1963 *Present:* Tambiah, J., and Abeyesundere, J.

S. H. PEIRIS and another (of the firm of Billimoria de Silva, Peiris and Panditaratne), Appellants, *and* THE MUNICIPAL COUNCIL OF GALLE, Respondent

*S. C. 134/61—D. C. Galle, 2558/X*

*Quasi-contract—Undue enrichment—Obligation arising therefrom—Duty of Court to frame issue on it*—Condictio indebiti—Quantum meruit—*Contract with a Municipal Council involving expenditure exceeding Rs. 1,500—Omission to execute it under seal—Effect—Prescription—Municipal Councils Ordinance, ss. 227, 228, 229.*

The obligation based on the principle that no one should be unjustly enriched at the expense of another is not based on contract but arises out of performance under an invalid obligation which confers a benefit on another person. The obligation based on unjust enrichment is independent of contract and is implied by the law without there having been any previous agreement or understanding.

Where all the averments necessary to raise an issue of undue enrichment on the part of the defendant are contained in a plaint, it is the duty of the Court to frame such issue at the trial even if the plaintiff fails to suggest it.

The plaintiffs, a firm of architects, were engaged by the defendant, a Municipal Council, to construct a building (Town Hall). The contract, although it involved an estimated expenditure of more than Rs. 1,500, was not containe in a written instrument under the seal of the Council as required by the provisions of section 228 of the Municipal Councils Ordinance. The plaintiffs, however, performed their part of the contract and handed over the building to the defendant. They sought, in the present action, to recover a sum of Rs.30,380/40, which they claimed was the unpaid balance out of a sum of Rs. 84,380/40 due to them as remuneration for the work done by them as architects. The trial Judge dismissed the action on the ground that the contract was void as it was not under seal and as the claim of the plaintiffs was prescribed.

*Held*, that the issue of undue enrichment should have been framed and tried by the trial Judge. In construing the provisions of sections 227, 228 and 229 of the Municipal Councils Ordinance, there is nothing to suggest that contracts not under seal, involving sums over Rs. 1,500, are illegal. Such contracts, not being penal, are not either expressly or impliedly illegal.

*Held further*, that the period of prescription in respect of the plaintiffs' claim commenced, in view of the evidence led, six months after the building was handed over to the defendant for ceremonial opening.

APPEAL from a judgment of the District Court, Galle.

*H. V. Perera, Q.C.*, with *Carl Jayasinghe* and *B. J. Fernando*, for the Plaintiffs-Appellants.

*H. W. Jayewardene, Q.C.*, with *F. A. Abeywardene* and *D. S. Wijewardene*, for the Defendant-Respondent.

*Cur. adv. vult.*

December 18, 1963. TAMBIAH, J.—

The plaintiffs, a firm of architects, brought this action against the defendant, the Municipal Council of Galle, to recover a sum of Rs. 30,380/40, which they claimed was the unpaid balance out of a sum of Rs. 84,380/40 due to them as remuneration for the work done by them as architects in constructing the Town Hall of Galle.

The defendant denied generally the averments in the plaint including the averment that the plaintiffs were engaged by them as architects for the purpose mentioned and took up the legal defence that the contract was void as it was not under the seal of the Municipal Council. The defendant also pleaded that the claim of the plaintiffs was prescribed and counter-claimed a sum of Rs. 30,380/40 as set-off for damages suffered by it due to the negligence of the plaintiffs.

The trial proceeded on various issues and the learned District Judge, in an exhaustive judgment, has held that the plaintiffs were engaged as architects by the Municipal Council and, although the contract was not under seal, the plaintiffs had performed their part of the contract and had handed over the Town Hall to the defendant. He also held that there was no negligence on the part of the plaintiffs. But he dismissed the plaintiffs' action on the ground that the contract was void as it was not under seal and as the claim of the plaintiffs was prescribed.

