HIGH COURT OF AUSTRALIA

GLEESON CJ
GUMMOW, HAYNE, CRENNAN AND KIEFEL JJ

MATTHEW LUMBERS AND ANOR — APPELLANTS

AND

W COOK BUILDERS PTY LTD
(IN LIQUIDATION) — RESPONDENT

Lumbers v W Cook Builders Pty Ltd (in liquidation)
[2008] HCA 27
*18 June 2*008
A39/2007

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Full Court of the Supreme Court of South Australia made on 1 March 2007 and, in their place, order that the appeal to that Court be dismissed with costs.*

On appeal from the Supreme Court of South Australia

Representation

D F Jackson QC with M R Burnett for the appellants (instructed by Lynch Meyer Lawyers)

G O'L Reynolds SC with R D Ross-Smith and B R Kremer for the respondent (instructed by Rick Schroeder)

CATCHWORDS

Lumbers v W Cook Builders Pty Ltd (in liquidation)

Quantum meruit – Services performed and subcontractors paid – Entitlement to compensation – Appellants entered into oral agreement with building company for construction of domestic dwelling – Respondent performed some of the construction work – Appellants did not request respondent perform any services or pay any subcontractors – Whether claim for quantum meruit or money paid available.

Restitution – Unjust enrichment – Appellants accepted benefit of construction work performed by and at the expense of respondent – Claim that it would be unconscionable for appellants to retain benefit – Appellants made no direct request of respondent – Whether restitutionary claim available.

Contract – Domestic building contracts – "Cost plus" oral agreement between building company and owners – Informal reorganisation within building company's corporate group – Benefit and burden of oral agreement informally assigned by building company to related company – No notice given to owners of reorganisation or assignment – Some subcontractors paid directly by owners – Acknowledgement by building company that owners had met all progress claims made and paid all monies due under the oral agreement – Whether related company can demand compensation from owners for difference between amounts paid by owners and amounts outlaid by related company together with margin for supervision and profit.

Words and phrases – "expense", "free acceptance", "incontrovertible benefit", "unjust enrichment", "windfall".

1 GLEESON CJ. In September or October 1993, W Cook & Sons Pty Ltd ("Sons") entered into an oral agreement with the appellants, Mr Matthew Lumbers and Mr Warwick Lumbers, to construct a house at North Haven, near Adelaide. Mr Matthew Lumbers owned the land and Mr Warwick Lumbers had an unregistered lease for life over the property. For present purposes, it is unnecessary to distinguish between Mr Matthew Lumbers and Mr Warwick Lumbers ("the Lumbers") as parties to the contract. The house was described by the primary judge as "quite distinctive". It ultimately cost more than $1 million to build. It was completed in May 1995.

2 In circumstances that will be described below, most of the work required by the contract, which included the engagement of building subcontractors and supervision of their work, was performed, not by Sons, but by W Cook Builders Pty Ltd (in Liquidation) ("Builders"). This change in the identity of the builder occurred without the knowledge or approval of the Lumbers. Builders and Sons were members of the same corporate group, but their shareholders and directors were not identical, and at some stage, for reasons that were not made clear in the evidence, their interests diverged. The proceedings giving rise to this appeal arose out of claims by Builders to be remunerated for its services. The claims included claims for reimbursement of amounts paid to various subcontractors, and a fee for supervision. The Lumbers made progress payments to Sons, as requested, at intervals over the period from April 1994 to May 1995. Without the knowledge of the Lumbers, Sons paid those amounts to Builders. Builders claimed that a balance (ultimately found to be $261,715) remained due and unpaid.

3 The making of the 1993 building contract by the Lumbers and Sons was asserted by Builders in its Statement of Claim, and was not denied. It was never suggested that there was a novation of the contract, or that the contract was terminated, either by the Lumbers or by Sons. The trial judge found that the payments made to Sons by the Lumbers did not cover the whole of the cost of the building work. The possibility that the Lumbers remain indebted to Sons is a matter upon which the Lumbers rely in resisting the claim made against them by Builders.

4 In November 1999, more than a year after Builders went into liquidation, Builders demanded payment from the Lumbers of a certain amount. Builders also claimed the same amount from Sons. This appeal concerns only the claim against the Lumbers. As will appear, the adjudication of the claim in the South Australian courts was constrained by the course of the proceedings, and by the absence of the evidence of at least one key potential witness.

5 Builders commenced an action in the District Court of South Australia, joining as defendants the Lumbers and Sons. It was alleged that the Lumbers, or alternatively Sons, were or was liable to Builders for "the contract price less the amount paid". That was a reference to the 1993 contract. It was alleged by

Builders that, in addition to the contract between the Lumbers and Sons, there were "arrangements" between Sons and Builders, under which Builders would carry out the building work required by the Lumbers. It was not alleged that the Lumbers were parties to those "arrangements". The Statement of Claim alleged oral "proposals", made by Sons in early 1994, and said to have been accepted by Builders. The proposals are referred to in more detail below under the heading "Reorganisation". The Statement of Claim alleged that the "proposal and acceptance constituted a contract between [Sons] and [Builders]." It alleged that, under the contract, Builders became legally bound to Sons to take over responsibility for the construction work and, further, that Sons assigned to Builders the benefit of the 1993 building contract. As will appear, the primary judge accepted the first part of that allegation of the legal effect of what occurred, but not the second. The Statement of Claim went on to allege that the amount claimed was due by the Lumbers to Builders, or alternatively to Sons "to be held on trust for" Builders. The claims against the Lumbers were based on contractual assignment or, alternatively, "restitution/unjust enrichment".

6 Before the action was fixed for hearing, Builders was ordered to provide security for Sons' costs. Such security was not provided. The action against Sons was stayed, although it appears from an observation of the trial judge that it could still be revived. He said it was "in a static condition". Hence, Sons was not an active party in the proceedings at trial or on appeal. The claim by Builders against Sons has never been litigated. Because of the stay order, something in the nature of an interpleader was not possible. Builders, at trial, pursued its action against the Lumbers separately from its claim against Sons. The trial judge described the effect of the stay order as follows:

> "The Orders were however conditioned so that Builders could not pursue any derivative claims ... Builders could therefore no longer claim that, if Sons were the correct plaintiff, Builders was beneficially entitled to any sum owed by the Lumbers to Sons. Nor could it argue that Sons was entitled to recover the balance outstanding on Builders behalf in the event of 'a legal black hole'."

7 The claim against the Lumbers based on assignment was dismissed in the South Australian courts and is not now pursued. That leaves this Court to deal with the claim based on "restitution/unjust enrichment" in the context just described; a claim that failed at first instance but succeeded on appeal in the Full Court of the Supreme Court of South Australia. Before turning to the relevant principles it is necessary to say more about the facts, and the history of the litigation.

The Cook group of companies

8 In 1993, Sons was the main operating company of the Cook family, which had established a significant reputation in the building industry since about 1910.

The respondent, Builders, was another in the Cook group of companies. At the time of the reorganisation referred to below, Builders was a dormant company. Mr Jeffrey Cook managed the practical side of the business of Sons, and later Builders, but had little or no involvement in the administration of either company. Mr David McAdam was a long-time employee of the Cook group. Mr McAdam's mother was married to Mr Jeffrey Cook's father. Though Mr McAdam and Mr Cook had known each other for 50 years, it appears that their relationship was, or became, strained. Mr McAdam was secretary of Sons and, until March 1994, a director of Builders. He had been responsible for financial management and contract administration of all of the companies in the Cook group since 1963. A partnership operating under the name of Portrush Traders employed all employees of the companies in the group. The evidence does not reveal the identity of the partners. After Builders ceased to be dormant, Builders and Sons shared common staff and administration and operated a common bank account. Mr McAdam entered into the respective company journals the sums to be allocated to each company. At the relevant times, the shareholders in Builders were members of Mr Jeffrey Cook's immediate family. Mr Jeffrey Cook was a director. After the reorganisation Mr McAdam resigned as a director of Builders. He continued as a director of Sons, which was then under his control.

The building contract

9 Negotiations for the construction of the house were conducted between Mr Warwick Lumbers and Mr McAdam. Much of the confusion, and many of the deficiencies in the evidence, in this case arose from the fact that neither party called Mr McAdam as a witness. He played a vital part in important events. The Lumbers chose Sons because of Sons' reputation and the Lumbers' desire for a "pedigree" for the house, and because of Mr Lumbers' confidence in Mr McAdam. In his evidence, Mr Warwick Lumbers emphasised that, because of his frequent absences overseas, he wanted someone whom he could trust to assess and approve invoices. Part of the explanation for the informality of the contract was the trust of Mr Lumbers in Mr McAdam. Sons was a licensed builder. Builders was not. Mr Lumbers' evidence was that he would not have agreed to an unlicensed builder's undertaking the work because that would have put his insurance policy at risk.

10 The building contract between the Lumbers and Sons was never reduced to writing. The trial judge found that Sons agreed to undertake the building work according to specifications and plans prepared by the Lumbers' architect. Some of the work was to be performed by Mr Warwick Lumbers himself. He held a restricted builders licence. His brother-in-law, an architect, designed the house. The trial judge said that "[t]he parties did not employ the traditional form of progress claims and payments, choosing instead, ad hoc, lump sum payments". Payments were to be made to Sons, which would, in turn, pay any subcontractors. No fixed price was agreed. However, it is not in dispute that the

price payable to Sons included the cost charged for the work performed by Sons and by subcontractors and for the supply of materials. There was some disagreement about an additional charge for supervision and management. The amount of the supervision charge was not agreed, but the trial judge considered that 10% of the project costs was a reasonable fee. No invoices were ever rendered; throughout the building work, Mr McAdam would telephone Mr Warwick Lumbers and state that he needed a certain sum of money, and Mr Lumbers paid that sum of money by cheque directed to Sons. The payments bore no direct relationship to actual expenditure in respect of the building work.

