The Honourable Justice Sulan, The Honourable Justice Vanstone and The Honourable Justice Layton. Supreme Court of South Australia. 30th January 2007

JUDGMENT : SULAN & LAYTON JJ:

1 The appellant, W Cook Builders Pty Ltd (In Liq) ("Builders"), brought an action in the District Court seeking a judgment against the first and second respondents, Matthew Lumbers and Warwick Lumbers ("the Lumbers") for the sum of $274,791. The claim was for the balance of monies due for work performed by Builders in the construction of a house at North Haven. The trial Judge dismissed the claim. The appeal raises complex issues of equitable assignment and restitution.

2 The claim was initially made against the Lumbers and Sons. However, as a consequence of Builders' failure to provide security for Sons' costs, a Master of the District Court stayed the action against Sons whilst permitting Builders to continue the action against the Lumbers. Sons therefore took no part in the trial, nor in the appeal before this Court.

Background

3 In order to deal with the issues of law, it is necessary to relate the facts in some detail. The facts, which were largely undisputed, are dealt with in the judgment of the District Court Judge, and we relate them mainly from his summary and findings.

The initial discussions

4 The construction of the house, which was far from a standard building, commenced in about February 1994 and was completed in May 1995. Matthew Lumbers owned the land, which had been transferred to him as a distribution under the terms of a family trust. Warwick Lumbers, who was the father of Matthew Lumbers, was granted an unregistered lease for his life over the property.

5 The negotiations for the construction of the house were conducted between Warwick Lumbers and David McAdam in and prior to November 1993. David McAdam was a senior executive of the Cook group of companies. We will deal in detail with his position and the role he played in the negotiations later in these reasons. As a result of the negotiations, the Lumbers entered into a contract with W Cook & Sons Pty Ltd ("Sons") for the construction of the house. We will consider the terms of this contract later. Matthew Lumbers had little to do with the arrangements for construction of the house. Michael Fielder, an architect and brother-in-law of Warwick Lumbers, undertook the design work. The arrangement between the Lumbers and Michael Fielder was of an informal nature. Fielder had prepared detailed plans and specifications well prior to the engagement of Sons as builders.

The Cook group of companies

6 The Cook family had been involved in the building industry for many years. Sons had been the main operating company. Over the years, as the business and the family grew, other companies were formed. All the companies were involved directly or indirectly in the building industry.

7 Builders was established some years after the businesses had been operating. This company was used to build properties as a speculator, and in the 1980s built home units.

8 Sons' primary business was the construction of domestic houses. In about 1990, after the death of his father, Jeffrey Cook became a director of Sons. In 1993, Jeffrey Cook, his brother and a cousin were involved in the businesses. David McAdam, who was a long-time friend and employee, managed the administration side of all the businesses.

9 In 1993, Sons was the main operating company. At this time, Jeffrey Cook managed the building side of the business and spent most of his time on site. David McAdam managed the office. They were the only two who dealt with clients. David McAdam had been responsible for financial management and contract administration in respect of the businesses of the companies since 1963. He had commenced working for the group in 1959. He was originally employed as a bookkeeper, which involved as part of his duties contract administration. He was a very experienced contract administrator.

10 A partnership operated under the name of Portrush Traders. This was the service company which employed all the employees and seems to have been the administration arm of the businesses. David McAdam was in charge and directed to which companies monies were to be allocated. Builders and Sons operated a common bank account, and all internal transactions were conducted via journal entry.

11 Sons was a licensed builder in 1993. Builders was not so licensed. In late February 1993, according to the evidence of Jeffrey Cook which was accepted by the trial Judge, David McAdam decided that Sons' business was to be restricted to joinery and carpentry, and Builders would undertake construction work. It was Builders' contention in the appeal and the trial that, after building work on the Lumbers' house had been commenced by Sons, Builders took over the building work and supervision of its construction. That occurred after the corporate re-organisation in about late February 1994. The work was completed in late 1995. Builders' claim is that it did the work and is, therefore, entitled to recover the balance of any monies owing. It was contended by Builders, and found by the trial Judge, that Builders had incurred costs during the construction of the house, which had not been recovered from the Lumbers. We will come to that in more detail later.

12 Throughout the relevant period, Builders and Sons had shared common staff. The administration of the contract was conducted by the same personnel throughout. Jeffrey Cook was the supervisor on site, and was in control of

the supervision of subcontractors who came on site. It was accepted, and the trial Judge found, that neither Builders nor Sons informed the Lumbers that Builders had taken over the work in place of Sons.

The building project

13 The trial Judge concluded that the project was conducted on an informal basis, as the principal persons involved on either side were known to one another. Although David McAdam and the Lumbers were not close friends, Warwick Lumbers trusted David McAdam implicitly. Warwick Lumbers gave evidence that he was travelling extensively at the time of the construction and consequently considered the involvement of David McAdam very important, as David McAdam was responsible for engaging the subcontractors, checking the invoices, approving the subcontractors and approving the invoices.