The evidence led in the case disclosed a most unsatisfactory state of affairs. Although the contract entered into by the defendant involved a sum over Rs. 1,500/-, no tenders were called for and the contract was not contained in a written instrument under the seal of the Council as required by the provisions of the Municipal Councils Ordinance.

At the hearing of the appeal, Mr. H. V. Perera, Q.C., who appeared for the plaintiff-appellants, argued that the contract was merely unenforceable and not void, but he did not press this argument and it is unnecessary for this Court to consider this aspect of the case in view of the order I propose to make. Mr. Perera also argued that the averments in the plaint are wide enough to enable the Court to frame an issue of " undue enrichment " on the part of the defendant, and, in the interest of justice, such an issue should have been framed and tried by the learned District Judge.

The plaint has been drafted in such a manner that all the averments necessary to raise the issue of undue enrichment are contained therein. The duty of raising the necessary issues for a just decision of a case rests on the Judge. In the instant case, it is with reluctance that the learned District Judge has dismissed the plaintiffs' claim. He has held that since the plaintiffs had performed their part of the contract without any negligence and had given the defendant the benefit of a Town Hall, it would be a travesty of justice if some relief is not given to the plaintiffs.

In *Jayawickreme v. Amarasuriya* [1] Lord Atkinson, who delivered the opinion of the Privy Council, posed the question "Are they" (the parties to the case) "to be denied justice because their pleader has chosen to over-state his clients' case, and the Judge to frame an issue embodying that overstatement?" In that case, the relevant issue was framed by their Lordships of the Privy Council in granting relief to the appellant. In the instant case, too, the learned District Judge should have framed the issue and should have tried it.

The doctrine of undue enrichment, which has its roots in the Roman Law, had virile growth in the Roman-Dutch Law and has not only been adopted in South Africa (vide The British Commonwealth Series—Vol. 5—The Union of South Africa (Hahlo and Kahn) p. 566), but also is firmly entrenched in the legal system of our country (vide *Sarnelis Appuhamy v. Ram Iswera* [2]). The doctrine is based on the well-known maxim contained in the Corpus Juris (D. 50. 17. 206):

> "*Jure naturae aequum est neminem cum alterius detrimento et injuria fieri locupletiorem.*"

Under the Roman Law, an action would lie where one person had been unjustly enriched to the detriment of another. Hence, different types of *condictiones* and the *actio de in rem verso* were available, but no general action based on undue enrichment existed.

In Roman-Dutch Law, the cases where an action would lie to recover undue enrichment received extension. Many Dutch jurists considered undue enrichment as a source of obligations and the various *condictiones* by which such enrichment could be recovered are still part of the modern law, though, both in Roman and Roman-Dutch Law, these actions are essentially statements on the substantive law, cloaked under terms of various actions (vide The South African Law of Obligations by Lee and Honore, Section 681). The delineation of the various *condictiones* should not be taken too rigidly. The most important of these is the *condictio indebiti* for which detailed rules have been enunciated.

The *condictio indebiti* is the general remedy available to a person who delivers a sum of money or other property to another person in order to pay a supposed, but non-existent, debt. The question whether the *condictio indebiti* is confined to the case of transfer of money or other property has to be answered in the affirmative both in the old as well as in modern law (*Voet* 5. 2. 18; 17. 6. 12). This remedy lies to recover the estimated value of services rendered if the recipient was benefited. The Italian mediaeval jurist, Paulus Castrensis (*ad* D. 19.5.27) says:

> "*quia si praesto tibi decem operas fabriles indebite credens me teneri, non possum repetere totidem operas fabriles tuas, sed debeo repetere aestimatiorem earum; quia in totum es effectus locupletior ex meis*".

In Roman and Roman-Dutch Law, the *condictio indebiti* included all claims for restitution where the plaintiff could have pleaded a peremptory exception before paying (*Voet* 12.6.4.) whilst the *condictio*

[1] *(1913) 20 N. L. R. p. 289 at 297.* [2] *(1954) 56 N. L. R. 221.*

*sine causa*, in the wide sense, included all other contracts (*Voet* 12.7.1 ; Lee and Honore *Ibid* Section 681).

