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ANTICIPATED CONTRACTS: ROOM FOR AGREEMENT

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It is not uncommon for two parties, who intend to enter into a formal, written contract, not to sign such an agreement before one of the parties does some work for the other. This will often not pose a problem: the parties will later conclude the formal contract, and the agreed contract price will cover the work already done. However, this will not always be the case. Sometimes, no written contract will ever be signed. In such circumstances, it is difficult to establish, first, whether the party who has done some work can recover anything and, secondly, on what basis that party might recover.

There has long been disagreement regarding the appropriate basis of recovery: does the recipient of the work have to pay because of an implied agreement, or in order to reverse an unjust enrichment?[1] This analytical distinction is not inevitably crucial; the "reasonable value" of the work provided by one party may represent both that party's loss and the other's gain.[2] But the claimant's loss and defendant's gain may not always be the same; indeed, the defendant may not derive any benefit from the claimant's work.[3] Moreover, unjust enrichment encounters difficulties irrelevant to contract. For example, what is the identifiable benefit? Can it be subjectively devalued? What is the

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[1] For two sides of the academic divide compare the contributions of E. McKendrick (ch. 11) and S. Hedley (ch. 12) in W. Cornish, R. Nolan, J. O'Sullivan and G. Virgo (eds), *Restitution: Past, Present and Future* (Oxford, 1998). For reasons of space, this paper does not consider other alternatives such as promissory estoppel: see e.g. *Baird Textile Holdings Ltd.* v. *Marks & Spencer Plc.* [2001] EWCA Civ 274; [2002] 1 All E.R. (Comm) 737; *Walton Stores (Interstate) Ltd.* v. *Maher* (1988) 164 CLR 387 (HCA); G. Jones, "Claims arising out of contract which do not materialize" (1980) 18 U.W. Ontario LR 447.

[2] *E.g. Whittle Movers Ltd.* v. *Hollywood Express Ltd* [2009] EWCA Civ 1189, at [15].

[3] *William Lacey (Hounslow) Ltd.* v. *Davis* [1957] 1 All E.R. 932 may be an example of this. In *Serck Control Ltd.* v. *Drake & Scull Engineering Ltd.*, H.H.J. Hicks Q.C. distinguished between contract and unjust enrichment: "At the first end of the spectrum … the measure should clearly be the reasonable remuneration of the claimant; at the other it should be the value to the defendant. In between there is a borderline, the position of which may be debatable" ((2000) 73 Con. L.R. 100, at [35]).

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ground of restitution? Has there been a change of position? Was the claimant a risk-taker, and does this bar restitution? Conversely, a contractual approach requires the terms of the agreement to be identified and interpreted, and issues of mitigation to be resolved. Such matters can be circumvented by a claim in unjust enrichment.

This contract/unjust enrichment debate is of theoretical and practical importance. In 2009, the Court of Appeal, in *Whittle Movers Ltd.* v. *Hollywood Express Ltd.*[4] and *RTS Flexible Systems Ltd.* v. *Molkerei Alois Müller GMBH & Co. K.G. (UK Productions)*,[5] overturned the decisions of the courts below, which had found that a contract arose between the parties. The appellate court, led by Waller L.J. in both cases, maintained that such a conclusion was impossible, and instead favoured restitutionary reasoning. The "no contract" stance adopted by the Court of Appeal must, however, now be doubted in the light of the decision of the Supreme Court in *Müller*: the Supreme Court insisted that a contract had been concluded by the parties.[6]

This paper will focus on the impact of these recent decisions. It will be argued that a contractual analysis is much to be preferred. It is clear that, if there is a contract, a claim in unjust enrichment will necessarily fail.[7] Therefore, deciding whether or not a contract exists cannot be avoided. The creation of a contract depends upon finding an offer and acceptance, supported by consideration and an intention to create legal relations. In "anticipated contract" cases, the offer may lie either in the defendant's asking the claimant to do the work, or in the claimant's tendering the work. The acceptance will subsequently be either the claimant's carrying out the work, or the defendant's acceptance of the work. Since parties rarely do work for nothing, and this is widely known, it seems reasonable to suggest that both parties will realise that there will be an obligation to pay for the work done, and that legal relations are intended to be created.