11 In its Statement of Claim, Builders made the following allegations concerning the contract between Sons and the Lumbers:

> "The express oral terms of the building contract included terms to the effect
>
> (a) That [Sons] would perform certain building work ('the building work') on the land.
>
> (b) That the building work would be in accordance with plans and specifications provided by [the Lumbers].
>
> (c) That [the Lumbers] could make variations to the plans and specifications from time to time.
>
> (d) That there would not be a fixed price for the contract works, but rather the price payable by [the Lumbers] to [Sons] would consist of
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> (i) the cost charged by sub-contractors for the performance of all components of the work;
>
> (ii) the cost charged for the supply of materials for the work;
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> (iii) an additional charge of 10% of the above costs (including such costs incurred directly by [the Lumbers]) for the supervision of the building work and the management of the building contract by [Sons].
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> (e) That [Sons] could submit invoices or demands to [the Lumbers] for progress payments at intervals to be determined by [Sons], which invoices or demands [the Lumbers] would be obliged to pay.
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> (f) The amount claimable in such invoices or demands was to be the amount paid or payable by [Sons] for sub-contract work and supply of materials, together with 10% for supervision and management by [Sons] …

(g) [Sons] could itself carry out work and supply materials for the building work, in which case it would be treated under the above terms as if it were a sub-contractor. The price claimable for the work or materials was to be a reasonable price."

12 The term alleged in (e) reflected the relationship between Mr Lumbers and Mr McAdam. It was left to Sons (effectively Mr McAdam) to decide the timing and the amounts of the progress payments. This term was admitted in the Lumbers' Defence. In fact, save for the matter of the 10% supervision fee, which was in dispute, there was no issue on the pleadings as to the formation of the building contract between Sons and the Lumbers, or as to such of its terms as are presently material. That is the basis on which the case was conducted and decided in the South Australian courts, and it is the basis upon which the present appeal must be decided. The respondent sought, by notice of contention in this Court, to dispute for the first time the existence of the contract it alleged in its Statement of Claim. This should not be permitted. If the contract, which in a number of respects formed the basis of Builders' claims, and in particular its claim founded on assignment, had been disputed by Builders, then the argument could well have been met by calling further evidence. It appears that the principal ground upon which Builders now seeks to deny the existence of a contract is uncertainty. If that point had been taken at trial, it would have been necessary for trial counsel and the trial judge to deal more extensively with some matters of fact and building practice. It is too late to raise the point now[1].

13 Preparation of the site commenced in November 1993, and building work commenced in February 1994. Mr Jeffrey Cook was the supervisor, and was in control of the subcontractors who came on site.

Reorganisation

14 In February 1994, there was a reorganisation within the Cook group of companies, after which Sons' business was restricted to joinery and carpentry, and Builders undertook construction work. The reorganisation was informal. There was no evidence of directors' meetings or of any documentation setting out the respective roles of the two companies. The evidence was that the reorganisation was devised by Mr McAdam; Mr Jeffrey Cook had little detailed understanding of its purpose or basis.

15 The same employees, including Mr Jeffrey Cook, continued with the building work after the reorganisation. The trial judge inferred that Portrush Traders continued to administer both Sons and Builders. Mr McAdam resigned as a director of Builders in March 1994. However, he continued to occupy an

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1 See *Water Board v Moustakas* (1988) 180 CLR 491 at 497; [1988] HCA 12.

office adjoining Mr Cook and maintained direct contact with Mr Warwick Lumbers. The Lumbers were not informed of the reorganisation and were unaware of the existence of Builders. At no relevant time was Builders a licensed builder.

16 After the reorganisation, Builders, rather than Sons, performed the construction work, which, to a substantial extent, involved the engagement and supervision of subcontractors. On 1 March 1994, an invoice reflecting the cost of work done by Sons to the date of the reorganisation, prepared by Mr McAdam, was rendered by Sons to Builders, and entered in the journal of Builders, also by Mr McAdam. After the reorganisation, payments to subcontractors were debited to Builders' accounts, though the evidence did not reveal whether the payments were made from Cook group funds and then debited to Builders' accounts through journal entries, or whether they were made from separate accounts of Builders.

17 Reference has already been made to the allegations in the Statement of Claim concerning a contract between Builders and Sons in February 1994. The "arrangements", said by Builders to have resulted in a contract, involved a proposal made by Mr McAdam on behalf of Sons which was accepted by Mr Jeffrey Cook on behalf of Builders. Builders alleged that it was unable to give full details of what was agreed between Mr McAdam and Mr Cook (thereby revealing what was confirmed in the evidence, that is to say, that Mr Jeffrey Cook did not understand completely what Mr McAdam was doing administratively). The Statement of Claim alleged that the terms were that "[a]s between [Sons] and [Builders], all future costs of the building work were to be charged to [Builders] rather than [Sons]", that Mr Jeffrey Cook would continue to supervise and manage the building work "on behalf of the builder" and that "[Builders] would be entitled to recover all amounts payable by [the Lumbers] in respect of the building work, including the additional charge of 10% for the supervision of the building work and management of the building contract." It was said to be a "legal effect" of the contract that Builders became contractually bound to Sons to carry out the building work and, further, that the benefit of the building contract, and future property in the price payable by the Lumbers to Sons, was assigned by Sons to Builders. There was no allegation that the Lumbers were parties to, or were aware of, this. In their Defence, the Lumbers said that they did not know and could not admit the facts alleged by Builders, but asserted that, if the facts were true, they were not disclosed to the Lumbers.

18 The Lumbers occupied the house in December 1994, although, as noted above, construction was not completed until May 1995. Subject to specific defects, the value of which was agreed, the completed building was satisfactory to the Lumbers.

Payments

19 At the time of the reorganisation, no request had been made by Mr McAdam to the Lumbers for any payment. The Lumbers were first requested to pay money on 30 April 1994. Every payment made by the Lumbers was made by cheque payable to Sons. Save for a final amount paid in December 1997, the remainder of the payments were made between 30 April 1994 and 16 May 1995. These payments followed requests from Mr McAdam for round sums, rather than progress payments specifically related to costs incurred. The Lumbers paid all amounts that were requested by Sons.

20 In 1999, Builders sent a notice to the Lumbers claiming that the difference between the amount recorded as incurred on the building project and the amount received from the Lumbers was $181,904. There was no explanation of why no part of that sum had been requested from the Lumbers earlier. Nothing was allocated in the books of Builders for the supervision fee until after the liquidation.

Subsequent events

21 On 26 May 1998, Builders was placed into voluntary administration. It went into liquidation on 22 June 1998.

22 By letter dated 1 February 1999, Mr Malcolm Cook, a director of Sons, wrote to Mr Warwick Lumbers in the following terms:

> "Following a restructuring of the Company in 1994, Mr Jeffrey R Cook, a director of [Sons], took over all building & construction operations currently in progress, operating as [Builders] … and continued building operations until May 1998, when [Builders] went into liquidation.
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> …
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> [Builders] operated as a separate entity, maintaining its own records in accordance with normal requirements, lodged taxation returns, & conducted its day-to-day business independently from [Sons]. All invoicing & receipts in relation to the [house at North Haven], (and all other building projects) were through the accounts system of [Builders].
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> …
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> We can not comment on any claims made by the liquidator of [Builders], however we do advise you that there are no outstanding amounts owing either by yourself, or any other person or entity, to [Sons] in relation to the construction of the above residence."

23 The circumstances in which that letter was written do not appear from the evidence, and Mr Malcolm Cook, like Mr McAdam, did not testify. It appears that, at least by the time that letter was written, Sons and Builders were at arm's length, although whether they were yet in dispute is not clear. Mr Malcolm Cook's reasons for writing the letter were not explained. Because Sons was not an active party to the litigation, following the stay of proceedings against it, the legal effect of the letter as between Sons and the Lumbers was never tested. Whether, for example, if Sons had been found to have been liable to Builders, Sons would have had a claim against the Lumbers was never decided.

24 On 8 November 1999, Builders served the Lumbers with a notice of demand for payment of $274,791, comprising the alleged deficiency of $181,904, together with a 10% supervision fee of $92,887. On 11 November 1999, Builders caused a workers' lien to be registered on the title to the property. Builders' claim was made some four years after the construction had been completed. Mr Warwick Lumbers suggested in his evidence that the claim might have been considered differently had he been provided with a bundle of invoices rather than a notice of demand.

The decision of the primary judge

25 Some features of the procedural context in which the matter came for hearing before Judge Beazley have been noted above. He remarked that "complexity has arisen from the casual basis upon which the parties have chosen to deal with each other, and indeed in the manner in which they have conducted the litigation." The fact that Sons took no part in the trial, that Mr McAdam did not give evidence, and that Mr Jeffrey Cook, although an experienced builder, was "able to give only scant evidence with respect to 'administration issues'" added to the difficulties. It may be remarked that the restitutionary principles on which the respondent relied were designed to overcome what otherwise would have been deficiencies in the law, but in the present case they appear to have been called in aid principally to overcome deficiencies in evidence and unusual aspects of procedure.

26 There were issues at trial, not presently relevant, concerning the amount of the claim; there were questions of the total amount of payments to subcontractors, allowances for defects, and the fee for supervision and management. The trial judge resolved most of those issues in favour of Builders, and quantified the claim at $261,715.

27 There was also an issue, which was the subject of argument in the present appeal but which may be put to one side for the moment, arising out of the fact that Builders was unlicensed. Section 39 of the *Builders Licensing Act* 1986 (SA) ("the Builders Licensing Act") provided:

> "An unlicensed person who performs building work in circumstances in which a licence is required under this Act shall not be entitled to recover any fee or other consideration in respect of the building work unless the Tribunal or any court hearing proceedings for recovery of the fee or consideration is satisfied that the person's failure to be licensed resulted from inadvertence only."

28 For reasons that turned upon the evidence of Mr Jeffrey Cook, the primary judge found that Builders' failure to obtain a licence did not result from inadvertence. There is no challenge to that finding.

29 The main issue was a dispute as to whether Builders was entitled to claim directly against the Lumbers. Referring to the conduct of Mr Jeffrey Cook after the reorganisation, the judge said:

> "He did not speak to Mr McAdam, Warwick Lumbers or [the architect] about the terms of the contract which he and his immediate family were apparently taking over in Builders. He did not raise the question of price despite the fact that all of the major variations took place after the re-organisation. He had no involvement in quantifying the amounts to be requested of the Lumbers, despite the large sums being debited to Builders' accounts for the work.
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> I have already discussed the failure of Builders to obtain a licence. Jeffrey Cook did not request the Lumbers to make payments direct to Builders rather than Sons ...
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> Finally when the building work was completed, Mr Cook appears to have made no attempt to quantify what was outstanding or seek payment from the Lumbers. It was only well after the liquidation of Builders that anyone put the Lumbers on notice that any sum was outstanding, and suggested a direct claim as an equitable assignee."