Although the Roman Law with regard to the various forms of *condictiones* was often highly technical and much of it has become obsolete, nevertheless the essential principles which underlie these *condictiones* form part of the modern law. It is unnecessary to use the name of any *condictiones* in claiming relief (*Groenewegen ad* D. 13.1.1 ; *Wessels*, Law of Contracts (2nd Edition) Vol. II, section 3758).

The Obligation arising out of undue enrichment is not based on contract but arises out of performance under an invalid obligation which confers a benefit on another person. The principle which regulated this remedy is succinctly stated in Justinian's Digest as follows (D. 12.6.54) :—

> "*Ex his omnibus causis, quae iure non valuerunt vel non habuerunt effectum, secula per errorem solutione condictione locus erit.*"

The principle that the doctrine of undue enrichment is applied where one gets the benefit of another's labour is recognised in modern law as well (vide *Frame v Palmer* [1]). Therefore, the contention of Mr. H. W. Jayewardene, Q.C., counsel for the defendant-respondent, that this remedy lies only where materials which accrue to the land are supplied, is untenable.

Mr. Jayewardene cited certain English cases and contended that where contracts involving sums over a certain value were not entered under the seal of a public corporation, they are null and void. He relied on the ruling of the House of Lords in the case of *Young & Co. v. Mayor and Corporation of Leamington* [2] and other English cases for the proposition that no claim on *quantum meruit* can be maintained where the specific provisions in a statute empowering a public corporation have been infringed. In that case, it was held that the provisions of section 174 of the Public Health Act of 1875 (38 & 39 Vict. c. 55), requiring contracts for more than 50l to be in writing, were mandatory and not merely discretionary and, therefore, where a duly authorised authority under the Act contracted for the execution of certain works involving a sum over 50l, such a contract, though executed, could not be enforced as it was not under seal.

In dealing with the question whether the relief could be based on quasi-contract, Lord Blackburn said : (Vide 49 L. T. at pages 2 & 3) : "Corporations are liable at common law, *quasi ex contractu*, to pay for work ordered by their agents and done under their authority. The cases on this subject are very numerous and conflicting, and they require review and authoritative exposition by a Court of Appeal. But, in my opinion, the question thus raised does not require decision in the present case. We have here to construe and apply an Act of Parliament. The Act draws a line between contracts for more than 50l. and contracts for 50l. and under. Contracts for not more than 50l. need not be sealed

[1] *1950 (3) S. A. 340 (C).*

[2] *49 L. T. 1.*

and can be enforced whether executed or not, and without reference to the question whether they could be enforced at common law by reason of their trivial nature. But contracts for more than 50l. are positively required to be under seal; and in a case like that before us, if we were to hold the defendants liable for what has been done under the contract, we should in effect be repealing the Act of Parliament."

The rationale of quasi-contract in English Law is nebulous and the problem of rationalisation presents exceptional difficulties (vide Wessels on Law of Contract (2nd Ed.) p. 488); the concepts of contract and quasi-contract both developed from the writ of assumpsit and English judges often considered a quasi-contract to be a contract by a fiction of the law and thought it anomalous to enforce a void contract as a quasi-contract. The reluctance of English judges to recognise the concept of quasi-contract could be seen in many cases, and Lord Blackburn's conclusions in *Young & Co. v. Mayor and Corporation of Leamington* (supra) may perhaps be due to such reluctance.

Lord Atkin, while he found it necessary to admit that the action based on quasi-contract was based upon a fictitious contract, characterised the fiction as "obvious", "fanciful" and "transparent". He said (vide *United Australia Ltd. v. Barclays Bank Ltd.*[1]): "These fantastic resemblances of contracts invented in order to meet requirements of the law as to forms of action which have now disappeared should not in these days be allowed to affect actual rights. When these ghosts of the past stand in the path of justice clanking their mediaeval chains, the proper course for the judge is to pass through them undeterred".