14 Payments were made by Lumbers on an ad-hoc basis. There was virtually no documentation. David McAdam would advise Warwick Lumbers that an amount was owing. Warwick Lumbers would cause a cheque to be delivered in the name of Sons. The cheques were banked and, by journal entry, those monies were credited to Builders.

15 Equally, the restructuring of the group was done on an informal basis. There was no documentation which set out what was the respective role of each company in the Cook group. There were journal entries which evidenced that payments made by the Lumbers to Sons were treated as being payments to Builders.

16 No invoices were sent to the Lumbers. All payments were made after an oral demand of David McAdam.

17 Another feature of the arrangement was that Warwick Lumbers coordinated some of the building work himself. Warwick Lumbers gave evidence that he carried out the structural steel work. Consequently, it appears that Warwick Lumbers incurred some costs directly. Other costs would be paid by David McAdam on behalf of Warwick Lumbers. Consequently, the quantum of the fees owing was not calculated exactly, and Warwick Lumbers gave evidence that he left this to David McAdam to calculate, taking into account the work that Warwick Lumbers did, and the work done by Builders or, as he thought, Sons.

18 Warwick Lumbers said that an important ingredient of the arrangement was that David McAdam would oversee the work and any problems he had were to be referred to David McAdam, whom he trusted. Warwick Lumbers attended the site from time to time. Warwick Lumbers believed that Sons was performing the work, and that Sons employed David McAdam and Jeffrey Cook, who was supervising the work on site. The trial Judge accepted the evidence of Warwick Lumbers that he was never informed about the internal arrangements of the Cook group pursuant to which Builders had assumed the work.

19 Warwick Lumbers gave evidence that it was important to him to deal with Sons, as they were a reputable company with a long history in the industry, and it was important for him to have that "pedigree", particularly for the purposes of making statements to prospective buyers. Warwick Lumbers also gave evidence that had he been told that Builders were unlicensed and that they would be carrying out the work, or that they would be a subcontractor to Sons on the project, his insurance would have been invalidated and he would not have proceeded.

20 Warwick Lumbers moved into the house at Christmas 1994. From 1995 until he received a letter from the liquidator of Builders, he did not receive any demand for further payment, with the exception of a payment in 1997 of $12,309. Warwick Lumbers gave evidence that he relied entirely on David McAdam; McAdam checked the invoices of subcontractors, and Lumbers paid monies to Sons whenever McAdam advised. Warwick Lumbers gave evidence that he was not given any progressive costings and did not discuss the costs with David McAdam until he received a letter of demand from the liquidator of Builders.

21 In cross-examination, Warwick Lumbers said that he believed David McAdam had a builder's licence, and that Sons had a licence. He made no independent check to confirm these facts.

Findings of trial Judge

22 The trial Judge made the following findings:

1. In September 1993, Warwick Lumbers telephoned David McAdam to engage Sons to undertake the construction of the house.
2. He chose Sons because of their reputation and because of the knowledge and competence of David McAdam.
3. He would never have agreed to any assignment of the contract whereby work would be undertaken by an unlicensed builder as that would have "avoided the policy of the insurance".
4. The arrangement was not committed to writing.
5. Warwick Lumbers was to do some of the work, including structural steelwork and Sons would undertake the foundations, the brickwork and other tasks in building the house. Sons were to pay subcontractors and the Lumbers were to pay Sons. Price was never determined. Sons were to receive a fee, but no specific amount was agreed.
6. Payments made to Sons bore no direct relationship to actual expenditure in respect of the building work, but were made upon David McAdam making a demand.
7. The building was an unusual design and difficult to construct.
8. On 1 March 1994, Sons invoiced Builders in the sum of $29,984 for work done by Sons. That sum reflected the costs incurred by Sons up to the date of the reorganisation.