30 The claim to be an equitable assignee of the 1993 building contract was in the forefront of the Builders' case at trial against the Lumbers. The claim was rejected by the primary judge, and by all three members of the Full Court. For reasons that will be apparent when considering the alternative restitutionary claim, and notwithstanding the form of the Statement of Claim, Builders was concerned to disavow a role as a subcontractor to Sons. The Lumbers, for their part, argued that there was a building contract between the Lumbers and Sons, which was never the subject either of novation or termination, and a subcontract between Sons and Builders. Whether the making of the subcontract, and the subsequent performance of the work by Builders, involved Sons in a breach of its contract with the Lumbers was immaterial. The Lumbers were unaware of any such breach, and never terminated their contract with Sons on account of it. They were not pursuing a claim for damages against Sons in that respect.

31 The primary judge described the principal argument of Builders as being that it was an equitable assignee of the benefit of the agreement between the Lumbers and Sons, and that it was entitled to recover in an action in its own name against the Lumbers. He noted that the alleged assignment was not in writing and did not comply with the requirements of s 15 of the *Law of Property Act* 1936 (SA).

32 In the light of the subsequent history of the litigation, it is possible to deal with this issue briefly. Judge Beazley rejected Builders' argument for two reasons. First, he was concerned about the high degree of personal confidence placed by the Lumbers in Sons when the original building contract was made. The identity of the builder was a matter of importance to Mr Warwick Lumbers. The substitution, without his consent, of another corporate entity, even one associated with the Cook group, as the recipient of the benefit of the contract would have made a significant difference to him. Builders was a company in which Mr McAdam had no personal interest. Mr Warwick Lumbers relied on being able to negotiate personally with Mr McAdam about matters such as defects and fees. The judge referred to *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd*[2], and *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd*[3]. Mr Lumbers, whose evidence the judge accepted, was adamant that he would not have agreed to such an assignment, and the judge considered there were good reasons for this. Secondly, the judge was unable to find, in the state of the evidence, that there was any intention on the part of Sons to assign the benefit of the contract to Builders or otherwise to effect any assignment as alleged in the Statement of Claim. Again, the absence of Mr McAdam was critical. The judge concluded that Builders performed its work on the project, not as an assignee of the benefit of the contract, but as a subcontractor to Sons. The allegations made by Builders in its Statement of Claim as to its contract with Sons are set out above. At trial, the Lumbers did not dispute that there was a contract between Sons and Builders, although they did not profess to know its terms, and challenged the assertion that its "legal effect" included an assignment of the benefit of the 1993 contract or the amount ultimately to be paid under that contract. The only direct evidence of the contract was Mr Jeffrey Cook's account of a conversation he had with Mr McAdam. Although his account was vague, he was clear about the fact that it was agreed that, after the "changeover", the building work (including the work presently in question) was to be done by Builders. The evidence of Mr Cook supported the allegations in the Statement of Claim except in one important respect, that is to say, the matter of the alleged assignment of rights from Sons to Builders. It was consistent with the evidence of Mr Cook that, as alleged in the Statement of Claim, Builders became contractually bound to Sons to perform future work and supervision on the

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2 [1902] 2 KB 660.

3 [1994] 1 AC 85.

building. As the primary judge said, once the allegation of an agreement as to assignment is rejected, it is appropriate to describe this as a subcontract.

33 In the alternative, Builders argued that it was "entitled to fair and just compensation for the benefit or enrichment accepted by the Lumbers." The judge said (references omitted):

> "At all times there was extant an agreement between the Lumbers and Sons which covered the work said to have been undertaken by Builders. Insofar as a claim ought to have been made by Builders it ought to have been against Sons. Sons remained liable under the Contract with the Lumbers. It cannot be said that the Lumbers have an obligation to make restitution to Builders, irrespective of whether Builders was mistaken as to its position when allegedly constructing the house. There was of course no evidence at all as to the allegedly mistaken understanding of Builders. In my opinion Builders could not succeed against the Lumbers under this alternative claim."

The decision of the Full Court

34 The Full Court of the Supreme Court of South Australia, by majority (Sulan and Layton JJ, Vanstone J dissenting) upheld Builders' appeal[4].

35 All three members of the Full Court rejected Builders' case on assignment. The majority regarded the trial judge's conclusion that there was insufficient evidence to find the existence of an intention to assign as soundly based. They found it unnecessary to deal with the question whether the contract was of such a nature that assignment was not possible. Vanstone J pointed out that, under the building contract, it was for the builder to determine the payments that were to be made over the course of construction. She considered that it would have been inconsistent with the trust reposed in Mr McAdam by Mr Warwick Lumbers, which accounted for the informal and in some respects open-ended nature of the contract, to permit another party to stipulate the amount of those payments. She concluded that the contract was of a personal nature and incapable of assignment.

36 The majority also decided that any claim by Builders to recover what they described as "contractual damages" would have been defeated by s 39 of the Builders Licensing Act. Vanstone J found it unnecessary to deal with this point. The majority said, however, that "[w]here an unlicensed person carries out building work, they may nevertheless bring an action in unjust enrichment in which damages will be calculated on a *quantum meruit* basis." They went on to

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4 *W Cook Builders Pty Ltd (in liq) v Lumbers* (2007) 96 SASR 406.

deal with the claim described by Builders in its Statement of Claim as "restitution/unjust enrichment".

37 The majority commenced their reasoning by putting to one side the subsisting contractual relationship between Sons and the Lumbers. This was a rather important, and controversial, first step. They justified it on two grounds. First, they referred to the letter signed by Mr Malcolm Cook, in February 1999, in which Sons said that it had no claim against the Lumbers. They did not discuss the legal effect of the letter, or explain how it would operate to defeat a claim by Sons. They simply referred to its existence. As mentioned earlier, the evidence did not show how it came to be written. Nor did it show that the Lumbers altered their position or otherwise acted in reliance on the letter. No doubt they were pleased to have it, but that does not mean that it was of legal consequence. Secondly, the majority said that Sons did not perform its obligations under the contract. Presumably they meant by this that Sons, without the knowledge of the Lumbers, delegated the performance of its obligations to Builders. Again, it is not clear what was said to be the legal consequence of this as between Sons and the Lumbers. If the delegation constituted a breach of contract by Sons, then the Lumbers might have had a claim for damages against Sons, if they could show they suffered harm. The contract, however, was never terminated; the building was built, generally to the satisfaction of the Lumbers; and the majority did not express a conclusion as to whether the Lumbers were liable to Sons under the building contract and, if not, why not. Furthermore, the majority gave no express consideration to the question of Builders' rights against Sons. They appear to have regarded those as irrelevant.

38 Understandably, the majority introduced their discussion of the subject of restitution by referring to the decision of this Court in *Pavey & Matthews Pty Ltd v Paul*[5]. That was a building case. There was only one contract, that is to say, a contract between an owner and a builder. Because the contract was not in writing, it was (by statute) unenforceable by the builder. The issue[6] in that case was whether the builder, in bringing a quantum meruit claim, was attempting to do that which the statute prohibited, that is, attempting to enforce the contract. In answering that question in the negative, the Court explained that the nature of the builder's claim against the owner was restitutionary, not contractual. The general principles stated in the course of that explanation have been taken up in later decisions. The majority referred to some of those decisions.

39 The present was not a case of the performance by Builders of services for the Lumbers at the request of the Lumbers; or of acquiescence in the provision of

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5 (1987) 162 CLR 221; [1987] HCA 5.

6 (1987) 162 CLR 221 at 245.

services by Builders knowing that the services were not being rendered gratuitously; or of the provision of services necessary for the protection of the Lumbers' property. The majority, however, identified the case as one "where the service conferred incontrovertible benefit on the defendant, and it would be unconscionable for the defendant to keep the benefit of the service with paying a reasonable sum for it"[7]. There are, they said, "three basic elements of unjust enrichment", subject to any available defence. The first is that the defendant must receive a benefit. The second is that the benefit must be received at the plaintiff's expense. The third is that it would be unconscionable for the defendant to retain the benefit. They discussed "incontrovertible benefit" and "free acceptance".

40 As to the former, they said:

> "The first point that may be noted was that the services provided by Builders saved the Lumbers from an expense. A significant part of Builders' claim is for expenses that it incurred during the course of the construction, in addition to the part of Builders' claim relating to its own provision of services. These expenses were incurred on the Lumbers' behalf.
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> However, even that portion of Builders' claim which pertains to the cost of the services it provided directly, can be characterised as saving the Lumbers from an expense. The Lumbers decided to construct a house, and expected to pay the full amount for its construction. The cost of the construction of the house, including the expenses incurred by Builders, and the cost of the services provided directly by Builders, was a cost that the Lumbers chose to incur. Builders, by incurring costs on their behalf and providing services, saved the Lumbers from an expense that they would otherwise have incurred.
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> Secondly, we consider that having the house constructed was an incontrovertible benefit independently of the question whether this saved the Lumbers from an expense. The provision of a house in which to live, which also represented an improvement to the land, conferred a benefit which no reasonable person could deny. The Lumbers have had a house constructed to their specifications and are able to live in that house. The Lumbers have also had an improvement to their land which has a realisable value upon sale.
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> It is also true that the Lumbers intended that the constructed house would have the 'pedigree' associated with having been constructed by Sons, a reputable and established firm. However, the fact that they did not

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7 cf *Monks v Poynice Pty Ltd* (1987) 8 NSWLR 662.

receive the benefit of the 'pedigree' of the house does not render the benefits they did in fact receive any less valuable, given the matters referred to above."

41 As to the latter, they said (references omitted):

"In this case, Builders incurred actual expenses from which the Lumbers benefited. There was acceptance by the Lumbers of the services of subcontractors for which Builders incurred a cost. Furthermore, the services provided were with the knowledge of Lumbers. The Lumbers benefited. The benefit was conferred at the expense of Builders. The Lumbers agreed to the work being carried out. The Lumbers, by moving in and occupying the house, accepted the benefit. The Lumbers knew that the services were not being provided gratuitously, as they had made a request to Sons for the provision of the services, and had made arrangements for payment with David McAdam.

