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Restitution--Quasi-Contract--Non-Conformance with State Building Contractors Licensing Statute as Basis for Denial of Restitution

Stefan Tucker

University of Michigan Law School

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RESTITUTION—QUASI-CONTRACT—NON-CONFORMANCE WITH STATE BUILDING CONTRACTORS LICENSING STATUTE AS BASIS FOR DENIAL OF RESTITUTION—Defendants, owners of an apartment building containing stores and living units, contracted with plaintiff to replace the roof of the building. Pursuant to the contract plaintiff replaced the roof, and when defendants refused to pay for the work done, plaintiff sued in the alternative for damages on the contract or for restitution on an implied contract.¹ Defendants moved for dismissal at pre-trial, contending that plaintiff was a residential alteration contractor and as such was required by state statute to have a license in order to bring an action for the collection of compensation.² On appeal from pre-trial orders dismissing the suit and denying a motion for rehearing, *held*, affirmed. Statutory provisions precluding unlicensed alteration contractors from maintaining an action to recover for services rendered applied to the plaintiff and prevented him from recovering the cost of the roof installed, either on the contract or in restitution. *Alexander v. Neal*, 364 Mich. 485, 110 N.W.2d 797 (1961).

The purpose of restitution is to remedy the fact that one party has been unjustly enriched at another's expense.³ In order that the requisite enrichment be found, it is necessary that an advantage be secured or a benefit be received and retained, either by obtaining services or property, or by saving money.⁴ Even where a person has secured an advantage at the expense of another, however, he is liable to pay for it only if the circumstances of its receipt or retention are such that, as between the two persons, it is unjust for him to retain it.⁵ Thus, where the original intent of the plaintiff was to confer a gift or gratuity upon the defendant, courts will not find a right of restitution when the plaintiff seeks recovery of that gift or its value. Nor will a court aid one who voluntarily confers a benefit upon another without having received any express or implied promise of reimbursement. In addition to being available as an alternative remedy for breach of contract,⁶ restitutionary recoveries may be extended to situations where, even though a party would not be able to recover on

¹ Brief for Appellant, p. 5a (declaration), *Alexander v. Neal*, 364 Mich. 485, 110 N.W.2d 797 (1961).

² MICH. STAT. ANN. § 18.36(16) (1957). See note 27 *infra*, for text of the provision.

³ See *Herrmann v. Gleason*, 126 F.2d 936 (6th Cir. 1942); see generally 5 CORBIN, CONTRACTS § 1104 (1951).

⁴ See RESTATEMENT, RESTITUTION § 1, comment *b* (1937).

⁵ *Id.* comment *c*.

⁶ See, *e.g.*, *United States v. Zara Contracting Co.*, 146 F.2d 606 (2d Cir. 1944).

a contract, the injustice of the other contracting party's enrichment requires relief. Furthermore, restitutionary relief may be afforded where no actual pecuniary enrichment has occurred, if it would be unjust not to grant recovery for the value of services rendered or property transferred or utilized.⁷ In the principal case there was obviously an undeserved enrichment, since defendants received a roof without paying for it. However, an enrichment which the defendant does not deserve is not always deemed to be unjust as to the plaintiff. The court's denial of the restitutionary remedy because the contract was unlawful⁸ must therefore be construed as a determination that, because of the illegality of plaintiff's act, defendant's receipt and retention of this benefit was not, under the circumstances, unjust to plaintiff.⁹

In many cases, although not uniformly, the illegality of an act by the plaintiff has been sufficient to absolve the defendant's enrichment of its unjustness. These courts seem to find it good policy to deny restitution in order to penalize plaintiff for, and deter others from, such illegal acts. The broad rationale given by courts refusing restitution is that the granting of restitution would be contrary to "public policy,"¹⁰ since it encourages illegal transactions¹¹ and circumvents the law.¹² Some courts deny restitutionary relief to punish the plaintiff,¹³ or because he is said to have disqualified himself from seeking the aid of the court.¹⁴ Many courts, however, do grant restitutionary relief in such situations, reasoning that regardless of the illegality of the contract, the enrichment is unjust, especially where the penalty would be utterly disproportionate to the offense.¹⁵ These courts further rationalize that the plaintiff is actually disaffirming

⁷ See RESTATEMENT, RESTITUTION § 1, comment *e* (1937).

⁸ MICH. STAT. ANN. § 18.86(1) (1957). See note 24 *infra*, for text of the provision.