The scope for finding a contract seems to be reasonably wide. But is it wide enough? Is there still room for a restitutionary approach in some instances which are not caught by the law of contract? It is suggested not: where no agreement can be found, there should not be a restitutionary remedy. The most likely ground of restitution here seems to be total failure of consideration.[8] But for this ground of restitution to succeed, it still needs to be shown that the defendant realised that he

[4] [2009] EWCA Civ 1189.
[5] [2009] EWCA Civ 26; [2009] 2 All E.R. (Comm) 542.
[6] Albeit not on the same terms as the first instance judge had thought: [2010] UKSC 14, [2010] 1 W.L.R.753.
[7] *Pan Ocean Shipping Co. Ltd.* v. *Creditcorp Ltd. (The Trident Beauty)* [1994] 1 W.L.R.161.
[8] *E.g. Yeoman's Row Management Ltd.* v. *Cobbe* [2008] UKHL 55; [2008] 1 W.L.R.1752. The speech of Lord Scott is not free from difficulty. For example, was Cobbe not a risk-taker by doing work without the protection of a contract? The decision might be better explained on the basis of a "collateral" contract, into which a term that a reasonable price be paid was implied.

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would have to give something in return for the benefit received.[9] If the defendant knew that he would have to pay, and the claimant expected to be paid, it inexorably follows that the parties were *agreed* on the need to pay something. If the parties did not reach even this level of agreement, then there is no room for unjust enrichment.

Any claim in unjust enrichment may be barred on the basis that the claimant was a risk-taker. After all, "there is nothing unjust about being visited with the consequences of a risk which one has consciously run".[10] If one party performs services prior to the agreement being concluded, then it may be argued that that party was taking a risk by "jumping the gun" and performing without having reached an agreement with the other side. Such a party deserves no sympathy. As the Supreme Court summarised, the better approach "is to agree first and to start work later".[11] Quite right. Performing without an agreement already in place is the wrong way round and should be discouraged. Contract law would not award a remedy, and nor should unjust enrichment.[12]

The approach of the Supreme Court in *Müller* is far preferable to that recently adopted by the Court of Appeal. The contractual approach provides a remedy in all cases where a remedy is appropriate. If no contract can be found, then there should be no remedy. There is neither room nor need for a restitutionary analysis. Judges are clearly becoming more comfortable with claims in unjust enrichment, but the law of unjust enrichment should not be undermined by cramming things within its scope which do not belong.

I. A Restitutionary Approach: No Consensus

Decisions which rely upon a restitutionary approach often cite *British Steel Corporation* v. *Cleveland Bridge and Engineering Co. Ltd.*[13] The parties were negotiating for the sale of steel nodes. During the course of those negotiations, the claimants produced the nodes and delivered them to the defendants. The defendants accepted the nodes, but refused to pay. Goff J. found that no contract had been concluded since the parties had not yet reached agreement on important matters, including liability for late delivery. However, the restitutionary claim did succeed: the defendant had to pay a reasonable sum to the claimant to reverse its unjust enrichment.

[9] See, *e.g.*, G. Virgo, *Principles of the Law of Restitution*, 2nd ed. (Oxford 2006) pp. 306–308; *Roxborough* v. *Rothmans of Pall Mall Ltd.* (2001) 208 CLR 516 (HCA).

[10] *Stephen Donald Architects Ltd.* v. *King* [2003] EWHC 1867 (TCC), at [79], *per* H.H.J. Richard Seymour Q.C.

[11] *Müller* [2010] UKSC 14, [2010] 1 W.L.R.753, at [1].

[12] "[I]f it is nannyish to impose liability in contract, then it is nannyish to impose it in restitution": Hedley *op. cit.* p. 196.

[13] [1984] 1 All E.R. 504.

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Although only a decision of first instance, this case has proved to be highly influential. It suggests that if essential terms are still to be agreed, then there will not be a contract.[14] However, it seems unsatisfactory to state that the parties have not reached *any* agreement when one party has provided work and services to another which have in fact been accepted. Surely there has been *some* agreement, which requires *some* remuneration? Admittedly, the still-to-be-agreed terms do not form part of the agreement made, but there is no reason why the fact that one particular contract was anticipated should preclude the court from finding that a different contract was actually made.[15] Moreover, it may be unreasonable to suggest that a term was truly essential if the contract has actually been performed.[16]

In *The Aramis*, Bingham L.J. observed that "it must be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract".[17] This statement is entirely appropriate, but it is not clear that it sits comfortably with *British Steel*: would the parties really have acted in the same manner in the absence of a contract?