On the other hand, the doctrine of undue enrichment, which was adumbrated by Lord Mansfield in *Moses v. Macferhn* [2], has received moral support from later eminent judges. Lord Wright, for example, confessed his sympathy with Lord Mansfield. "It is clear" he said (vide *Fibrosa's* case [3]) "that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English Law are generically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution".

The Roman-Dutch Law, which is a superstructure on Roman Law, has developed the doctrine of undue enrichment on rational lines. For the application of this doctrine it is not necessary to invoke any particular form of action (vide Principles of South African Law by Wille (2nd Edition) p. 436). Therefore, those who administer the Roman Dutch Law are spared the ghastly sight of apparitions that "stand in the path of justice". The obligation, based on unjust enrichment, is independent of

[1] *1941 A. C. 1 at p. 29.*

[2] *(1760) 2 Burr 1005.*

[3] *1943 A. C. 32 at 61.*

contract and is implied by the law without there having been any previous agreement or understanding (Ibid p. 435).

In construing the provisions of sections 227, 228 and 229 of the Municipal Councils Ordinance, there is nothing to suggest that this remedy had been wiped away by the Legislature. There is nothing in the Ordinance to suggest that contracts not under seal, involving sums over Rs. 1,500/–, are illegal. Such contracts not being penal, there is no room for holding that such an agreement is either expressly or impliedly declared illegal.

Mr. Jayewardene also urged that the granting of the remedy based on the doctrine of unjust enrichment may result in the public being defrauded. All that this Court seeks to do, in the instant case, is to compensate the plaintiffs for services performed by them to the defendant and we fail to see how the public, which has benefited by the plaintiffs' services, can be defrauded when a Court of law seeks to compensate the plaintiffs. If the Legislature intended that this remedy should not be invoked in cases where the contract is void for want of seal, it would have expressly stated that no other remedy would lie in such cases. For these reasons, I am of the view that the issue of undue enrichment should have been framed and tried by the learned District Judge.

The learned District Judge's finding that the claim of the plaintiffs is prescribed also cannot be supported. There is the uncontradicted evidence of Mr. Pieris who stated that his duties as architect continued for a period of six months after the building was handed over to the defendant. It is during this period that the services of an architect are indispensable. It is his duty to see that there are no cracks, sinking of foundation or other defects caused by faulty workmanship. Although the building was handed over for ceremonial opening on 21st July, 1956, the duties of the plaintiffs continued for six months thereafter. The plaintiffs could only have been re-imbursed in full after this period was over. Therefore, I am of the view that the claim of the plaintiffs is not prescribed. For similar reasons, the claim based on unjust enrichment is also not prescribed.

For these reasons, I *pro forma* set aside the order of the learned District Judge and remit the case for the issue based on undue enrichment to be tried. The defendant is entitled to raise any consequential issues at the trial.

It is a matter of regret that the defendant, a public corporation, should have flouted the provisions of the Municipal Councils Ordinance. Having induced the plaintiffs to render their services, the defendant went to the extent of denying the contract and alleged negligence on the part of the plaintiffs. Such an allegation was not substantiated and it is surprising that the defendant claimed in reconvention the identical sum which the plaintiffs alleged as balance sum due to them for services rendered. High standards of integrity and good conduct are expected of public bodies and we observe with regret that the defendant has, in the instant case, fallen far short of such standards.

In adopting this course, we are of the view that the law subserves justice, though the converse is not true. In view of the fact that the plaintiffs could have raised the issue of enrichment at the trial, I order that each party bear the costs incurred in the lower Court. The appellants, however, are entitled to the costs of the appeal.

ABEYESUNDERE, J.—I agree.

*Order set aside* pro forma.