The only factor which could be said to vitiate the free acceptance by the Lumbers is the fact that they were unaware that the work was being conducted by Builders rather than Sons. The fact that Warwick Lumbers said he would not have accepted the benefit if he had known Builders was doing the work, and because he relied on Sons' name and the fact that Sons was licensed and, therefore, insured is, in our view, ultimately not to the point. There has been no suggestion that there was any difference in the quality of the construction of the house as a consequence of its having been built by Builders rather than Sons. In this regard, it is relevant that Jeffrey Cook acted as the supervisor. Also, David McAdam acted as the administrator of the building work and was responsible for sourcing materials and labour in the same way, presumably, that he would have been had the project been on the books of Sons rather than Builders. There was no suggestion that the house would have been built differently, or to a higher standard, had Sons completed the project. Indeed, the evidence of the [Lumbers] was that externally, there was nothing to indicate that it was Builders that was building the house rather than Sons. The fact that the Lumbers were mistaken about who provided the benefit does not vitiate their acceptance of it.

It should be noted that the conduct of Builders and Sons in failing to inform the Lumbers about their internal arrangements is not inconsequential. Builders is unable to recover the contractual sum to which Sons would have been entitled had it completed the work. Instead, Builders can recover solely on a *quantum meruit* basis, as identified above."

42 The majority went on to find that it was clear that the provision of services, and the payments to subcontractors, were at Builders' expense and that

it would be unconscionable for the Lumbers to retain the benefit without payment.

43 Vanstone J, dissenting, said that there was no free acceptance of, or conferring of, any benefit. There was a contract between the Lumbers and Sons, and another contract between Sons and Builders. Builders' work on the Lumbers' project was performed under obligations owed by Builders to Sons. Its remedies lay under its contract with Sons. It had no additional or alternative restitutionary claim against the Lumbers.

44 For the reasons that follow, the conclusion of Vanstone J is to be preferred.

The restitutionary claim

45 In considering Builders' restitutionary claim, the contractual relations between the Lumbers and Sons, and between Sons and Builders, cannot be put to one side as an inconvenient distraction. The original structure of the litigation has been described above. The circumstances that, by reason of a failure on the part of Builders to comply with an order for security for costs, Sons has taken no active part in the litigation, and that, by reason of the absence of any evidence from Mr McAdam, what went on between Sons and Builders is obscure, do not displace the necessity of identifying the contractual position. The case was conducted and decided in the South Australian courts on the basis that, as Builders alleged, there was a contract between the Lumbers and Sons. Builders claimed that there was an assignment to it by Sons of the benefit of that contract. That claim failed. The primary judge held that the work performed by Builders was performed pursuant to a further contract which was made between Sons and Builders; a contract that was entered into without the knowledge of the Lumbers. That finding was not reversed in the Full Court, although it is not clear how the majority accommodated it to their reasoning. It was adopted by Vanstone J. The finding should be accepted. No reason has been shown to doubt that it was correct. As the trial judge pointed out, once the possibility of assignment is rejected, and in the absence of any suggestion of novation, the characterisation of the "arrangements" between Sons and Builders as a contract is appropriate. Even if the conduct of Sons in making such a contract and thereby delegating the performance of its obligations amounted to a breach of its contract with the Lumbers, the contract between the Lumbers and Sons remained in force. There was, therefore, a head contract between the Lumbers and Sons, and a subcontract between Sons and Builders.

46 So far as appears from the evidence, Builders had, and may still have, a viable claim against Sons. The claim was not defeated on the merits or otherwise in any relevant respect rendered worthless. Builders and Sons have their own separate creditors and members. The contractual arrangements that were made effected a certain allocation of risk; and there is no occasion to disturb or

interfere with that allocation. On the contrary, there is every reason to respect it. There was no mistake or misunderstanding on the part of Builders. It was accepted on both sides in argument that in the ordinary case a building subcontractor does not have a restitutionary claim against a property owner, but must look for payment to the head contractor[8]. That was said to be subject to exceptions[9], but the difficulty for Builders was to show that the case fell within any recognised exception or within general principles justifying a new exception.

47 In *Pan Ocean Shipping Co Ltd v Creditcorp Ltd*[10], Lord Goff of Chieveley said:

> "I am of course well aware that writers on the law of restitution have been exploring the possibility that, in exceptional circumstances, a plaintiff may have a claim in restitution when he has conferred a benefit on the defendant in the course of performing an obligation to a third party (see, eg, *Goff and Jones on the Law of Restitution*, 4th ed (1993), pp 55 et seq, and (for a particular example) *Burrows on the Law of Restitution*, (1993) pp 271-272). But, quite apart from the fact that the existence of a remedy in restitution in such circumstances must still be regarded as a matter of debate, it is always recognised that serious difficulties arise if the law seeks to expand the law of restitution to redistribute risks for which provision has been made under an applicable contract."

48 In some Australian jurisdictions, there has been legislation enacted to protect the interests of building subcontractors, but such protection is confined within a certain statutory framework[11]. The fact that such legislation exists should discourage, rather than encourage, attempts to extend the scope of restitutionary claims beyond the bounds set by legal principle[12], especially where to do so would be to cut across or disturb contractual relationships and established allocation of risk.

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8 *Hampton v Glamorgan County Council* [1917] AC 13.

9 See *Restatement of the Law: Restitution and Unjust Enrichment*, 3d, Tentative Draft No 3 (2004) at §29.

10 [1994] 1 WLR 161 at 166; [1994] 1 All ER 470 at 475.

11 eg *Worker's Liens Act* 1893 (SA); *Subcontractors' Charges Act* 1974 (Q).

12 cf *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 843; *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 62 [24]; [1999] HCA 67.

49 To repeat, Builders' services were not performed at the request of the Lumbers, but pursuant to a contact between Sons and Builders. There was no acquiescence by the Lumbers in the provision of services by Builders. The Lumbers were unaware of the existence or role of Builders. As far as they were concerned, the services were being provided by Sons under the building contract. That was not provision of services for the protection of the Lumbers' property.

50 The majority in the Full Court decided the case on the basis that Builders performed services that conferred an incontrovertible benefit on the Lumbers, and that it would be unconscionable for the Lumbers to keep the benefit of those services without paying a reasonable sum for them. In their application to the facts of the present case, each of the two elements in that proposition should be rejected.

51 As to the concept of conferring of benefit, what was involved was the performance of building work on property owned by the Lumbers in circumstances where there was a building contract between the Lumbers and Sons obliging Sons to perform that work and the Lumbers to pay Sons for it, and a subcontract between Sons and Builders obliging Builders to perform the work and Sons to pay Builders. As it happens, there was no material difference between the total price to be paid under the contracts. However, the case for Builders can be tested by supposing that there had been such a difference. Furthermore, the unusual agreement as to progress payments made between the Lumbers and Sons, an agreement that was closely connected with the personal relationship between Mr Warwick Lumbers and Mr McAdam, highlights the significance of the 1993 contract as, from the point of view of the Lumbers, the source of their legal rights and obligations. In *Steele v Tardiani*[13], which in one sense was a simpler case than the present because there was only one contact involved, Dixon J explained the problems of identifying, for the purpose of a quantum meruit claim not based on the contract, a "benefit" conferred on a building owner by the performance of work otherwise than in accordance with the contract. He accepted that, where building work is done outside the contract, and the benefit of the work is taken, there may arise an obligation to pay for the work. He went on to refer, however, to "the dilemma in which a building owner is placed". He quoted Collins LJ who said, in *Sumpter v Hedges*[14]:

> "Where, as in the case of work done on land, the circumstances are such as to give the defendant no option whether he will take the benefit of the work or not, then one must look to other facts than the mere taking the benefit of the work in order to ground the inference of a new contract ...

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13 (1946) 72 CLR 386 at 402-403; [1946] HCA 21.

14 [1898] 1 QB 673 at 676.

> The mere fact that a defendant is in possession of what he cannot help keeping, or even has done work upon it, affords no ground for such an inference."

52 The reference to an "inference of a new contract" may reflect an approach since overtaken by *Pavey & Matthews Pty Ltd v Paul*, but the problem involved in identifying a conferring or accepting of a benefit remains.

53 The concept of "free acceptance" invoked by the majority in the Full Court, whatever its exact scope, is commonly related to a defendant who "did not take a reasonable opportunity open to him to reject the proffered services"[15]. That was not the situation of the Lumbers in the present case. Similarly, what was sought to be characterised as an "incontrovertible benefit" was that which Sons had undertaken to provide for the Lumbers and for which the Lumbers had agreed to pay Sons. If the principle relied upon by Builders extends to the claim by Builders against the Lumbers, it is difficult to see why it would not extend also to the work performed by the numerous subcontractors engaged by Sons and later by Builders. Much, perhaps most, of the physical construction work on the site was performed, and many of the physical materials brought to the site were supplied, by such subcontractors. Why Builders was in a different position from them vis-à-vis the Lumbers was not explained. In a broad colloquial sense, they were conferring benefits on the Lumbers, and the Lumbers were accepting those benefits, but that was not so in any legal sense.

54 It was argued that the Lumbers had received a "windfall" and that it would be unconscionable of them to refuse to pay Builders for the work in question. This characterisation proceeds upon assumptions as to the respective rights and obligations of the Lumbers, Sons and Builders which, for reasons already stated, have not been justified. Insofar as the Lumbers have been relieved from liability to pay the full agreed price for the work done on their property it appears principally to be the consequence of Builders' failure to make or pursue a prompt claim against Sons, and Builders' failure to pursue its claim against Sons in the present proceedings. If that claim had been pursued, it may well have resulted in a claim by Sons against the Lumbers. Alternatively, it may be the consequence of the unexplained attitude of Sons in the letter written by Mr Malcolm Cook in early 1999. The procedural and evidentiary deficiencies in the case make it impossible to conclude that the conduct of the Lumbers in refusing to pay Builders is unconscionable. If they have been enriched, it is at the expense of Sons. If any party has been enriched at the expense of Builders, it is Sons.

55 The restitutionary claim of Builders has not been made out.

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15 cf Goff and Jones, *The Law of Restitution*, 7th ed (2007) at [1-019].

Builders Licensing Act

56 In view of the conclusion reached above, it is unnecessary to consider the defence based on s 39 of this Act.

Conclusion

57 The appeal should be allowed. The orders of the Full Court of the Supreme Court of South Australia should be set aside and in their place it should be ordered that the appeal to that Court be dismissed with costs. The respondent should pay the costs of the appellants of the appeal to this Court.

