Enrichment That is Not Unjust

Smith Development, Inc v Flood 198 GA. App 817, 403 S.E.2d 249

In *Smith Development, Inc v Flood* 198 Ga. App 817, 403 S.E.2d 249 a builder, without the knowledge or consent of the defendant Ms Flood, commenced to build a $40,000 house on vacant land owned by Ms Flood. When the house was about 50% complete, Ms Flood discovered the work and had her solicitor write to the builder requesting that no further construction take place and warning the builder that if construction continued it would be at the peril of the builder.

The builder had contracted with Mr and Mrs Dyer to build the house. They were negotiating with Ms Flood to purchase the land for $12,000. Negotiations for the sale of the land continued. The builder did not stop the work and completed the house about one month later. Ms Flood offered to sell for $16,000. That offer was rejected and Ms Flood rented the premises, receiving $6,000 in rent.

The builder sued Ms Flood, claiming a quantum meruit. The builder argued that by continuing negotiations for the sale of the land after she became aware of the construction work and by leasing the house to a third party, Ms Flood had accepted the services rendered by the builder and that it would be unjust if she were not to pay for them.

The Court of Appeals of Georgia (USA) held that the builder was not entitled to recover anything from Ms Flood. The Court held that a contract cannot be implied from the mere performance of services and that Ms Flood could not accept services from the builder of which she was totally unaware. Accordingly, any acceptance of services would have to arise by virtue of her conduct after she became aware of the construction being carried out on her land. As soon as she became aware, she did not accept the builder's work. She told the builder to stop work. The house became hers by being annexed to the soil. The fact that she chose to use the house and not tear it down, did not mean that she accepted the services of the builder.

The Court found that at the time of rendering the services, the builder did not intend that they should be paid for by Ms Flood. The builder expected to be paid by Mr and Mrs Dyer. So far as concerns Ms Flood, the services were rendered gratuitously and with no expectation at the time of rendition that Ms Flood would pay for them.

It is submitted that the same decision would likely be reached by Australian Courts. However, it is interesting to note that the Court of Appeal of Georgia speaks of an implied promise:

> "Existing Precedent in Georgia appears compatible with the above rule. "Quantum Meruit lies ordinarily when one renders services valuable to another which the latter (voluntarily) accepts, raising the implication of a promise to pay the reasonable value thereof."

In Australia it is now accepted that "the true foundation of the right to recover on a quantum meruit does not depend on the existence of an implied contract" (*Pavey & Matthews Pty Ltd v Paul* (1986) 61 ALJR 151 per Mason and Wilson JJ at 153).

A point of difference between the Court of Appeals of Georgia and the Court of Appeal of NSW is that the former considers that:

> "When quantum meruit is an available remedy value means value to the owner rather than the cost of producing the result to the contractor."

Compare *Renard Constructions (ME) Pty Limited v Minister for Public Works* (NSW Court of Appeal, unreported 12/3/91). Had the Court of Appeals of Georgia not found for the defendant, the Court would have considered reducing the value of the property by taking into account the defendant's legal costs and other factors. In *Renard*, the NSW Court of Appeal rejected the argument that the defendant should pay to the contractor the value to the defendant of the works performed as distinct from the reasonable cost to the contractor of performing the works.

- Philip Davenport