9. David McAdam resigned as a director of Builders on 10 March 1994. Nevertheless, the same employees, including Jeffrey Cook, continued with the building work. David McAdam continued to occupy an office adjoining that of Jeffrey Cook, and maintained direct contact with Warwick Lumbers.
10. It was not until April 1994 that the Lumbers were requested to and did pay an initial sum of $42,000. The Lumbers made payments to Sons totalling $407,000 between 30 April 1994 and 16 May 1995.
11. The directors of Cook Builders were Jeffrey Cook and Rosemary Cook. McAdam had been a director. He was appointed in July 1975 and ceased to be a director on 10 March 1994. In respect of Cook Sons, the current directors are Malcolm Cook and Simon Cook. Jeffrey Cook was a director and ceased to be a director on 2 February 1999. David McAdam was appointed in July 1972 and ceased to be a director on 1 September 1994.
12. The Lumbers occupied the house at Christmas 1994.
13. In February 1995, Sons rendered invoices totalling $116,670 for joinery work, and they were paid by Builders.
14. On 31 September 1995, $559,676.83 had been entered in the accounts of Builders for Lumbers' work. Of this sum, $369,328.87 had been paid by Builders to independent subcontractors and suppliers, and the balance of $190,348.46 had been paid to or credited in Builders' journal to Sons. (This figure should have been $190,347.96.) Lumbers had paid $407,000 by this date.
15. As at 30 September 1995, the difference between the sums recorded as incurred on the building project and those received from the Lumbers was $152,676.83. This was not the subject of any request by David McAdam to the Lumbers. A final sum of $12,309 was paid by the Lumbers on 15 December 1997.
16. That as at 1999 there was a deficiency totalling $181,904 and there was no adequate explanation as to why that sum or any of it had not been requested of the Lumbers until 1999 after Builders had been placed in liquidation.
17. By letter dated 1 February 1999, Sons advised Warwick Lumbers in the following terms: *That Sons conducted the original negotiations and took out indemnity insurance in relation to the construction of the house. In 1994, Jeffrey Cook took over all building and construction operations and operated as Builders and continued that operation until May 1998 when Builders went into liquidation. Builders operated as a separate entity, and all invoices in respect of the Building project were through the account system of Builders.*

    The letter went on to say: *We cannot comment on any claims made by the liquidator of W. Cook Builders Pty Ltd, however we do advise you that there are no outstanding amounts owing either by yourself, or any other person or entity, to W. Cook & Sons Pty Ltd in relation to the construction of the above residence.*

23 The trial Judge found that a reasonable fee for the work carried out by Jeffrey Cook was $92,887. He concluded that the quantum of the Builders' claim, which he calculated as $261,715, having regard to an allowance for defects, was reasonable.

24 The trial Judge also concluded:
- that Jeffrey Cook did not understand the effect of the reorganisation in 1994;
- that it was unclear whether he turned his mind on behalf of Builders to the performance of the pre-existing Lumbers' agreement;
- that the journal entries of Builders suggest that Sons delegated the performance of its obligations under the Lumbers' agreement to Builders;
- that the conduct of the companies, and in particular Builders, was consistent with the delegation of the burden and possibly the assignment of the benefit on the basis that Sons was now merely another subcontractor of Builders.

25 The trial Judge found that whether there had been an assignment, as opposed to some other arrangement, depended on the intention of the parties. David McAdam was not called as a witness. The trial Judge found that he ought to have been, as he was the only one who could explain entries in the books. However, he did not draw any adverse inference against either party because of the failure to have called David McAdam. No-one sought to call Malcolm Cook, the managing director of Sons. The trial Judge found that Jeffrey Cook did not attempt to quantify what was outstanding or seek payment from the Lumbers, and it was only after the liquidation of Builders that anyone put the Lumbers on notice that any sum was outstanding. The trial Judge was not satisfied that there was a valid equitable assignment of the benefit of the building agreement between the Lumbers and Sons to Builders. This decision was challenged on appeal.**Assignment**

Was there an assignment of the contract from Sons to Builders?

26 For Builders to recover pursuant to the contract, it must be shown that there was a valid assignment of the benefit of the contract to Builders. In determining whether such an assignment occurred, a preliminary question is whether there was the requisite intention to assign.

27 Although an inference of assignment can be drawn by assessing the conduct of parties, and although an absence of formality is not determinative of the existence of an assignment, there must be sufficient evidence to make such an inference. The learned trial Judge found that there was insufficient evidence to determine that there was intention to assign. In addition to the lack of documentary evidence, there was, significantly, no evidence given at trial by David McAdam, who effected the separation of the businesses. The conclusion of the trial Judge is soundly based, and there is no basis for this Court to interfere with the finding of the trial Judge in this regard.

Consequently, Builders' claim in assignment must fail at this preliminary stage. In the absence of an intention to assign, there can be no assignment.

28 We further note that the trial Judge also considered whether the contract was capable of assignment, addressing in particular the personal nature of the contract. The trial Judge considered this important due to the trust placed in David McAdam and the nature of the contract, involving, as it did, a complex program of construction and a high level of responsibility and involvement on the part of David McAdam. The trial Judge concluded that the benefit of this contract could not be assigned to a company in which David McAdam had no interest, and that assignment could not occur where the consequence would be that the price of the work could be determined by Builders' directors.

29 There is some difficulty in this reasoning. First, David McAdam ceased to be a director of Builders on 10 March 1994 and of Sons on 1 September 1994. He was therefore a director of Builders at the time of the transfer of the project in February 1994, and was a director of neither company between 1 September 1994 and the completion of the project. Secondly, and more significantly, David McAdam was a shareholder of Builders and was an employee of both companies at all relevant times. It cannot be said, therefore, that Builders was a company in which David McAdam had no interest.

30 This finding of fact appears to have assumed significance in the reasoning of the learned trial Judge. However, as Builders has not established the intention to assign, it is unnecessary to resolve the question of whether the contract between Sons and the Lumbers was capable of assignment.