58 GUMMOW, HAYNE, CRENNAN AND KIEFEL JJ. Between about February 1994 and April or May 1995 a house was built in a suburb of Adelaide. The house was large, of unusual design, and expensive. The respondent, W Cook Builders Pty Ltd (In Liq) ("Builders") claims that the appellants – "the Lumbers" – have not paid all that should be paid for building the house. That claim was first made by the liquidator of Builders more than four years after the building work was completed.

59 The first appellant, Mr Matthew Lumbers, owned the land on which the house was built. He granted his father, the second appellant, an unregistered lease of the property for life. It was the father, Mr Warwick Lumbers, who had most of the dealings about building the house, but for the most part it will not be necessary to distinguish between the appellants.

60 The Lumbers say that they never had any dealings with Builders. They say their dealings were with a different company – W Cook & Sons Pty Ltd ("Sons") – and that they have paid Sons all that Sons has ever asked them to pay. The Lumbers first became aware of Builders, and of the claimed involvement of Builders in the matter, in August 1998, more than three years after the building work was completed.

61 It is not, and never has been, disputed that the Lumbers agreed with Sons that Sons would build the house. Neither that agreement, nor any of the other agreements or arrangements to which it will be necessary to refer, was reduced to writing. The agreement the Lumbers made with Sons about building the house was constituted by conversations between Mr Warwick Lumbers and a Mr David McAdam. It is not, and never has been, disputed that Mr McAdam was then acting on behalf of Sons or that the conversations constituted an agreement for Sons to build the house according to the design and instructions of a named architect. No price was fixed for the work. It was agreed that Sons would be paid "cost plus". Yet it is Builders, not Sons, who now claims for the balance of the price of the work of building the house. These reasons will show that Builders' claim fails.

62 Work was performed by subcontractors. But it should be indicated at once that this was not a case where by reason of supervening events, such as the insolvency of the head contractor, an unpaid subcontractor seeks to recover by direct action against the owner, whether under a "mechanics' lien" statute such as

the *Worker's Liens Act* 1893 (SA) or under the general law[16]. Further, Builders made no claim under that statute as a subcontractor of Sons.

63 Neither the issues that are to be decided in this appeal, nor the way in which those issues are decided, can be understood without first observing some features of the way in which the litigation developed.

Builders' pleaded case

64 Builders brought proceedings in the District Court of South Australia against not only the Lumbers but also Sons. By its pleading, Builders made claims in contract and in "Restitution/Unjust Enrichment". It made some other claims as well, including a claim to enforce a lien under the *Worker's Liens Act* as a "contractor"[17], but it will not be necessary to examine those other claims.

65 Builders alleged in its pleading that the Lumbers (or one of them) had made an oral building contract with Sons. Builders further alleged that, some months after the Lumbers had made their contract with Sons, Builders made an oral contract with Sons by which the benefit of Sons' contract with the Lumbers was assigned to Builders, and Builders was obliged (to Sons) to perform the work that had to be done under the Lumbers contract with Sons. Builders pleaded that, as a result of the agreement between the Lumbers and Sons, and the subsequent agreement between Builders and Sons, either the Lumbers were (or one of them was) liable to Builders on the basis that the building contract had been assigned to Builders or, if the building contract had not been assigned, the Lumbers were (or one of them was) liable to Sons. If the Lumbers' liability was to Sons, Builders alleged that Sons was liable to Builders for the amount owing under the building contract.

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16 cf *Hampton v Glamorgan County Council* [1917] AC 13; *Winterton Constructions Pty Ltd v Hambros Australia Ltd* (1991) 101 ALR 363; *Pan Ocean Shipping Co Ltd v Creditcorp Ltd* [1994] 1 WLR 161; [1994] 1 All ER 470; Watts, "Does a subcontractor have restitutionary rights against the employer?", (1995) *Lloyd's Maritime and Commercial Law Quarterly* 398.

17 Defined in s 2 of the *Worker's Liens Act* 1893 (SA) as "a person (*not being a sub-contractor*) contracting with or employed by another person to do work, or to procure work to be done, or to furnish materials in connection with work" (emphasis added).

66 Builders pleaded claims in "Restitution/Unjust Enrichment" against the Lumbers and alternative claims against Sons. As against the Lumbers, Builders alleged that they received the benefit of the completed house "at the expense of" Builders (because it, Builders, had done the work) and alleged that "[i]t would be unconscionable, unconscientious and unjust" for the Lumbers "to accept such benefits without making payment of the full value of the construction work carried out on the land".

67 Builders' claim in "Restitution/Unjust Enrichment" against Sons took generally the same form as the claim against the Lumbers. But on this branch of its claim, Builders alleged that the benefit which Sons had received was Sons' right to sue the Lumbers for the price of the work done, and Sons having met its contractual obligations to perform the building contract. Again, Builders alleged that this benefit was obtained at the expense of Builders because Builders did the work and paid for it, and it was said to be "unconscionable, unconscientious and unjust" for Sons to retain that benefit without making payment to Builders. The pleading, which was not settled by counsel, failed to specify with the necessary clarity the material facts upon which Builders relied to demonstrate that conclusion in law. The pleading was embarrassing in the technical sense of that term[18]. This deficiency in the pleading by Builders of its case has contributed to difficulties apparent at all subsequent stages in the litigation.

The Lumbers' defences

68 As noted earlier, the Lumbers admitted that they had made a building contract with Sons. They denied any knowledge of the alleged agreement or arrangement between Builders and Sons. The Lumbers alleged that Builders was not licensed under the *Builders Licensing Act* 1986 (SA) (in force at the time of building) or the *Building Work Contractors Act* 1995 (SA) (which later repealed and replaced the earlier Act) and that, by operation of one or other of those Acts, Builders was precluded from recovering "any fee or other consideration in respect of the building work"[19] unless the failure to hold and maintain a licence was inadvertent, which the Lumbers alleged was not the case here.

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18 *Winterton Constructions* (1991) 101 ALR 363 at 375-376.

19 *Builders Licensing Act* 1986 (SA), s 39; cf *Building Work Contractors Act* 1995 (SA), s 6(2) – "fee, other consideration or compensation under or in relation to a contract".

69 The Lumbers counterclaimed for damages, for allegedly defective work, but the detail of that counterclaim need not be examined.

Builders' case at trial

70 Builders' case at trial was much affected by the fact that, before trial, Sons obtained an order requiring Builders to provide security for its costs. Builders did not provide that security and further proceedings by Builders against Sons were then stayed. The case that Builders prosecuted at trial was, therefore, radically different from the case which it had pleaded. The case which Builders had pleaded had made alternative claims against the Lumbers and Sons. The case which Builders prosecuted at trial made claims only against the Lumbers.

71 At trial, the chief weight of argument on behalf of Builders was placed upon its contention that Builders and Sons had made a contract by which Sons assigned the benefit of its building contract with the Lumbers to Builders. The Lumbers denied any knowledge of the arrangements which it was alleged had been made between Builders and Sons; there was no evidence to the contrary. Builders' assignment argument failed and its claims against the Lumbers were dismissed.

Builders' case in the Full Court

72 On appeal to the Full Court of the Supreme Court of South Australia there was a marked shift in the way in which Builders put its case. Chief weight was then placed upon its restitution claim against the Lumbers. A majority of the Full Court (Sulan and Layton JJ; Vanstone J dissenting) held that the restitution claim should succeed[20]. The majority concluded that the Lumbers had received "an incontrovertible benefit"[21] which the Lumbers had freely accepted[22], that the benefit was received at Builders' expense[23], and that it would be unconscionable for the Lumbers to retain the benefit without paying for it[24]. That Builders was not licensed under the *Builders Licensing Act*, and that the failure to hold a

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20 *W Cook Builders Pty Ltd (in liq) v Lumbers* (2007) 96 SASR 406.

21 (2007) 96 SASR 406 at 422 [75].

22 (2007) 96 SASR 406 at 423-424 [83]-[84].

23 (2007) 96 SASR 406 at 424 [86].

24 (2007) 96 SASR 406 at 426 [95].

licence was not inadvertent, was held[25] not to preclude its recovering the sum it claimed from the Lumbers.

73 Builders' appeal, therefore, was allowed. The judgment entered at trial in favour of the Lumbers was set aside and judgment entered for Builders.

74 It is against those orders that the Lumbers now appeal to this Court. The appeal to this Court should be allowed, and orders made restoring the judgment entered at trial dismissing Builders' claims against the Lumbers.

The framework for analysis

75 The analysis undertaken by the majority in the Full Court proceeded from principles stated at a high level of abstraction. There were four elements in the framework of the analysis made by the Full Court: "benefit" (or "incontrovertible benefit"[26]), "acceptance" (or "free acceptance"[27]), "expense", and unconscionability. Obviously, much turns on what is meant by those terms and upon what are the features said to make retention of the "benefit"

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25 (2007) 96 SASR 406 at 426 [99]-[100].

26 The word "incontrovertible" has been used in this context to direct attention to whether what has been done results in an accretion to the defendant's wealth. As Beatson pointed out in Guest et al (eds), *Chitty on Contracts* ("Chitty"), 26th ed (1989), vol 1 at 1317 [2040]: "[i]n the case of the rendering of services as opposed to the payment of money, 'the identity and value of the resulting benefit to the recipient may be debatable' [*BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 at 799]".

27 The word "free" has been used in this context to direct attention to whether the recipient of a benefit had an opportunity to accept or reject the benefit. Cf *Munro v Butt* (1858) 8 E & B 738 [120 ER 275]; *Sumpter v Hedges* [1898] 1 QB 673; *Forman & Co Pty Ltd v The Ship "Liddesdale"* [1900] AC 190. Writing in successive editions of Chitty, Beatson suggested that English law "appears hostile to claims for services rendered or work done in the absence of a contract (express or implied) between the parties [and that] [t]he mere receipt of a benefit, when the defendant had no real option to accept or reject it, does not justify a claim for *quantum meruit*" (footnotes omitted). See Chitty, 25th ed (1983), vol 1 at 1153 [2050], 26th ed (1989), vol 1 at 1408-1409 [2145], 27th ed (1994), vol 1 at 1490 [29-127], 28th ed (1999), vol 1 at 1564 [30-186]; cf 29th ed (2004), vol 1 at 1698 [29-109], 1708 [29-131].

unconscionable. Adding words like "incontrovertible" and "free" to some of the terms emphasises the evident difficulties of definition. As is especially relevant here, much also turns on the particular facts and circumstances to which the terms are to be applied. None of the terms, "benefit", "acceptance" or "expense", can usefully be defined or applied without deciding whether attention is to be confined to the party who is identified as conferring the benefit and the recipient of that benefit, or account must be taken of the legal relationships that exist between one or other of those two parties and some third party or parties in relation to the events and transactions said to constitute conferring a "benefit", its "acceptance", or the incurrence of "expense".

