SUPREME COURT OF QUEENSLAND

CITATION:	*Gambaro Pty Ltd v Rohrig (Qld) Pty Ltd* [2018] QCA 327
PARTIES:	**GAMBARO PTY LTD AS TRUSTEE FOR THE GAMBARO HOLDINGS TRUST** **ABN 42 938 456 099** **(appellant)** **v** **ROHRIG (QLD) PTY LTD** **ABN 67 093 753 970** (respondent)
FILE NO/S:	Appeal No 8044 of 2018 SC No 8579 of 2014
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2018] QSC 149 (Holmes CJ)
DELIVERED ON:	27 November 2018
DELIVERED AT:	Brisbane
HEARING DATE:	21 November 2018
JUDGES:	Sofronoff P and Philippides JA and Boddice J
ORDERS:	**1. Appeal dismissed.** **2. The appellant pay the respondent's costs of the appeal.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – where the appellant entered into a contract with the respondent pursuant to which the respondent would carry out construction of a hotel – where the appellant terminated the contract, alleging defective work on the part of the respondent – where the respondent sought for certain paragraphs, namely 38 to 54, of the appellant's statement of claim to be struck out – where the relevant paragraphs pleaded a claim for payments made by the appellant to the respondent, which the appellant alleged to be in excess of the respondent's entitlement – where the appellant made the allegation of overpayment by reference to a term of the contract which stipulated a "Guaranteed Maximum Price" – where the learned primary judge struck out paragraphs 38 to 54 – whether the learned primary judge erred in finding that the appellant had no real prospect of demonstrating that the clause of the contract which stipulated the Guaranteed Maximum Price survived termination so that it could

constitute the basis for a claim in restitution

D O Ferguson & Associates v Sohl (1992) 62 BLR 95, discussed
Kleinwort Benson Ltd v Birmingham City Council [1996] 4 All ER 733, discussed
Roxborough v Rothmans of Pall Mall Australia Ltd (2001) 208 CLR 516; [2001] HCA 68, cited
Woolwich Equitable Building Society v Inland Revenue Commissioners [1993] AC 70, discussed

COUNSEL: S L Doyle QC, with T Matthews QC and D D Keane, for the appellant
P Dunning QC, with F Lubett, for the respondent

SOLICITORS: N R Barbi Solicitor for the appellant
McCullough Robertson Lawyers for the respondent

[1] **SOFRONOFF P:** The appellant ("Gambaro") entered into a contract with the respondent ("Rohrig") pursuant to which the latter would carry out the construction of a 68 room hotel and certain other works upon a site in Caxton Street, Brisbane. The parties adopted the *Australian Standard General Conditions of Contract* AS4000-1997. Relevantly, clause 2.1 provided that Gambaro would pay Rohrig "the Cost of the Works" together with certain other figures. The expression "Cost of Works" used in clause 2.1 was defined in clause 1, relevantly, to mean:

> "where the *works* are included in a *Trade Package*, the aggregate of:
>
> i. the *Trade Package Lump Sums*; and
>
> ii. all *Contract Sum Adjustments* …"

[2] Clause 2.1 further provided:

> "However [Gambaro] will not be liable to pay [Rohrig] any more than the *Adjusted Guaranteed Maximum Price*. This however will not prevent or limit any claim [Rohrig] may have against [Gambaro] at law, including for breach of contract or negligence."

[3] The expression "Adjusted Guaranteed Maximum Price" was defined in clause 1 of the Contract to mean:

> "the *Guaranteed Maximum Price* as adjusted by the *Contract Sum Adjustments*."

[4] The expression "Guaranteed Maximum Price" was defined to mean:

> "… the lump sum price for the *Works* set out in Item 6A and particularised in Schedule 1, which cannot be exceeded unless there are *Contract Sum Adjustments*."

[5] Item 6A in the Schedule provided for a Guaranteed Maximum Price of AUD $14,297,274.20.

[6] The effect of these provisions was that Rohrig agreed to do the work for a fixed price (which was to be ascertained by reference to certain adjustments) but which would not, in any event, exceed a certain figure (which would also be adjusted in due course).

[7] The works reached practical completion. Gambaro contended that Rohrig had performed some defective work. The contractual mechanism for dealing with such disputes was invoked and led to Gambaro terminating the contract pursuant to clause 39. Clause 39.10 provides that if the Contract is terminated pursuant to clause 39.4 then:

> "the parties' remedies, rights and liabilities shall be the same as they would have been under the law governing the *Contract* had the defaulting party repudiated the *Contract* and the other party elected to treat the *Contract* as at an end and recover damages."

[8] Having terminated the Contract, Gambaro issued proceedings against Rohrig and sought two remedies. The first was a claim for an amount of money by which Gambaro said it had overpaid Rohrig. The second claim was for damages arising out of the alleged defective work. It is only the first category of claim that is relevant to this appeal.