Notice of alternative contention

31 The Lumbers filed a notice of alternative contention, arguing that the judgment should be upheld on the basis that s 39 of the *Builders Licensing Act 1986* (SA) precluded Builders from recovering any money for building work.

32 It is not disputed that Builders was not licensed, contrary to the requirements of the *Builders Licensing Act 1986* (SA) which was in force at the relevant times. Section 39 of 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*.

33 The trial Judge concluded that the failure of Builders to hold a licence at the relevant time was not due to inadvertence.

34 The consequence of Builders' failure to hold a licence is that in these proceedings, Builders cannot recover contractual damages from Lumbers. This means that even if there had been a valid assignment of the contract, which in our opinion there was not, Builders would be precluded from a claim on that contract by the operation of s 39.

35 However, s 39, which refers to "*any fee or other consideration*", precludes only contractual claims. Where 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.[1] We will now address Builders' claim in unjust enrichment. The question which then arises is whether Builders' claim for restitution can succeed.

The claim in restitution

36 The trial Judge concluded that Builders had not established that the Lumbers ever knew Builders' role. He found that at all times there was extant an agreement between the Lumbers and Sons which covered the work said to have been undertaken by Builders. Sons remained liable under the contract with the Lumbers. The trial Judge concluded that it could not be said that the Lumbers had an obligation to make restitution to Builders irrespective of whether Builders was mistaken as to its position when constructing the house. He further concluded that there was no evidence of a mistaken understanding by Builders. He concluded that Builders could not succeed against the Lumbers under the claims for restitution.

37 The trial Judge considered it unfair that Builders should suffer loss. However, he seems to have concluded that Sons should have brought the action under the contract and, therefore, Builders should not succeed.

38 The question which arises for consideration, therefore, is whether Builders, which carried out the work and constructed the house unbeknown to the Lumbers, who believed that they had contracted with Sons, have a claim in restitution to recover by way of *quantum meruit*.

39 Builders submitted in the appeal that the trial Judge erred in law in failing to find that the plaintiff was entitled to claim in restitution against the Lumbers for the unpaid value of the building work.

40 Mr Blue QC, on behalf of the Lumbers, submitted that recovery in restitution depends not on any subjective evaluation of what is fair and reasonable, but on a plaintiff bringing itself within one of the established categories in which restitution is made out. He submitted that, in order for Builders to succeed, it was required to show that the Lumbers exercised a choice to accept the benefit of the goods and services provided by Builders, with knowledge of what Builders was doing and the basis upon which it was doing it.

[1] ***Nunkuwarrin Yunti v A L Seeley Constructions Pty Ltd*** (1998) 72 SASR 21; ***Tea Tree Gully Builders v Martin*** (1992) 59 SASR 344.

41 It was submitted that, as there was an existing contract between Sons and the Lumbers, it would be inconsistent with that contractual position for Builders to be entitled to claim in restitution based upon a doctrine of free acceptance.

42 The appellant, Builders, seeks to recover on the basis that it is unconscionable for the respondents, the Lumbers, to have received the benefit of having a home built by Builders and, therefore, should not be entitled to retain the benefit without compensating Builders. In substance, Builders submits that the Lumbers have been unjustly enriched at Builders expense and Builders are, therefore, entitled to recover in *quantum meruit* for the goods and services that were supplied at Builders expense. Further, Builders claim an entitlement to receive a fee for their supervision of the job.

43 Unjust enrichment is a subordinate means of recovery, and restitution will not be awarded where a party has a claim in contract. In other words, where there is a valid contract, the entitlements and obligations of the parties will be governed by the terms of that contract, to the exclusion of a claim in restitution.

44 Mr Blue QC submitted that if a claim in restitution was upheld, it would have the result that a valid contractual arrangement between Sons and the Lumbers would be overridden by the claim. There was a current enforceable contract between the Lumbers and Sons which governed their relationship and defined the Lumbers' rights and liabilities and, therefore, there is no room or place for a set of rights and liabilities between the Lumbers and a stranger, namely, Builders. He submitted that the effect of upholding the claim would be to set the law of contract on its head.

45 In our view, that submission overlooks, first, that Sons, which was under the control of David McAdam, has subsequently accepted that it has no claim against Lumbers and, secondly, the fact that it did not perform its obligations under the contract. In our view, to uphold a claim in restitution by Builders in no way interferes with the contractual relationship between Sons and Lumbers.

46 The trial Judge appears to have relied upon the fact that there was a contract between the Lumbers and Sons to carry out the very work that Builders in fact carried out and this somehow lead to Builders claim in restitution failing. However, we consider that the fact that Sons may have been in breach of its contractual obligations to the Lumbers is not a basis for denying Builders its claim in restitution.

47 The relevant consideration is the equitable position of the Lumbers with respect to Builders. It is 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. The question remains whether Builders are entitled to recover in restitution in circumstances where Builders did the work and the Lumbers have the benefit of the work and have not paid for it. The issue is whether the Lumbers have been unjustly enriched or received an incontrovertible benefit which Builders are entitled to recover.