76 In the present case, the majority in the Full Court directed principal attention to the relationship which it was held should be found to exist between Builders and the Lumbers. The legal relationship between the Lumbers and Sons was put to one side. Two bases for taking that step were identified. First, it was said[28] that Sons "did not perform its obligations" under its contract with the Lumbers. It was said[29] to be "not to the point for the Lumbers to claim that they are not liable to Builders because they have a contract with Sons, if Sons did not perform their part of the contract". Secondly, emphasis was given to the fact that Sons had acknowledged[30] that it has no claim against the Lumbers. The majority in the Full Court concluded[31] that in these circumstances "to uphold a claim in restitution by Builders in no way interferes with the contractual relationship between Sons and the Lumbers".

77 These reasons will demonstrate that the legal relationship between Sons and the Lumbers cannot be dismissed from consideration, whether on the bases assigned by the majority in the Full Court or otherwise. When proper account is taken of the rights and obligations that existed between Sons and the Lumbers under their contract, the analysis made by the majority in the Full Court is shown to be flawed. The Lumbers are not shown to have received a "benefit" at Builders' "expense" which they "accepted", and which it would be unconscionable for them to retain without payment. No less importantly, proper

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28 (2007) 96 SASR 406 at 416 [45].

29 (2007) 96 SASR 406 at 416 [47].

30 (2007) 96 SASR 406 at 416 [45].

31 (2007) 96 SASR 406 at 416 [45].

analysis of the legal relationships revealed by the evidence will illustrate the dangers inherent in "top-down reasoning"[32].

78 The application of a framework for analysis expressed only at the level of abstraction adopted in this case, by reference to "benefit", "expense" and "acceptance" coupled with considerations of unconscionability, creates a serious risk of producing a result that is discordant with accepted principle, thus creating a lack of coherence with other branches of the law[33]. There are two reasons of particular relevance to this case why that is so. They may be identified by reference to two questions which, although expressed separately, will later be seen to intersect in several ways. First, does applying the posited framework for analysis to the facts of the present case extend the availability of recovery beyond the circumstances in which a claim for work and labour done (or money paid) for and at the request of the defendant would be available? Secondly, and no less importantly, how is the result of applying this framework for analysis consistent with the obligations relevant parties undertook by their contractual arrangements?

79 The doing of work, or payment of money, for and at the request of another, are archetypal cases in which it may be said that a person receives a "benefit" at the "expense" of another which the recipient "accepts" and which it would be unconscionable for the recipient to retain without payment. And as is well apparent from this Court's decision in *Steele v Tardiani*[34], an essential step in considering a claim in quantum meruit (or money paid) is to ask whether and how that claim fits with any particular contract the parties have made. It is essential to consider how the claim fits with contracts the parties have made because, as Lord Goff of Chieveley rightly warned in *Pan Ocean Shipping Co Ltd v Creditcorp Ltd*[35], "serious difficulties arise if the law seeks to expand the law of restitution to redistribute risks for which provision has been made under an applicable contract". In a similar vein, in the Comments upon §29 of the

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32 *Roxborough v Rothmans of Pall Mall* (2001) 208 CLR 516 at 544 [73] per Gummow J; [2001] HCA 68; *McGinty v Western Australia* (1996) 186 CLR 140 at 232 per McHugh J; [1995] HCA 46.

33 See *Sullivan v Moody* (2001) 207 CLR 562 at 580-581 [53]-[55] per Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ; [2001] HCA 59.

34 (1946) 72 CLR 386; [1946] HCA 21.

35 [1994] 1 WLR 161 at 166; [1994] 1 All ER 470 at 475.

proposed *Restatement*, (3d), "Restitution and Unjust Enrichment"[36], the Reporter says:

> "Even if restitution is the claimant's only recourse, a claim under this Section will be denied where the imposition of a liability in restitution would overturn an existing allocation of risk or limitation of liability previously established by contract."

80 Likewise, it is essential to consider whether the facts of the present case yield to analysis as a claim for work and labour done, or money paid, because where one party (in this case, Builders) seeks recompense from another (here the Lumbers) for some service done or benefit conferred by the first party for or on the other, the bare fact of conferral of the benefit or provision of the service does not suffice to establish an entitlement to recovery. As Bowen LJ said in *Falcke v Scottish Imperial Insurance Company*[37]:

> "The general principle is, beyond all question, that work and labour done or money expended by one man to preserve or benefit the property of another do not according to English law create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure. *Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will.*" (emphasis added)

The principle is not unqualified. Bowen LJ identified[38] salvage in maritime law as one qualification. Other cases, including other cases of necessitous intervention, may now be seen as further qualifications to the principle but it is not necessary to examine in this case how extensive are those further qualifications or what is their content. For the purposes of this case the critical observations to make are first that Builders' restitutionary claim does not yield to analysis as a claim for work and labour done or money paid and secondly, that Builders' restitutionary claim, if allowed, would redistribute not only the risks but also the rights and obligations for which provision was made by the contract the Lumbers made with Sons.

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36 Tentative Draft No 3, 22 March 2004. Section 29 deals with the topic of restitution in cases of "Self-Interested Intervention".

37 (1886) 34 Ch D 234 at 248.

38 (1886) 34 Ch D 234 at 248.

A claim for work and labour done or money paid?

81 At trial, Builders did not frame its claim against the Lumbers as a claim for work and labour done or money paid at the Lumbers' request. Builders, therefore, did not seek to prove that the Lumbers had ever asked Builders to do whatever Builders did in connection with building the Lumbers' house. And the evidence that was led at trial showed that the Lumbers had never asked Builders to do anything in connection with the Lumbers' house.

82 On the hearing of the appeal to this Court, however, Builders submitted that acceptance of a benefit, without a request, would be sufficient, at least in this case, to found an action by Builders for work and labour done or money paid. Builders submitted that this conclusion was supported, if not required, by this Court's decision in *Pavey & Matthews Pty Ltd v Paul*[39]. That is not so.

83 In *Pavey & Matthews*, a majority of this Court held[40] that the right to recover on a quantum meruit does not depend on the existence of an implied contract but on a claim to restitution or one based on unjust enrichment. The concept of unjust enrichment was described[41] by Deane J in *Pavey & Matthews* as constituting:

> "a unifying legal concept which explains why the law recognises, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognise such an obligation in a new or developing category of case."

84 It is important to recognise two points about *Pavey & Matthews*. First, there was no issue in that case about whether the plaintiff, a builder, had a claim for work and labour done and materials supplied. The issue in the case was whether that claim was defeated by a statutory provision[42] analogous to s 4 of the *Statute of Frauds* 1677 (UK) ("no action shall be brought upon any agreement ...

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39 (1987) 162 CLR 221; [1987] HCA 5.

40 (1987) 162 CLR 221 at 227 per Mason and Wilson JJ, 256-257 per Deane J.

41 (1987) 162 CLR 221 at 256-257.

42 *Builders Licensing Act* 1971 (NSW), s 45.

unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized"). In particular, the issue was whether the builder's action on a quantum meruit was a direct or indirect enforcement of the oral contract the parties had made. The majority in *Pavey & Matthews* held[43] that because "the true foundation of the right to recover on a quantum meruit does not depend on the existence of an implied contract" the action was not "one by which the plaintiff seeks to enforce the oral contract".

85 The second point to be noted is that unjust enrichment was identified as a legal *concept* unifying "a variety of distinct categories of case"[44]. It was *not* identified as a principle which can be taken as a sufficient premise for direct application in particular cases. Rather, as Deane J emphasised[45] in *Pavey & Matthews*, it is necessary to proceed by "the ordinary processes of legal reasoning" and by reference to existing categories of cases in which an obligation to pay compensation has been imposed. "To identify the basis of such actions as restitution and not genuine agreement is not to assert a judicial discretion to do whatever idiosyncratic notions of what is fair and just might dictate."[46] On the contrary, what the recognition of the unifying concept does is to *assist* "in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognise such an obligation in a *new or developing category of case*" (emphasis added)[47].

86 Builders' submission that acceptance of a benefit, without a request, suffices to found an action for work and labour done or money paid thus finds no direct support in *Pavey & Matthews*. That issue did not arise and was not decided in that case. Rather, the question to which *Pavey & Matthews* directs attention is whether the long-established and well-recognised category of cases constituted by claims for work and labour done or money paid at the *request* of another should be extended or developed in the manner for which Builders contended. And in that regard Builders emphasised what had been said by

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43 (1987) 162 CLR 221 at 227 per Mason and Wilson JJ; see also at 256 per Deane J.

44 (1987) 162 CLR 221 at 257 per Deane J.

45 (1987) 162 CLR 221 at 257.

46 (1987) 162 CLR 221 at 256 per Deane J.

47 (1987) 162 CLR 221 at 257 per Deane J.

Doyle CJ, for the Full Court of the Supreme Court of South Australia, in *Angelopoulos v Sabatino*[48].

87 It is convenient to consider the decision in *Angelopoulos* by reference to Builders' submission that, subject to one immaterial qualification, all the nine factors identified[49] by Doyle CJ in *Angelopoulos* as relevant to "acceptance" of a benefit, were present in this case. It is important, however, to preface that consideration by observing that although Builders' argument was directed immediately to demonstrating that "acceptance" of a benefit suffices to found an action for work and labour done or money paid, its arguments about the availability of an action for work and labour done or money paid were directed ultimately to the proposition that adopting the framework for analysis used by the majority in the Full Court in this case was not inconsistent with long-established principles governing actions for work and labour done or money paid.