In any event, the Court of Appeal in *Whittle* was content to apply both *The Aramis* and *British Steel*.[18] In *Whittle*, the parties were negotiating a long-term, written contract for the distribution and warehousing of food and drink products. During the negotiations, the claimant began to perform the envisaged services, and the defendant paid for them. After a relatively short period of time, the defendant cancelled the arrangement. The claimant argued that this was a breach of contract. Both the trial judge and Court of Appeal agreed that no long-term agreement had been reached, since negotiations were still ongoing. But that did not preclude the claimant from contending that an interim, collateral contract had been concluded by the parties' conduct for the services actually rendered. This argument was attractive to the judge, but not the Court of Appeal; Waller L.J. described such a conclusion as "not tenable".[19] This is unduly rigid: there seems to be no reason why the judge was not entitled to find that a contract had been concluded on the facts. Whether or not a contract is concluded by

[14] *Mamidoil-Jetoil Greek Petroleum Company S.A.* v. *Okta Crude Oil Refinery A.D.* [2001] EWCA Civ 406; [2001] 2 All E.R. (Comm) 193, at [69]; *Whittle, op. cit.; Müller op. cit.*

[15] *Cf.* Hedley, *op. cit.*, p. 197.

[16] *G Percy Trentham Ltd.* v. *Archital Luxfer Ltd.* [1993] 1 Lloyd's Rep. 25, 27. In *Pagnan SPA* v. *Feed Products Ltd.* [1987] 2 Lloyd's Rep. 601, 619, Lloyd L.J. explained that a term would only be truly "essential" if the contract would be incomplete and therefore unenforceable without it, and continued: "Of course the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later". This was cited with approval by the Supreme Court in *Müller, op. cit.*, at [49].

[17] [1989] 1 Lloyd's Rep. 213, 224.

[18] [2009] EWCA Civ 1189. This case is considered in more detail at (2010) 126 L.Q.R. 175.

[19] *Ibid.*, at [45].

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conduct is essentially a question of fact.[20] There may legitimately be some debate about what price should be paid under that contract,[21] but that should not distract the court from the important point that the parties were *agreed* that the services would be paid for, and that the consensual nature of the transaction means that it rightfully belongs within the domain of the law of contract.

The judgment of Waller L.J. in *Whittle* was mirrored in the same judge's decision in the Court of Appeal in *Müller*. The sidelining of contractual reasoning was unfortunate. Requested services were provided and accepted, and both parties knew that payment would be required. Offer, acceptance, consideration and an intention to create legal relations were all present. A contractual analysis is sufficient and convincing. The reversal of the Court of Appeal's approach in *Müller* is therefore welcome.

II. A Contractual Approach: Room for Agreement

It has long been clear that where a transaction has been fully performed the court may find a contract. For example, in *G Percy Trentham Ltd.* v. *Archital Luxfer Ltd.*, Steyn L.J. observed that:

> "The fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty. Specifically, the fact that the transaction is executed makes it easier to imply a term resolving any uncertainty, or, alternatively, it may make it possible to treat a matter not finalised in negotiations as inessential."[22]

Similarly, in *Mamidoil-Jetoil Greek Petroleum Company S.A.* v. *Okta Crude Oil Refinery A.D.*, Rix L.J. emphasised that the court should strive "to preserve rather than destroy" bargains, and that, especially in the commercial context, the court would be willing to imply necessary terms in order to uphold a contract.[23] To this line of case law can now be added the recent decision in *Müller*.

The claimant, RTS, was negotiating a contract for the construction and installation of equipment to be used by Müller. Detailed negotiations took place, and work began on the basis of a letter of intent. The letter of intent expired, but RTS continued to supply the goods and

[20] *Dinkha Latchin* v. *General Mediterranean Holdings S.A.* [2003] EWCA Civ 1786, at [20]-[23].
[21] In *Whittle*, the trial judge accepted that the price of the interim contract was the same as that envisaged under the longer-term contract, but it may have been more appropriate to imply a term that a reasonable price be paid in the context of the shorter-term agreement, using the Supply of Goods and Services Act 1982, s.15. A contract can be formed despite the price not being expressly agreed: *Foley* v. *Classique Coaches* [1934] 2 KB 1.
[22] [1993] 1 Lloyd's Rep. 25, 27.
[23] [2001] EWCA Civ 406; [2001] 2 All E.R. (Comm) 193, at [69].