The law of unjust enrichment

48 A useful starting point for considering this principle is ***Pavey & Matthews Pty Ltd v Paul***.[2] The appellant, a builder, carried out certain building work pursuant to an oral agreement with the respondent that the respondent would pay the builder a reasonable remuneration for the work, calculated by reference to prevailing rates of payment within the building industry. The *Builders Licensing Act 1971* (NSW) provided that a building contract which was not in writing was unenforceable by the builder. The appellant claimed for money owing payable as a *quantum meruit*. Mason, Wilson, Deane and Dawson JJ found in favour of the appellant on the ground that it was entitled to restitution based upon unjust enrichment. Deane J said: *The circumstances in which the common law imposes an enforceable obligation to pay compensation for a benefit accepted under an unenforceable agreement have been explored in the reported cases and in learned writings and are unlikely to be greatly affected by the perception that the basis of such an obligation, when the common law imposes it, is preferably seen as lying in restitution rather than in the implication of a genuine agreement where in fact the unenforceable agreement left no room for one. That is not to deny the importance of the concept of unjust enrichment in the law of this country. It constitutes a unifying legal concept which explains why the law recognizes 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, recognize such an obligation in a new or developing category of case. In a category of case where the law recognizes an obligation to pay a reasonable remuneration or compensation for a benefit actually or constructively accepted, the general concept of restitution or unjust enrichment is, as is pointed out subsequently in this judgment, also relevant, in a more direct sense, to the identification of the proper basis upon which the quantum of remuneration or compensation should be ascertained in that particular category of case [citations omitted]*.[3]

49 Mason and Wilson JJ agreed with Deane J. They said: *Deane J, whose reasons for judgment we have had the advantage of reading, has concluded that an action on a quantum meruit, such as that brought by the appellant, rests, not on implied contract, but on a claim to restitution or one based on unjust enrichment, arising from the respondent's acceptance of the benefits accruing to the respondent from the appellant's performance of the unenforceable oral contract ... We are therefore now justified in recognizing, as Deane J has done, that the true foundation of the right to recover on a quantum meruit does not depend on the existence of an implied contract.*[4]

[2] (1987) 162 CLR 221.
[3] Ibid 256-7.
[4] Ibid 227.

50 Subsequent discussion of the principle is contained in the New South Wales case of ***Monks v Poynice Pty Ltd and Anor***.[5] The first defendant was a company controlled by the plaintiff and the second defendant equally. The controllers fell out and the second defendant appointed the third defendant as a receiver under a floating charge. The notice of assignment, pursuant to the appointment, contained an error resulting in the appointment of the third defendant as receiver being invalid. The third defendant sought to be remunerated and reimbursed for his time spent from the date of the appointment. There was no contract between the company and the third defendant appointing the third defendant as the company's agent or receiver.

51 Young J held that any claim must lie in restitution. He upheld the claim. He concluded that in equity there appeared to be at least four circumstances in which a claim could succeed where there is no contract. The first is where there is a request, express or implied, for the performance of the service. The second is where the party benefited, accepted or acquiesced in the provision of the service under circumstances where it must have been known that the service was not being rendered gratuitously. The third is where the service that is provided is necessary to be carried out for the protection of the defendant's personal property. The fourth is where the service conferred incontrovertible benefit on the defendant, and it would be unconscionable for the defendant to keep the benefit of the service without paying a reasonable sum for it. Insofar as incontrovertible benefit is concerned, Young J was of the view that before a claim is allowable, it must be established that the work was done solely for the benefit of the company.

52 In a later case ***Cadorange Pty Ltd (In Liq) v Tanga Holdings Pty Ltd***,[6] the plaintiff and defendant companies were in the hands of a common controller. The common controller was of the view that, by virtue of a contract entered into, the claimant would have the fee simple in a portion of the land, and would erect a building. The building would then be leased to Cadorange. It was because of this belief that expenditure on the land was made. There was no transfer of the fee simple to the claimant, nor had the contract been stamped. The expenditure on the land was made in the expectation that in due course the land would be vested in the claimant in fee simple, and that it would then be able to lease to Cadorange. A claim was made in contract, but in the alternative the claimant relied on the principle of unjust enrichment entitling it to have an equitable charge over the property to secure its reimbursement for monies expended on the property or value added to the property.

53 Young J posed the question whether the facts of the case fell into one of the categories where the law recognises an obligation on a person who has money spent on his property by another being obliged to compensate that other. The defendant argued that the claimant had merely made a misprediction, that is, it had no claim in restitution because if a person does work thinking they will get a benefit, they do not have a claim because they are merely a victim of self-delusion.

