor is not related to the issues claimed, then restitution may be granted. If, however, the owner is tortuous, has knowledge of the benefits gained, and has had the opportunity to make restitution, then implied law and unjust enrichment can be claimed by the contractor to make possible recovery from the owner.

Authority. Another potential problem area of which the contractor should be aware is the authority of the party requesting services. Consider a situation in which a contractor was asked to make repairs to an existing aqueduct by two government employees. After completion of

repairs, the government would not compensate the contractor because those employees did not have the authority to request work. The contractor sued. In this example, the significant points for the contractor to prove are that the employees were acting for the government and that the government benefited by the contractor's services. For successful recovery, the contractor must show that these government employees had sufficient authority to request services.[9]

[9] *Construction and Design Law Digest, 89 Rights and Remedies § 23.4d 1 1988.*

6. CONCLUSION

The doctrine of unjust enrichment stands as a viable method of recovery for the contractor when the owner has benefited from the contractor's work and has not compensated the contractor for such work. Unjust enrichment, as a prerequisite for restitution, can be used in combination with implied law and *quantum meruit* to recover the reasonable value of the work performed.

During the contract phase and when particular problems arise, the contractor should be knowledgeable of what related circumstances are covered by express contract terms and conditions. The contractor should also be aware of any actions and any oral or written communication by involved parties that would prove or disprove reasonable expectation of compensation, acceptance of the work, officiousness, tortuous conduct, authority, etc. The application of quasi-contracts or implied law will take into consideration such information to decide if the owner truly is unjustly enriched and whether the contractor deserves restitution for the value of work performed.

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