

EXPANDING CONTRACTORS' CLAIMS: THE IMPACT OF 'UNJUST ENRICHMENT' ON CONTRACT

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INTRODUCTION

The Building and Construction list in the Supreme Court of NSW is testimony to the increase in building disputes in NSW. As lawyers it is our function to monitor the driving force behind that litigation and, if possible, to determine any shift in the thinking of the courts which might affect a litigant's prospects.

The reported cases demonstrate growing reliance by contractors on the principle of unjust enrichment in order to recover claims. The purpose of this paper is not so much to consider the principles of unjust enrichment as it is to determine a possible shift in thinking by the courts on this issue and to consider what that means for the contractor in practical terms.

In Australia there are strongly opposing views on whether all the different categories of obligation that arise outside tort and contract can be unified under a third category of unjust enrichment; or, alternatively, whether the law of obligation is bound forever to recognise 'non-wrongs' a varied category of non-wrongs which give rise to an obligation on the part of the principal to restore.

One view is that that there certainly never was a project to unify 'all those species of common law obligations which are neither contractual nor tortious in nature'.¹ Another view is that the law of unjust enrichment is no more than that category of non-wrongs which includes, and generalises, mistaken payment and all other events of the same kind.²

Contractors are usually bound by tight and unforgiving contracts. Experience has taught us that it is unlikely that principals and contractors will, or can, contemplate *all* the events which steer the performance of a

contract. The standard approach of a principal is to cast the onus of bidding on a cost basis on the contractor, for better or for worse. It is the inequity that this arrangement sometimes results in that provides the court with an opportunity to reach beyond the contract to bring about a more equitable result if a dispute arises.

The legal process which the contractor must use to achieve this outcome in Australia is still that 'varied category of non-wrongs'³ which give rise to an obligation on the part of the principal to restore. They are principally:

- (a) quantum meruit;
- (b) mistake;
- (c) misrepresentation;
- (d) claims under the *Trade Practices Act 1974* (Cth) or the *Fair Trading Act 1987* (NSW);
- (e) unconscionability;
- (f) good faith; and
- (g) estoppel.

Although each of these causes of action has its own distinct character and elements, all have unjust enrichment as a single underlying basis.

THE SHIFT IN JUDICIAL THINKING

It is possible to detect a shift in judicial thinking by the courts on the question of unjust enrichment. Contracts are not the last word in considering contractors' claims. Principals could do well to avoid unreasonable conduct in their contract administration or they may reap the bitter rewards of unreasonable conduct from which their contract may not be able to protect them.

The cases which are discussed in this paper have been selected not solely for the propositions for which they stand but also because of the *language* which is used. The