⁹ Where transactions or contracts have been declared unlawful for failure to comply with statutory requirements, some courts have nevertheless allowed restitutionary recovery. See *Cook v. Sherman*, 20 Fed. 167 (C.C. Iowa 1882) (corporate directors' contract); *Lund v. Bruflat*, 159 Wash. 89, 292 Pac. 112 (1930) (unlicensed plumber; restitution limited to materials furnished). *But see Berka v. Woodward*, 125 Cal. 119, 57 Pac. 777 (1899) (unlicensed lawyer); *Enterprise Frame & Novelty Corp. v. Schieman*, 183 Misc. 3, 49 N.Y.S.2d 860 (N.Y. City Ct. 1944) (Emergency Price Control Act).

¹⁰ Yet, judges sometimes seem to use a "public policy" analysis to justify their personal beliefs. See *Richardson v. Mellish*, 2 Bing. 229, 130 Eng. Rep. 294, 303 (C.P. 1824). ("It is never argued at all but when other points fail.")

¹¹ *McMullen v. Hoffman*, 174 U.S. 639 (1899).

¹² *E.g.*, *Le John Mfg. Co. v. Webb*, 222 F.2d 48 (D.C. Cir. 1955); *Gesellschaft.Für Drahtlose Telegraphie M.B.H. v. Brown*, 78 F.2d 410 (D.C. Cir.), *cert. denied*, 296 U.S. 618 (1935). This rationale is most often used where recovery in restitution would be nearly equal to recovery on the contract itself. See Wade, *Benefits Obtained Under Illegal Transactions—Reasons for and Against Allowing Restitution*, 25 TEXAS L. REV. 31, 32 (1946).

¹³ *E.g.*, *Holman v. Johnson*, 1 Cowp. 341, 98 Eng. Rep. 1120 (K.B. 1775).

¹⁴ See Wade, *supra* note 12, at 37.

¹⁵ See Wigmore, *A Summary of Quasi-Contract*, 25 AM. L. REV. 695, 712 (note) (1891).

the illegal contract¹⁶ and requesting the court only to restore a value belonging to him.¹⁷ Another consideration is that the denial of restitutionary recovery to the plaintiff would foster fraud, encouraging the defendant who knows the law to swindle the plaintiff by enticing him to perform his illegal contract to the fullest.¹⁸

Although the specific issue presented in the principal case was before the Michigan Supreme Court for the first time, the court has been presented with analogous situations in the past. Where a contract for the sale of goods was void because it was made on Sunday, the court granted restitution to the vendor;¹⁹ but where a contract for the sale of land was invalid because of non-compliance with the Statute of Frauds, the court, apparently finding a stronger legislative intent than in the Sunday case, denied restitution to the broker.²⁰ However, if in a contract not involving realty unenforceable under the Statute of Frauds one-year rule²¹ one party had fully performed, the court would grant him restitution.²² The principal case thus came before a court which has not been consistent as to its granting of the restitutionary remedy; and, seemingly, there are factors in the principal case which militate strongly against the denial of relief.

The purpose of the relevant statute is to safeguard and protect home owners and those who undertake to become home owners,²³ requiring the obtaining of a license before one may engage in residential building and/or maintenance and alteration contracting.²⁴ A license may be obtained if one maintains a place of business in Michigan, passes a written examination establishing a fair knowledge of English and an ability to

¹⁶ See Wade, *supra* note 12, at 54.

¹⁷ See *Planters Bank v. Union Bank*, 83 U.S. (16 Wall.) 483 (1872); *McMullen v. Hoffman*, 174 U.S. 639 (1899) (dictum). *Contra*, *Brown v. Timmany*, 20 Ohio 81 (1851).

¹⁸ See Wade, *supra* note 12, at 57.

¹⁹ *Tucker v. Mowrey*, 12 Mich. 378 (1864). *Accord*, *Rott v. Goldman*, 236 Mich. 261, 210 N.W. 335 (1926).

²⁰ *Paul v. Graham*, 193 Mich. 447, 160 N.W. 616 (1916). *Accord*, *McCarthy v. Loupe*, 62 Cal. 299 (1882); *Weatherhead v. Cooney*, 32 Idaho 127, 180 Pac. 760 (1919); *Hale v. Kreisel*, 194 Wis. 271, 215 N.W. 227 (1927).

²¹ MICH. STAT. ANN. § 26.922 (1953): "In the following cases . . . every agreement, contract and promise shall be void, unless . . . in writing and signed by the party to be charged therewith [including] every agreement that, by its terms, is not to be performed in one year from the making thereof . . ."

²² *Sutton v. Rowley*, 44 Mich. 112, 6 N.W. 216 (1880); *accord*, *Hummel v. Hummel*, 133 Ohio St. 520, 14 N.E.2d 923 (1938); *Colonial Brick Co. v. Zimmerman*, 255 Mich. 655, 239 N.W. 301 (1931) (dictum).