88 Adapting what was said by Doyle CJ in *Angelopoulos* to the facts of this case, the nine factors identified by Builders as supporting its claim were:

(a) the plaintiff (here, Builders) did not do the work gratuitously;

(b) Builders did not act "entirely at [its] own initiative"[50] but at the implied request of the Lumbers;

(c) payment for doing the work was not subject to fulfilment of a subsequent condition;

(d) the work was not done "on a basis from which [Builders] chose to depart"[51];

(e) the Lumbers benefited from what Builders did;

(f) the benefit was conferred at the expense of Builders;

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48 (1995) 65 SASR 1.

49 (1995) 65 SASR 1 at 12-13.

50 (1995) 65 SASR 1 at 13.

51 (1995) 65 SASR 1 at 13.

(g) the Lumbers "approved of or agreed to"[52] Builders carrying out the work it did;

(h) the circumstances were such that the Lumbers "must have known as ... reasonable [persons] that [Builders] expected to be remunerated for [its] services"[53]; and

(i) there is no particular circumstance (such as change of position) by virtue of which it would be unjust to require the Lumbers to remunerate Builders.

89 It will be noted that the second of the matters identified was the making of an "implied request" by the Lumbers to Builders to do the work and to pay money. At once it should be pointed out that, if Builders did whatever work it did and paid whatever money it paid at the Lumbers' request, Builders' claim for a reasonable price for the work and for the money it paid would fall neatly within long-established principles. It would matter not at all whether the request was made expressly, or its making was to be implied from the actions of the parties in the circumstances of the case[54]. Builders would have an action for work and labour done or money paid for and at the request of the Lumbers.

90 And if Builders did work or paid money at the Lumbers' request, it would also follow that it would be neither necessary nor appropriate to consider any of the other eight factors identified in *Angelopoulos* in deciding whether Builders could recover a fair price for the work it had done and the amount it had paid for and at the request of the Lumbers. To the extent that *Angelopoulos* is understood as requiring separate or additional consideration of those other factors, where a plaintiff seeks to recover a fair price for work done at the defendant's request, or the amount the plaintiff has paid for the defendant at the defendant's request, *Angelopoulos* is wrong and should not be followed.

91 But in the end Builders did not submit that it could be found that the Lumbers had made any request directed to Builders. Rather, Builders' arguments

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52 (1995) 65 SASR 1 at 13.

53 (1995) 65 SASR 1 at 13.

54 *Birmingham and District Land Company v London and North Western Railway Company* (1886) 34 Ch D 261 at 274 per Bowen LJ; *Way v Latilla* [1937] 3 All ER 759 at 765 per Lord Wright.

proceeded from the premise that, in the present case, the Lumbers' request (or requests) for work to be done and money paid was (or were) directed to Sons and not to Builders. Although Builders thus accepted that, unlike *Angelopoulos*, it could not be said that the Lumbers made any request directed to Builders, this difference from *Angelopoulos* was said to be immaterial. The identity of the party to whom the request was directed was said to be of no moment because confusion about which company in a group of companies is party to a contract is a common occurrence in modern corporate life[55]. And although no case of mistake was run at trial, or on appeal to the Full Court, the possibility of confusion of identity between Sons and Builders was said by Builders to be reason enough to treat the fact of a request, regardless of the identity of the party to whom the request was directed, as the relevant consideration.

92 The propositions just described take several steps that would require the closest consideration before they could be accepted. First, it may greatly be doubted that any sufficient foundation was laid in the evidence adduced or arguments advanced in the courts below for either an argument based in mistake about the identity of the party with whom the Lumbers dealt, or an argument based in some confusion of identity between Sons and Builders. Secondly, even if it were to be accepted that confusion about the identity of the relevant contracting parties can and sometimes does occur when a contract is made with one of a group of companies, the legal consequences of any such confusion have hitherto been determined by application of the law of contract and doctrines of mistake[56].

93 It is not necessary, however, to pursue these aspects of the matter further. Rather, it is important to recognise that, although expressed in different terms, Builders' argument that the identity of the party to whom the Lumbers directed their request to do work and pay money should be dismissed as irrelevant, was an argument that sought to treat the contract made between the Lumbers and Sons as irrelevant.

94 And it will be recalled that it was a necessary element of the reasoning of the majority in the Full Court to put aside further consideration of the contract between Sons and Lumbers. It will further be recalled that the majority in the Full Court took that step on the bases, first, that Builders "did the work" and Sons

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55 cf *Qintex Australia Finance Ltd v Schroders Australia Ltd* (1990) 3 ACSR 267 at 268.

56 *Qintex* (1990) 3 ACSR 267 at 276-277.

"did not perform its obligations" under its contract with the Lumbers, and secondly, that Sons acknowledged it had no claim against the Lumbers.

95 Both bases for putting aside the contract between Sons and Lumbers are flawed.

Builders did the work?

96 The first proposition made by the majority in the Full Court was expressed in several different ways but each can be seen as a variant of a single compound proposition: that "Builders did the work, and Sons did not". To say that "Builders did the work, and Sons did not", elides a number of different ideas. Neither Builders nor Sons "did" any work. Each is a corporation. The work that was done in the construction of the house, whether it was done at the building site or in an office, was done by individuals. Before deciding which company "did" the work it would be necessary to identify for which company the relevant individuals were working. Here, as in so much else of the trial of this litigation, the evidence was exiguous and such evidence as was adduced was less than clear.

97 On any view of the matter, Mr McAdam was an important participant in relevant events. He negotiated the original contract with the Lumbers. As noted earlier, there was no dispute that he did this on behalf of Sons. But Mr McAdam was also, so it seems, the originator of the idea that Builders should "take over" the work on the Lumbers' contract from Sons. And it was Mr McAdam who was said to have made the agreement or arrangement between Builders and Sons that Builders would "take over" the work, and it was he who then carried that agreement or arrangement into effect. But neither side in the present litigation called Mr McAdam to give evidence.

98 Such little evidence as was given about the relationships between Builders and Sons was given by Mr Jeffrey Cook. Two aspects of those relationships require examination: first, the corporate relationship between the two entities and second, the agreement or arrangement made between them to effect a "changeover" of the company that was to be responsible for the construction of the Lumbers' house.

99 The evidence led at trial suggested that, in 1993, Sons was, and for many years had been, the chief building company in a group of companies associated with several members of the Cook family who were third or subsequent generation descendants of the eponymous W Cook. The companies traced their history to about 1910.

100 Mr Jeffrey Cook was a director of Sons up to at least 1993, the year before Sons made its contract with the Lumbers. At that time there were two shareholders of Sons: an investment company associated with Mr Jeffrey Cook and his family, and another investment company associated with another branch of the Cook family. The shareholding and directorate of Builders were said to differ from those of Sons, but no details of those differences were given in evidence. In 1993, Mr Jeffrey Cook "sat at the top of the apex for managing the building side of the business" of Sons. Sons also operated a joinery workshop and in 1993 Mr Jeffrey Cook managed that part of the business as well.

101 Mr McAdam began working in the Cook businesses in 1959. He was appointed a director of Sons in 1964, the year in which it was incorporated. In 1993, he was responsible for the financial and contract administration of Sons.

102 At the start of 1994, Mr McAdam proposed to Mr Jeffrey Cook "separating" the joinery business of Sons from its building business. Mr Cook agreed that this should be done, and agreed that, "after the changeover", building work would be done by Builders (then a company which did not operate in any way). This "changeover", Mr Cook said, was done by book entries and took effect from about April 1994. At trial he said that he understood the changeover "was going to be effective in relation to probably the separation and then the viability of keeping them [the joinery and the building businesses] separate to make them more financial". Mr Cook's evidence-in-chief was that the so-called "changeover" was effected "in the books". He said that Sons carried out the work on the Lumbers' house until the changeover, but that after the changeover "*[i]n the books* it was W. Cook Builders" (emphasis added).

103 At the outset of the trial, counsel then appearing for the Lumbers indicated that there was no dispute that "the subcontractors were, in fact, paid by [Builders]". Given that it was not disputed that the Lumbers had paid some subcontractors directly, this statement of what was not disputed was expressed too widely. Nonetheless, the conventional basis upon which the litigation has been conducted at all stages is that Builders paid those subcontractors whom the Lumbers did not pay.

104 The books in which entries were made to effect the "changeover" about which Mr Jeffrey Cook gave evidence were not tendered. No evidence was led to show what happened, if anything, about employment contracts or bank accounts. In particular, the trial judge was unable to say whether payments made to subcontractors after the changeover were made from a separate bank account of Builders or from what he described as "Cook Group funds, with the payments being debited through journal entries to the Builders accounts". As his Honour went on to say:

> "Externally ... nothing appeared to have changed. The same employees, including Mr Jeffrey Cook, continued with the building work. Mr McAdam continued to occupy an office adjoining that of Mr Cook, and maintained direct contact with Mr Warwick Lumbers. Neither Mr Jeffrey Cook nor Mr McAdam made any mention to the Lumbers or the architect Mr Fielder of the existence of Builders, or even the re-organisation."

105 As noted earlier, Mr Warwick Lumbers paid directly some subcontractors who worked on the house. Otherwise, all payments made by the Lumbers were directed to Sons; none was directed to Builders. The payments the Lumbers made to Sons were made in response to oral requests by Mr McAdam. No written progress claims or invoices were said to have been prepared or sent to the Lumbers, whether on behalf of Sons or on behalf of Builders.

106 There was a dispute at trial about what amount should be allowed for supervision of the work that was done. (The claim for supervision was the largest part of the claim that Builders made against the Lumbers.) The trial judge found that 10 per cent of cost was a fair allowance for supervision. This finding is not now challenged and the dispute about the quantum of this aspect of the claim may be put aside. But while the evidence at trial assumed that Mr Jeffrey Cook played an important part in supervising the construction of the house, no evidence was led of what he did, or of what were the arrangements pursuant to which he undertook that work.

Who "did the work"?

107 To say, in these circumstances, that Builders "did the work" obscures what were the legal relationships that brought about the result described. The end result described is as consistent with Builders having performed or procured performance of the work in satisfaction of an obligation it owed to Sons, as it is with Builders performing or procuring performance of the work in satisfaction of an obligation it understood that it owed to the Lumbers. And if Builders performed or procured performance of the work in satisfaction of an obligation it owed to Sons, Sons thereby procured the performance of the obligation it owed the Lumbers.