54 Young J gave extensive consideration to the development of the law throughout the nineteenth century and various authorities and writings on the subject matter. He referred to Cooke and Oughton's text,[7] and observed that there are three situations where the court may compensate a person who has enriched another outside the field of contract, they being (a) where the defendant has freely accepted the benefit; (b) where the benefit is incontrovertible so that no reasonable person could say it was not enriched; and (c) where, on an objective valuation of the benefit conferred by the plaintiff, it is conscionable that the defendant should have to pay for it.

55 Young J, in the course of his analysis, referred to the distinction between cases where one person spends money for the benefit of another, and cases where a person expends work and energy on behalf of another. In the former, the action often will be one that has traditionally been called "quasi contract", such as *indebitatus* count for money paid by the plaintiff at the request of the defendant. However, no common law action was available for services and benefits conferred. Young J also discussed the historical development of the common law, and then considered the equitable principles, including the principle of acquiescence, sometimes referred to as propriety estoppel.

56 Young J specifically referred to the text by ***Heydon, Gummow and Austin***[8] in which the learned authors said: *The present law is a collocation of two lines of cases. The first, typified by **Dillwyn v Llewellyn** (1862) 4 De GF & J 517; [1861-73] All ER Rep 384, relates to expenditure on the representor's property encouraged by some representation of benefit. The second line relates to expenditure with passive acquiescence by the 'representor'; Lord Kingsdown's summary of the principle in **Ramsden v Dyson** (1865) LR 1 HL 129 is usually cited, though that case was not on its facts an application of the rule .... Cases of acquiescence with knowledge will be harder to prove than active encouragement, and will often be less reprehensible. In cases of acquiescence with knowledge there will be no liability unless the improver has made a mistake about his legal rights (**Willmott v Barber** (1880) 15 Ch D 96 at 105 per Fry J), while in cases like **Dillwyn v Llewellyn** the representee cannot be said to have made a mistake, except in the sense that he was 'mistaken' to rely on the representor's statements of intention.*

57 Young J concluded that in the case at bar it was not a case of free acceptance by Cadorange of the benefits which the claimant effected to its land.

5 (1987) 8 NSWLR 662.
6 (1990) 20 NSWLR 26.
7 ***Common Law of Obligations*** (1989), 102-3.
8 **Heydon, Gummow and Austin, *Cases and Materials on Equity and Trusts*** (2nd ed, 1982), 300.

58 He then discussed incontrovertible benefits. He said: *The principle, as I understand it, is that if one asked the reasonable person on the Bondi bus whether the benefit which the defendant conferred on the plaintiff was a benefit to the plaintiff the reasonable person would say "Of course".*[9]

59 In summary, Young J identified that the circumstances in which an unjust enrichment has been found include not only circumstances in which there has been a request, but also where a benefit has been freely accepted, or where a defendant has received an incontrovertible benefit. An incontrovertible benefit can be said to have been received when a benefit has been conferred by a plaintiff on a defendant such that a reasonable person would say that the defendant was enriched and that it would be unjust if the plaintiff were not remunerated for that benefit.

60 The general approach of Young J is consistent, although differently expressed, with the approach taken by Byrne J in ***Brenner and Anor v First Artists' Management Pty Ltd***.[10] Byrne J considered ***Pavey***'s case and the application of the law of unjust enrichment and said: *It was submitted on behalf of the defendant that the test was whether each of the parties thought at the relevant time that the work would be recompensed. I think that the court is not concerned with the actual state of mind of the parties or of either of them. Moreover, the enquiry must in my view be principally directed to the position of the party to be charged, for the thread running through this area of law is the injustice of the enrichment of that party. In my opinion the appropriate enquiry is whether the recipient of the services, as a reasonable person, should have realised that a person in the position of the provider of the services would expect to be paid for them and did not take a reasonable opportunity to reject those services [citations omitted].*[11]

61 The approach of Byrne J was in turn endorsed by Doyle CJ in ***Angelopoulos and Anor v Sabatino and Anor***,[12] discussed later in these reasons.

Applicable principles – restitution – unjust enrichment

62 A claim in restitution has been recognised to be appropriate in a number of circumstances. They include the recovery of money paid under a mistake, the award of reasonable remuneration following full performance of a contract unenforceable by statute, the recovery of money paid under a mistake of law, and the award of an account of profit.[13] There are also several established categories of case in which the circumstances are recognised, although not universally accepted, to give rise to an unjust enrichment, as identified by Young J. It is increasingly recognised that unjust enrichment is a unifying concept which provides a rationale for allowing restitution in the recognised categories, as well as allowing restitution in circumstances which are consistent with the underlying concept but do not fall within an established fact pattern.[14]

63 Consequently, there are three basic elements of unjust enrichment which are satisfied in the categories of case in which an unjust enrichment has been found.[15] First, the defendant must receive a benefit. Secondly, that benefit must be received at the plaintiff's expense. Thirdly, it must be shown that it would be unjust if the plaintiff were not remunerated; this element can also be expressed as requiring the plaintiff to establish that it would be unconscionable for the defendant to retain the benefit. A fourth consideration is that there is no defence applicable or available to the claim. In this case, there is no suggestion that such a defence exists. We will consider the remaining three elements in turn.