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services to Müller, who paid some, but not all, of the envisaged contract price. A dispute then arose regarding the equipment supplied. The court was asked to determine whether a contract had been concluded and, if so, upon what terms. It is significant that both parties' primary case was that there was a contract between them. RTS argued that the contract contained the "MF/1 terms", which included a liquidated damages clause. Müller argued that those terms were not part of the agreement. The trial judge found in favour of Müller, but the Supreme Court ultimately disagreed, insisting that the solution which made the most "commercial sense" was that the parties had agreed to the MF/1 terms.[24]

Given the contractual nature of the relationship between the parties, it is unsurprising that there may be arguments regarding the precise nature of what exactly was agreed. But it is suggested that squabbling over the *terms* of the contract is much more appropriate than disputing the very *existence* of a contract. The "no contract" approach was only an alternative argument of RTS, but succeeded in the Court of Appeal. The Supreme Court was right to reject this; it was "unrealistic to suppose that the parties did not intend to create legal relations".[25] Effect should be given to whatever contract was formed.

Admittedly, there remains scope for disagreement about what agreement was reached. Christopher Clarke J. gave effect to some of the terms negotiated between RTS and Müller, on the basis that negotiations on those points were concluded, but not the MF/1 terms, to which, according to the judge, the parties had not conclusively assented. Such an approach emphasises that the court will not rescue RTS from its decision to perform without a clear, written agreement in place. However, it might result in a bargain that neither side intended to enter into.[26] Moreover, it may be problematic to "cherry-pick" parts of a contract: during the course of negotiations, term X may appear stable, but later be changed in return for the modification of term Y. It is suggested that an "all-or-nothing" approach has much to commend it: either the totality of the hoped-for written contract should form the basis of the agreement, or it should be disregarded in its entirety. The latter approach would leave the contract very "bare", and essentially based upon the transaction which has in fact been executed. The agreement could then be filled in through the implication of terms. Most significantly, the court could imply a term that a reasonable price be paid.

[24] [2010] UKSC 14, [2010] 1 W.L.R.753, at [63]. The Justices clearly thought it unlikely that performance would not be based on detailed terms: *ibid.*, at [9].
[25] *Ibid.*, at [58].
[26] *Ibid.*, at [43].

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The Supreme Court thought that the parties had reached agreement on all relevant terms, including the MF/1 terms, and had accepted that agreement through their conduct.[27] The judge had been reluctant so to find, particularly since there was a "subject to contract" bar in place: the detailed terms were not to take effect until the relevant documents were executed and signed.[28] This indicates that the parties did not intend to become legally bound until that occurred.[29] Parties are naturally free to dictate when and how they enter into contractual obligations, but, as the Supreme Court pointed out, the intention not to be bound before signature could be "waived".[30] This must be right: the parties may initially intend to be bound by entering into a written contract, but this intention cannot be irrevocably binding upon them. If they change their minds and wish to enter into binding obligations through another route, then this must be possible. A "subject to contract" clause is no more than an indication that, determined objectively, the parties do not intend to create legal relations until the contract is signed. But, in *Müller*, the Supreme Court held that the parties must have intended to create legal relations through their conduct, and no longer required an executed and signed contract. The Justices held that "[a]ny other conclusion makes no commercial sense", and that "the reasonable, honest businessman … whether he was an RTS man or a Müller man … would have concluded that the work should be carried out for the agreed price on the agreed terms … without the necessity for a formal written agreement, which had been overtaken by events".[31]

This conclusion may be the most appropriate on the facts of the case, but in other circumstances the "subject to contract" bar will remain in place.[32] The question of whether or not an intention to create legal relations can be objectively ascertained, regardless of a "subject to contract" clause, should be a question of fact for the trial judge. Nevertheless, difficult questions concerning *when* exactly the "subject to contract" bar is waived remain. It should not be waived simply by agreeing all the terms; the "subject to contract" proviso is intended to protect a party from being bound in such instances. Nor will it necessarily be waived as soon as performance begins and an initial instalment is accepted, as in *Whittle*. But it does not inevitably follow that the transaction must be fully executed for the "subject to contract" bar to be waived. Indeed, in *Müller* the Supreme Court considered

[27] The Supreme Court thought it "inconceivable" that the parties would have agreed only some of the terms, but not the MF/1 terms: *ibid.*, at [63].
[28] *Ibid.*, at [31].
[29] G. Treitel, *The Law of Contract*, 12th ed., by E. Peel (London 2007), para. 4-006. See too *Confetti Records (A Firm)* v. *Warner Music UK Ltd.* [2003] EWHC 1274 (Ch), [2003] E.M.L.R. 35, at [62]–[112] (Lewison J.).
[30] *Müller, op.cit.*, at [86]–[88].
[31] *Ibid.*, at [86].
[32] *E.g. Regalian Properties plc.* v. *London Docklands Development Corp.* [1995] 1 W.L.R. 212.