²³ MICH. STAT. ANN. § 18.86(1) (1957): "In order to safeguard and protect home owners and persons undertaking to become homeowners . . ."

²⁴ MICH. STAT. ANN. § 18.86(1) (1957): ". . . it shall be unlawful on and after the effective date of this act for any person to engage in the business of or to act in the capacity of a residential builder and/or . . . alteration contractor . . . without having a license therefor . . ."

read and interpret specifications, and, if the commission so requires, submits "reasonable evidence" of ability to perform the duties of an alteration contractor. But "satisfactory proof" of having been in the business of residential contracting for five years is prima facie proof of fitness to carry on the business, and eliminates the necessity of taking the examination.²⁵ One who has no license and violates a provision of the act may be fined up to \$500, imprisoned up to six months, or both.²⁶ Furthermore, one who engages in such a business without a license cannot bring an action in the state courts for the collection of compensation.²⁷ In its analysis of the statute it seems that the court's interpretation of the meaning of the term "home" was derived from an extension of the definition of a "residential maintenance and alteration contractor"²⁸ to include one who alters or repairs a structure used for both residential and commercial purposes. The court's construction that "home owners" included any owner of any structure housing a residence obscures the fact that the probable goal of the legislators was the protection of the non-commercial home owner, not the commercial investor who would be less likely to be mulcted by the incompetent or fly-by-night contractor. Since a non-commercial home owner

²⁵ MICH. STAT. ANN. § 18.86(4) (1957): "Every residential builder and/or residential maintenance and alteration contractor shall maintain a place of business in this state The commission is hereby authorized to require any applicant and/or licensee to submit reasonable evidence of his ability to perform his duties as a residential builder and/or residential maintenance and alteration contractor."

"The commission shall also require each applicant for a license to pass a written examination establishing, in a manner satisfactory to the commission, that the applicant has a fair knowledge of the English language including . . . an ability to read and interpret plans and specifications Satisfactory proof of having been engaged in the business of contracting for the erection, construction, . . . wrecking of or demolition of residential or combination of residential and commercial structures for a period of 5 years shall be prima facie proof of the applicant's fitness to carry on said business, and he shall not be required to take said examination"

²⁶ MICH. STAT. ANN. § 18.86(16) (1957): "Any person . . . acting in the capacity of a residential builder and/or residential maintenance and alteration contractor within the meaning of this act, who shall violate any of the provisions of this act, without a license as herein provided . . . shall upon conviction thereof, if a natural person, be punished by a fine not to exceed \$500.00, or by imprisonment in the county jail for a term not to exceed 6 months, or by both such fine and imprisonment in the discretion of the court."

²⁷ MICH. STAT. ANN. § 18.86(16) (1957): "No person engaged in the business or acting in the capacity of a residential builder and/or residential maintenance and alteration contractor may bring or maintain any action in any court of this state for the collection of compensation for the performance of any act or contract for which a license is required by this act without alleging and proving that he was duly licensed under this act at all times during the performance of such act or contract"

²⁸ MICH. STAT. ANN. § 18.86(2)(c) (1957): "Residential maintenance and alteration contractor shall be construed to mean any person who, for a fixed sum, . . . or other compensation, other than wages, undertakes with another for the repair, alteration or any addition to, . . . improvement of, . . . or demolition of a residential structure or combination of residential and commercial structures, except for his own use and occupancy. . . ."

might reside in a partially commercial structure, it was necessary to extend the statute's coverage to contractors who worked on combination residential-commercial structures. Yet that provision does not justify the court's decision that one investing but not residing in such a combination building was intended to come within the scope of the act. Since defendants were probably not intended to be protected by the act, it seems that they should not be allowed to invoke the "illegality" of the transaction in which they participated as a bar to restitutionary relief. Moreover, in view of the doubt that the act applied to the plaintiff at all, it is questionable whether the court should even have denied recovery on the contract. In addition, though there are penalties for contracting without a license, the ease with which the requirements for obtaining a license may be met²⁹—which the court apparently overlooked—seems to negate the strength the court attributed to the statute. Considering the dubiousness of the application of the statute to plaintiff, and the doubt that the legislature intended the statute to have the coverage and effect attributed to it by the court, it is submitted that the court erred in denying restitutionary relief in the principal case. The factors which compel the conclusion that defendant's enrichment was unjust far outweigh the reasons justifying defendant's retention of any benefit.³⁰

Stefan Tucker

²⁹ See MICH. STAT. ANN. § 18.86(4) (1957). The text is at note 25 *supra*.

³⁰ See DAWSON & PALMER, CASES ON RESTITUTION 1018 (rev. ed. 1958).