Did the Lumbers receive a benefit?

64 As Mason and Carter observe, the question of whether a defendant has been enriched by a benefit is complex. In cases where the unjust enrichment arises from a payment of money, it may be easy to conclude that the enrichment of the defendant and the loss suffered by the plaintiff are equal. However, as Robert Goff J stated in ***BP Exploration Co (Libya) Ltd v Hunt (No 2)***,[16] "*where the benefit does not consist of money, then the defendant's enrichment will rarely be equal to the plaintiff's expense*".[17]

65 The conventional view has been that in cases where a defendant has been said to be unjustly enriched by the gratuitous supply of services, this second element must be satisfied by demonstrating that the defendant requested the plaintiff to provide those services.[18] Generally, services rendered without prior request will not be regarded as beneficial.[19] These limitations would prevent a plaintiff from recovering in circumstances where benefits were provided officiously, and protect a defendant from liability in circumstances where he or she did not choose to assume a liability. As Young J observed in ***Cadorange***: *Indeed, it must be a rare case in which the court can impose a liability where there was no request or adoption, and where, had the person benefited had any say in the matter, he or she might well have rejected the offer of benefit.*[20]

9 ***Cadorange Pty Ltd (In Liq) v Tanga Holdings Pty Ltd*** (1990) 20 NSWLR 26, 35.
10 [1993] 2 VR 221.
11 Ibid 259-60.
12 (1995) 65 SASR 1.
13 See **Keith Mason and J W Carter, *Restitution Law in Australia*** (1995), [206].
14 See, eg, ***Pavey and Matthews Pty Ltd v Paul*** (1987) 162 CLR 221, 256-7 (Deane J); cf ***Marriott Industries Pty Ltd v Mercantile Credits Ltd*** (1991) 160 LSJS 288, 296 (King CJ).
15 Keith Mason and J W Carter, ***Restitution Law in Australia*** (1995), [203]; Goff and Jones, ***The Law of Restitution*** (6th ed, 2002), [1-016]; see also ***Marriott Industries Pty Ltd v Mercantile Credits Ltd*** (1991) 160 LSJS 288, 314-15 (Olsson J)
16 [1979] 1 WLR 783.
17 Ibid 805.
18 See, eg, ***Rowe v Vale of White Horse District*** Council [2003] 1 Lloyd's Rep 418, 421.
19 Keith Mason and J W Carter, *Restitution Law in Australia* (1995), [212].
20 ***Cadorange Pty Ltd (In Liq) v Tanga Holdings Pty Ltd*** (1990) 20 NSWLR 26, 35.

66 Professor Jones, in his book ***Restitution in Public and Private Law***[21] considered the issue of a restitutionary claim for services rendered. He commented that, because services cannot be returned, it must be shown that they had been requested or, in the view of some courts, that they have been freely accepted or that they have incontrovertibly benefited another. He formulated the principle that a defendant will be deemed to have benefited from services rendered if a reasonable person in the defendant's position should have realised that a person in the position of the plaintiff would expect to be paid for them and the defendant did not take a reasonable opportunity to reject the proffered services. If a defendant has freely accepted services, then it can be said that he has been enriched and that it is unjust to allow him to retain that enrichment.

67 However, the law of unjust enrichment has recognised that a benefit may be received in other circumstances: for example, where the defendant freely accepted the benefit provided, where the defendant received an incontrovertible benefit, or where the provision of the service was necessary for the protection of the defendant's property. In these circumstances, an enrichment will be said to have been received even though there was no request. Thus, a benefit can be demonstrated in a range of circumstances where no request has been made, as identified by Young J in ***Monks v Poynice***.

68 In this case, there was no express request made directly from the Lumbers to Builders for the work to be completed. We will therefore address the question of whether the Lumbers received an incontrovertible benefit and is, thereby, entitled to restitution, before considering the alternative question of whether there can be restitution based on free acceptance.

Incontrovertible Benefit

69 As previously discussed, an incontrovertible benefit is one that no reasonable person could deny.[22] As noted above, there is little difficulty in characterising the receipt of money as an incontrovertible benefit, but non-monetary benefits present greater difficulty. It has sometimes been said that non-monetary benefits will only be capable of being regarded as incontrovertible where their value has been realised.[23]

70 The scope of what constitutes an incontrovertible benefit is evolving. It is recognised that services may provide an incontrovertible benefit – for example, sewerage services were viewed as an incontrovertible benefit in the recent case of ***Rowe v Vale of White Horse District Council***.[24] There are also cases in which realisable benefits may be regarded as incontrovertible.[25] We also consider that saving the defendant from incurring an expense could also be regarded as an incontrovertible benefit in some circumstances.[26]

71 Clearly, care must be taken in characterising the provision of services as an incontrovertible benefit due to the reluctance of the law to require defendants to make restitution when they cannot return the benefit and have not realised its value.