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various options for when the requirement of execution and signature of written documents was dispensed with, and eventually decided upon a date prior to complete performance, as that was when "the die was cast".[33]

Deciding when the die was cast and the parties intended to be bound on the negotiated terms may not be easy. Indeed, such an intention may be impossible to discern. After all, the Supreme Court stated that "it cannot be said that there will always or even usually be a contract on the terms that were agreed subject to contract. That would be too simplistic and dogmatic an approach. The court should not impose binding contracts on the parties which they have not reached. All will depend upon the circumstances".[34] Very sensible. But just because the parties have not reached a binding contract on the detailed terms under negotiation, that does not preclude finding a more minimal contract through the parties' performance. The long-term, "principal" written agreement may remain "subject to contract", but a collateral agreement to pay for work actually done does not labour under the same bar.

Whilst the approach taken by the Supreme Court suggests that it will be rare for there not to be an intention to create legal relations, and hence rare that there will not be some sort of contract between the parties, the Justices did emphasise that each case turns on its own particular facts. Thus *British Steel* is not necessarily incompatible with *Percy Trentham*; the Supreme Court thought that "[t]he decision in the *British Steel* case was simply one on the other side of the line".[35] However, it is submitted that the thrust of the judgment in *Müller* suggests that very rarely will a term be considered "essential" if performance has been requested and accepted. The approach in *British Steel* should be sidelined.

III. Conclusion

It may be seen as rather conservative to suggest that instances of "anticipated contract" fall exclusively within the realm of contract, rather than the exciting new world of unjust enrichment. However, in situations where the formation of a contract is clearly at the forefront of the parties' minds during the course of negotiations, it seems appropriate to focus upon whether an agreement has been reached, and upon what terms. If there is no agreement, the claimant should not recover anything, and should suffer the consequences of performing without the security of a contract. This is entirely satisfactory,

[33] *Müller, op. cit.*, at [87].
[34] *Ibid.*, at [47].
[35] *Ibid.*, at [54].

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particularly since the claim brought seems essentially concerned with recovering losses rather than reversing gains; forcing compensation within unjust enrichment is obviously problematic.[36]

Moreover, it is not even certain that on the facts of *Müller* and *Whittle* a restitutionary claim would necessarily succeed. The Court of Appeal suggested that it might, but did not need to decide the point in either case. However, identifying the ground of restitution may not be a straightforward matter: since the defendants in each case did pay *something* to the claimants, it is difficult to maintain that the consideration *totally* failed. Partial failure of consideration is not a ground of restitution.[37] This obstacle may yet be overcome by the courts,[38] but the law has not reached this point in its development. The law of contract, by contrast, is better developed and untroubled by such issues.

Given the existence of an offer, acceptance, and intention to create legal relations, the law of contract can do all the work needed in this area. The major problem associated with finding a contract seems to be that there may not be an "intention to be bound", either because essential terms are yet to be agreed, or detailed negotiations remain "subject to contract". Neither objection poses undue difficulty in a situation where a remedy is desirable.[39] It is highly unlikely that a term should be considered to be "essential" if the agreement has nevertheless been performed. Moreover, a term essential to an anticipated agreement may not be essential to the contract actually formed. Similarly, any "subject to contract" bar may have been waived through the parties' conduct, or circumvented because the contract actually formed between the parties does not include the terms which were negotiated by them, but not yet intended to have legal effect.

It is only if a contract is found that it can be concluded with confidence that a claimant was not taking a risk by performing his side of the bargain. In the absence of such agreement, he should be condemned as a risk-taker and any restitutionary claim should therefore be barred. It is only through this analysis that the Supreme Court's plea in *Müller* will be taken seriously: "[t]he moral of the story is to agree first and to start work later".[40]

[36] *Countrywide Communications Ltd.* v. *ICL Pathway Ltd.* [2000] C.L.C. 324, 349.
[37] *Stocznia Gdanska SA* v. *Latvian Shipping Co.* [1998] 1 W.L.R. 574.
[38] *Westdeutsche Landesbank Girozentrale* v. *Islington London Borough Council* [1996] A.C. 669, 682 (Lord Goff); Birks, 'Failure of Consideration' in F. Rose (ed.) *Consensus Ad Idem* (London 1996).
[39] It is suggested that a remedy will only be desirable where a contract can legitimately be found. This is unlikely to be the case if the claimant has simply done what would normally be done in the hope of concluding a contract. See, *e.g., William Lacey (Hounslow) Ltd.* v. *Davis* [1957] 1 All E.R. 932.
[40] *Müller, op. cit.*, at [1].

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