[9] The allegations of material fact concerning the overpayment appeared in paragraphs 38 to 54 of the second amended statement of claim. In those paragraphs Gambaro had pleaded that during the course of the Contract it had paid progress payments to Rohrig totalling $13,888,749.96. Gambaro alleged that Rohrig issued an Adjudication Application under the *Building and Construction Industry Payments Act* 2004 and that on 31 July 2014 an adjudicator determined that a sum was due from Gambaro to Rohrig. Gambaro paid a further $970,607.31 as a result of that adjudication and other claims. The pleading alleges that the largest proportion of that payment reflected the amount due as a result of the adjudication.

[10] Gambaro alleged that it has paid Rohrig $14,771,120.25 and that it has thereby overpaid Rohrig $751,692.77 more than it would ever have been obliged to pay by reason of the limit imposed by the "Guaranteed Maximum Price". Gambaro then pleaded:

> "53. In the premises pleaded by paragraph 52 above:-
>
> (a) The defendant was and is not entitled pursuant to the Contract to payment of the Excess Payments;
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> (b) The plaintiff was not obliged pursuant to the Contract to have paid the Excess Payments;
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> (c) It would be not be [*sic*] compatible with equity and good conscience for the Defendant to retain the Excess Payments; and
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> (d) As a consequence the Defendant is obliged to repay the excess Payments by way of restitution and further or in the alternative as monies had and received by the Defendant to the use of the Plaintiff.
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> 54. Further and in the alternative in the premises pleaded by paragraph 53 above the Defendant must:
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> (a) account to the Plaintiff the Excess Payments;
>
> (b) further and in the alternative, make restitution to the Plaintiff of the Excess Payments pursuant to s 100 of the Act."

[11] Rohrig applied to strike out paragraphs 38 to 54 of the pleading and submitted to the Chief Justice, who heard the application, that the claim for recovery of the Excess Payment was "untenable" because the Contract had been terminated on 17 April 2015 and that, as a consequence, the terms of the Contract (save for those expressed to survive termination) "ceased to be applicable from that date onward". Rohrig submitted that following termination the parties were "left to their common law rights" and that the "result is that on its own pleaded case" Gambaro has precluded any final determination of Rohrig's "true contractual entitlement to payment of the Costs of Works".

[12] In short, the complaint was that the cause of action required an application of the terms of the Contract in order to calculate amounts payable under it but, because the Contract had been terminated, that course was not open because the terms no longer bound the parties.

[13] There was no submission by Rohrig that a restitutionary claim might not otherwise be available to Gambaro.

[14] It will be remembered that in its statement of claim Gambaro had alleged no more than that, having regard to the contractual terms, Rohrig had been paid more than it could ever have claimed as the Contract Price and that, consequently, the excess was recoverable.

[15] Gambaro's written outline at first instance simply joined issue with the point raised by Rohrig about the inefficacy of the contractual terms. Gambaro submitted that the termination of the Contract did not mean that the "Cost of the Works" could not be determined. Rohrig's contractual entitlement for payment at the time of termination could be calculated and, as a result, Gambaro could estimate the amount of overpayment and "seek restitution of amounts paid in excess of the contractually defined 'Cost of the Works'".

[16] The Chief Justice struck out paragraphs 38 to 54 of the second amended statement of claim but gave leave to Gambaro to replead.

[17] In my respectful opinion her Honour was right to strike out those paragraphs.

[18] The claim is for restitution of an amount by which Gambaro alleges Rohrig has been unjustly enriched. As the learned editors of Goff & Jones, *The Law of Unjust Enrichment* (8th ed) put it:

> "… unjust enrichment is not an abstract moral principle to which the courts must refer when deciding cases; it is an organising concept that groups decided authorities on the basis that they share a set of common features, namely that in all of them the defendant has been enriched by receipt of a benefit that is gained at the claimant's expense and circumstances that the law deems to be unjust."[1]

[19] In the same work there is the following statement:

> "… claimants in unjust enrichment must demonstrate a positive reason for restitution. [The chapters in this book] are concerned with the following topics: lack of consent and want of authority; mistakes;

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1 at 1-08, citations omitted.

> duress; undue influence; failure of basis; necessity; secondary liability; ultra vires receipts and payments by public bodies; legal incapacity; illegality; and money paid pursuant to a judgment that is later reversed. The first four of these all concern situations where the claimant's intention to benefit the defendant is absent or vitiated; the next concerns the situation where the parties have a common understanding, objectively assessed, that the defendant's enrichment is conditional on the happening of an event that does not occur and the last six concern situations where restitution is awarded in order to accomplish various policy objectives that do not turn on the parties' intention."[2]

[20] In *Woolwich Equitable Building Society v Inland Revenue Commissioners*,[3] Lord Browne-Wilkinson said:

> "… as yet there is in English law no general rule giving a plaintiff a right of recovery from a defendant who has been unjustly enriched at the plaintiff's expense."