108 Issues about the possible intersections between contractual arrangements, on the one hand between Builders and Sons, and on the other between the Lumbers and Sons, were not explored at trial. The evidence that was led at trial required the conclusion, however, that whatever may have been the legal effect of the arrangements which Mr McAdam had sought to effect between Builders

and Sons, and whatever it was that Builders later did in performance of those arrangements, anything that Builders did in relation to the building of the Lumbers' house was done with the knowledge and assent of Sons.

109 It is possible that the informality of the "changeover" arrangements which Mr McAdam made was such that it could not be said that Builders and Sons agreed upon terms to effect that "changeover" that were sufficiently certain to be enforceable as a contract between Builders and Sons. If that were so, it may not be apt to describe the relationship between those entities as a subcontract. It is also possible, however, that despite the informality of the arrangement, an enforceable agreement was reached that Builders would perform Sons' work under the Lumbers contract. Indeed, making such an agreement was an important element in the assignment case Builders had advanced at trial.

110 It is only in this Court that Builders sought for the first time to advance a different case and argue (under cover of a notice of contention) that the arrangements between Builders and Sons were too uncertain to admit of enforcement. It is too late for Builders to advance such a case[57]. If the point had been taken at trial different evidence may well have been adduced.

111 In any event, however, if no concluded agreement was made between Builders and Sons before work was done or money was paid, there is no doubt that, if the work was done by Builders it was done at Sons' request, or that, if Builders paid money, it did so at Sons' request. It follows that, if Builders did work or paid money, it had a claim against Sons for work done and money paid at Sons' request. That is, if Builders did work or paid money, Builders could look to Sons for payment for the work it did and the money it paid at the request of Sons in performance of the building works which Sons had agreed to perform under its contract with the Lumbers. However, if an enforceable contract were made then no action would lie for a quantum meruit while the contract remained on foot[58].

112 It also follows that, if Builders did work or paid money, Sons could point to that work or that payment by Builders as done or paid in performance of Sons' obligations to the Lumbers. Sons could do that because nothing in the evidence suggested that Sons could not engage persons other than its employees to build

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57 *Water Board v Moustakas* (1988) 180 CLR 491; [1988] HCA 12.

58 *Matthes v Carter* (1955) 55 SR (NSW) 357 at 364; *Gino D'Allesandro Constructions Pty Ltd v Powis* [1987] 2 Qd R 40 at 59.

the Lumbers' house. Such evidence as was led at trial suggested that, in accordance with common building practice, both the Lumbers and Sons assumed that subcontractors would be engaged to perform the work.

113 It follows that the compound premise for the conclusions reached by the majority in the Full Court, that "Builders did the work and Sons did not", obscured much more than it illuminated. To the extent that the proposition identifies who paid subcontractors or material suppliers, it is a proposition that is incomplete in relevant respects. It is incomplete because it does not identify what were the legal relationships that governed those payments. Further, to the extent that the proposition asserts that it was employees or subcontractors of Builders who worked at the site of the Lumbers' house, the proposition is again incomplete in a relevant respect. It is incomplete to the extent that it does not reflect the evidence led at trial that demonstrated that Sons procured Builders to do the work that Sons had contracted to perform. It procured that result either by making a contract with Builders to that effect or, if there was no contract, by asking that Builders do it. And contrary to the conclusion reached by the majority in the Full Court it follows that the evidence led at trial did not establish that Sons had "failed" to do the work its contract with the Lumbers required it to perform, or that Sons was otherwise in breach of its contract with the Lumbers in any relevant respect.

114 For these reasons, the first of the two bases on which the majority in the Full Court put aside, as irrelevant, the legal relationship between the Lumbers and Sons (that Builders did the work and Sons did not) is shown to be wrong. What of the other basis relied on by the Full Court: Sons' disavowal of any claim against the Lumbers?

Sons makes no claim?

115 By a letter dated 1 February 1999, signed by Mr Malcolm J Cook as a director of Sons, Mr Warwick Lumbers was told that "there are no outstanding amounts owing either by yourself, or any other person or entity, to [Sons] in relation to the construction" of the Lumbers' house. Reference was made in that letter to "a restructuring of the Company [Sons] in 1994" and to Mr Jeffrey Cook taking over "all building & construction operations currently in progress, operating as [Builders] ... and [continuing] building operations until May 1998, when [Builders] went into liquidation". The letter said that "[a]ll invoicing & receipts in relation to [the Lumbers' house] (and all other building projects) were through the accounts system of [Builders]". The letter concluded by saying that "Mr Jeffrey Cook has had no input into this reply" and that he had "had no contact with [Sons] in relation to the day-to-day operations of the Company, since about May of 1998".

116 No evidence was led at trial about how or why this letter was written. In particular, Mr Warwick Lumbers was not asked any question about how the letter came about. Be this as it may, it is plain from the letter's text that, at least in February 1999, Sons made no claim to any further payment in respect of the construction of the Lumbers' house. And there was no evidence led at trial that Sons had thereafter sought any further payment from the Lumbers.

117 The majority in the Full Court treated the fact that Sons has made no claim for further payment from the Lumbers as bearing upon whether allowing a claim in restitution by Builders "interferes with the contractual relationship between Sons and the Lumbers"[59]. But the *absence* of any claim by Sons against the Lumbers does not, without more, say anything about the nature or the content of the contractual relationship between Sons and the Lumbers. And the absence of a claim by Sons does not demonstrate, as the majority in the Full Court assumed, that the Lumbers would obtain some "windfall" unless the Lumbers were found liable to Builders.

118 It is necessary to say something more about both the relevance of the contractual relationship between Sons and the Lumbers and about the notion of "windfall". Because the two matters are related it will be convenient to begin by saying something about the notion of "windfall".

119 An important element in the reasoning of the majority in the Full Court was that if the Lumbers were not held liable to Builders they would have obtained a house for which they had not paid enough. The amount paid was characterised as not "enough" by taking the amount that had been outlaid for subcontractors and materials, adding an amount for supervision and the agreed profit margin, and comparing that with the total payments made by the Lumbers. And because the total of outlays, supervision, and profit exceeded the total payments made, it was said that the Lumbers would receive a "benefit", a "gain" or a "windfall" if they were not found to be liable to Builders.

120 The accuracy and the relevance of any such characterisation depends upon whether the Lumbers had performed their obligations under their contract with Sons. If the Lumbers have not fully performed their obligations under their contract with Sons, by not paying all that is due to Sons, it is evident that the Lumbers have not received any benefit, gain or windfall. They would remain liable to Sons. Questions of benefit, gain or windfall could arise only if Sons has

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59 (2007) 96 SASR 406 at 416 [45].

no further claim against the Lumbers. Two possible bases for the conclusion that Sons has no further claim against Lumbers should be examined.

121 If the Lumbers have paid all that they owe Sons under the agreement they made with Sons, it may then be possible to say that Sons made an improvident bargain. But whether that description of the bargain is apt is not now relevant. What is presently important would be the conclusion that the Lumbers have satisfied their obligations to Sons, not any commercial characterisation of the bargain. Yet as earlier explained, notions of "benefit", "gain" or "windfall" employed in this case do not depend upon an analysis of the legal obligations of the parties. They seek to invoke some broader economic analysis comparing the "worth" or "value" of the end product (determined by totalling the outlays made to construct the house) with the amount the Lumbers have paid.

122 If, on the other hand, the Lumbers have *not* paid Sons all that Sons could lawfully demand under the agreement between the Lumbers and Sons, there may be some question about the legal effect of the letter written on behalf of Sons. If that letter were to be held to now stand in the way of Sons recovering amounts otherwise due under the agreement, the sending of the letter may again be described as improvident or commercially unwise. But again such a characterisation of the letter is not to the point. If the letter does provide an impediment to further recovery by Sons from the Lumbers, the Lumbers would have obtained, in effect, a sufficient discharge from Sons of their obligations. But no matter whether the Lumbers have paid all that they owe, or the letter written by Sons presents some legal obstacle to Sons' recovering further sums owed by the Lumbers, it is not right to describe the result as one in which the Lumbers have in any sense obtained a "windfall". The economic result arrived at follows either from the bargain that Sons made with them, or from the way in which Sons has subsequently dealt with that bargain. It is not a result that follows from anything that the Lumbers sought to have Builders do or refrain from doing.

123 For these reasons, the second of the bases upon which the majority in the Full Court put aside from consideration the contractual obligations undertaken by the Lumbers and Sons is also flawed.

The relevance of the contract between the Lumbers and Sons

124 When account is taken of the contractual relationship between the Lumbers and Sons several observations may then be made.

125 First, the Lumbers accepted no benefit at the expense of Builders which it would be unconscionable to retain. The Lumbers made a contract with Sons

which either has been fully performed by both parties or has not. Sons made an arrangement or agreement with Builders which again has either been fully performed or it has not. If either the agreement between Sons and the Lumbers or the agreement or arrangement between Sons and Builders has not been fully performed (because all that is owed by one party to the other has not been paid) that is a matter between the parties to the relevant agreement. A failure of performance of either agreement is no reason to conclude that Builders should then have some claim against the Lumbers, parties with whom Builders has no contract.

126 Because Builders had no dealings with the Lumbers, Builders has no claim against the Lumbers for the price of any work and labour Builders performed or for any money that Builders may have paid in relation to the construction. Builders has no such claim because it can point to no request by the Lumbers directed to Builders that Builders do any work it did or pay any money it did. Reference to whether the Lumbers "accepted" any work that Builders did or "accepted" the benefit of any money it paid is irrelevant. It is irrelevant because it distracts attention from the legal relationships between the three parties: the Lumbers, Sons and Builders. To now impose on the Lumbers an obligation to pay Builders would constitute a radical alteration of the bargains the parties struck and of the rights and obligations which each party thus assumed. There is no warrant for doing that.

127 The second observation to be made is more general. It is that identification of the rights and obligations of the parties, in this as in any matter, requires close attention to the particular facts and circumstances of the case. Necessarily that requires close attention to what contractual or other obligations each owes to the other.

Conclusion and Orders

128 Builders claim in restitution against the Lumbers fails. It is then not necessary to consider the Lumbers' defence to that claim founded in the *Builders Licensing Act* or the *Building Work Contractors Act*.

129 The appeal should be allowed with costs, the orders of the Full Court of the Supreme Court of South Australia set aside and in their place there should be orders that the appeal to that Court is dismissed with costs.