[21] In *Kleinwort Benson Ltd v Birmingham City Council*,[4] Evans LJ said that the power to order restitution on the ground of unjust enrichment was subject "to the binding authority of previous decisions" and courts do not have a "discretionary power to order repayment whenever it seems … just and equitable to do so".

[22] An example of a building case in which a restitutionary claim was made in respect of overpayment was cited by the Chief Justice. *D O Ferguson & Associates v Sohl*[5] was a case in which a building owner terminated a building contract. The works had not been completed. The contract provided a price for the works of £32,194.25. The owner had paid the builder £26,738.75. At trial the value of the work which the builder had actually done was established to be only £22,065.75. It followed that at the date of termination of the Contract there had been an overpayment above the actual value of the work of £4,673. The building owner completed the works using another contractor but, in the result, the total cost of the completed works was less than the balance of the contract price still due. It followed that the building owner had suffered no loss by reason of the builder's breach of contract and recovered only nominal damages for breach of contract.

[23] The building owner also sued to recover the amount that had been paid to the builder in excess of the value of the work that the builder had completed. The claim was in restitution. The trial judge gave judgment for the sum by which the amount paid to the builder exceeded the value of work done.

[24] In the Court of Appeal, Hirst LJ described the claim as one for "restitution for monies paid for work that had never been done". His Lordship said:

> "…the learned judge's finding is that for the £4,673 there was indeed a total failure of consideration because £4,673 was paid by the [building owner] for work that was never done at all. The [builders] rightly recovered their £22,000 odd for work which they had done, including

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2 *ibid* at 1-22.
3 [1993] AC 70 at 196-197.
4 [1996] 4 All ER 733 at 737.
5 (1992) 62 BLR 95.

> their profit and there is no question of rolling back the carpet so far as that payment is concerned. But for the sum actually claimed in restitution there was, in my judgment, no consideration at all, and it matters not, though Mr Armstrong sought to argue the contrary, that at some stage or other that sum of money formed part of a larger instalment."

[25] It was an absence of consideration that grounded a restitutionary claim and rendered its retention legally unjust. To use the language of Goff & Jones, the retention of money despite a failure of consideration was a circumstance that the law deems to be unjust. In terms of the taxonomy adopted in Goff & Jones, the restitutionary claim was grounded in a "failure of basis". Sometimes the expression "failure of consideration" is used. Unlike the related expression of "total failure of consideration", a failure of basis or a failure of consideration in the context of a restitutionary claim need not, although it may, involve a defeat of the entirety of a promisee's expectations.[6]

[26] Gambaro's pleading is defective because it identifies no fact that can engage an obligation to make restitution. It pleads no circumstance that the law deems unjust. The mere fact that a payment has been made in excess of what is due does not, of itself, constitute a basis upon which to conclude that the payee's enrichment was "unjust" in the technical sense of the word.

[27] For this reason, I respectfully agree with the reasons of the Chief Justice that Gambaro had no real prospect of demonstrating that clause 2.1 of the Contract survived termination so that it could constitute the basis for a claim in restitution.[7] The Contract was at an end and the clause had no further operation as between the parties by way of contractual obligation. Because the Contract was at an end, the terms could not form the sole basis for the restitutionary claim, as the Chief Justice rightly concluded. Indeed Mr Dunning QC, who appeared with Ms Lubett for the respondent, accepted in oral argument that the terms of the Contract might be "relevant" to a cause of action. It is just that, as the Chief Justice pointed out, the terms about maximum price cannot, on their own, support such a claim because they no longer bind the parties.

[28] Mr Doyle QC, who appeared with Mr Matthews QC and Mr Keane for the appellant, submitted that there was a plea that the Excess Payment had been made under compulsion and that compulsion furnished the further necessary element that, together with the facts about which the Contract had provided, supported the restitutionary claim. It is true that the fact of the adjudication and the resulting payments were pleaded but the statement of claim does not allege any connection between the adjudication as a matter of compulsion and the injustice of the payment. Compulsion or duress may constitute a basis for a restitutionary claim.[8] Whether or not a claim based on compulsion can be pleaded is not something upon which I express any opinion. What is clear is that the matter that has been struck out did not do so.

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6 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 525-6 per Gleeson CJ, Gaudron and Hayne JJ and at 555-7 per Gummow J.

7 See *Gambaro Holdings Trust v Rohrig (Qld) Pty Ltd* [2018] QSC 149 at [13].

8 Goff & Jones, *The Law of Unjust Enrichment*, 8th ed, at Chapter 10.

[29] For these reasons I respectfully agree that the contested paragraphs were rightly struck out.

[30] I would order that the appeal be dismissed and that the appellant pay the respondent's costs of the appeal.

[31] **PHILIPPIDES JA:** For the reasons given by Sofronoff P, I agree that the appeal should be dismissed and the appellant pay the respondent's costs of the appeal.

[32] **BODDICE J:** I agree with Sofronoff P.