72 The evidence indicates that the Lumbers were advantaged by the work of Builders, and in particular by the provision of the following services:

1. The construction of the house on the land, which entailed:
   a. Engaging contractors, by David McAdam and/or Jeffrey Cook.
   b. Supervision of the construction by Jeffrey Cook.
   c. Paying contractors.
   d. Constructing the building according to Fielders' drawings.
2. David McAdam, as a director/employee of Sons, dealt with Warwick Lumbers in respect of the building work.
3. David McAdam acted as the administrator of the building work, which role had particular importance when Warwick Lumbers was overseas.

73 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.

74 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.

75 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.

[21] Gareth Jones, ***Restitution in Public and Private Law*** (1991).
[22] See also Keith Mason and J W Carter, *Restitution Law in Australia* (1995), [213].
[23] Ibid, [213]-[215].
[24] [2003] 1 Lloyd's Rep 418.
[25] Keith Mason and J W Carter, ***Restitution in Australia*** (1995), [215]; cf ***Cressman and Anor v Coys of Kensington (Sales) Ltd (McDonald, Part 20 Defendant)*** [2004] 1 WLR 2775.
[26] Keith Mason and J W Carter, ***Restitution in Australia*** (1995), [215], [809], [839], [932].

76 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 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.

Free Acceptance

77 The development of the law in Australia seems now to recognise the obligation of a defendant to pay reasonable remuneration for an accepted benefit based on unjust enrichment[27] without the necessity of a request having been made.

78 In ***Angelopoulos and Anor v Sabatino and Anor***,[28] Doyle CJ, with whom Duggan and Nyland JJ agreed, dealt with the claim as a claim in restitution. He concluded that an explicit request is not an essential element to the success of the claim such as the one before him. Doyle CJ considered the decision of the High Court in **Pavey's** case. He said: **Pavey**'s case has now made it clear that a restitutionary claim may be described as a claim *"to recover a debt owing in circumstances where the law imposed or imputed an obligation or promise to make compensation for a benefit accepted".*[29]

79 Doyle CJ sounded a cautionary note as to the concept of acceptance of a benefit and the need to be aware of the potential of the notion being applied in a manner which might unsettle aspects of the law of contract. He referred to the decision in ***Brenner and Anor v First Artists' Management Pty Ltd***,[30] and to the passage from Byrne J's judgment cited earlier.[31]

80 Doyle CJ agreed with Byrne J's observations. He said that the case before him combined factors involving both encouragement and acceptance by the defendant of a benefit, and those factors made it impossible to dispute the finding that the enrichment of the defendant was unjust.

81 In this respect, ***Angelopoulos*** provides an example of a case where free acceptance can satisfy the third element of unjust enrichment – unconscionability – as well as establishing the existence of a benefit. The same cannot be said of incontrovertible benefit, for example, where unconscionability must be independently established.[32]

82 However, more than simple acceptance of a benefit is involved. It is necessary to establish that the defendant acquiesced in the provision of the service, in circumstances where a reasonable person should have realised that a person in the plaintiff's position would expect to be paid for that service. It is also necessary to establish that the defendant had a reasonable opportunity to reject the provision of the service and did not do so.[33] In our view, the exact identity of the person providing the benefit is not a necessary component, so long as the benefit is obtained and accepted.[34]

83 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.

84 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 respondents 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.[35]

85 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

27 Keith Mason and J W Carter, ***Restitution Law in Australia*** (1995), [216]-[218]; see, eg, ***Brenner and Anor v First Artists' Management Pty Ltd*** [1993] 2 VR 221; ***Cadorange Pty Ltd (In Liq) v Tanga Holdings Pty Ltd*** (1990) 20 NSWLR 26; ***Angelopoulos and Anor v Sabatino and Anor*** (1995) 65 SASR 1

28 (1995) 65 SASR 1.

29 Ibid 7.

30 [1993] 2 VR 221.

31 Ibid 259-60.

32 ***Rowe v Vale of White Horse District Council*** [2003] 1 Lloyd's Rep 418, 421-2; Goff and Jones, ***The Law of Restitution*** (6th ed, 2002), [1-019].

33 ***Rowe v Vale of White Horse District Council*** [2003] 1 Lloyd's Rep 418, 422; Keith Mason and J W Carter, ***Restitution Law in Australia*** (1995), [217]; ***Brenner and Anor v First Artists' Management Pty Ltd*** [1993] 2 VR 221, 260.

34 Cf ***McKeown v Cavalier Yachts Pty Ltd and Anor*** (1988) 13 NSWLR 303.

35 Cf ***Rowe v Vale of White Horse District Council*** [2003] 1 Lloyd's Rep 418.

been entitled had it completed the work. Instead, Builders can recover solely on a *quantum meruit* basis, as identified above.

Was the benefit received at Builders' expense?

86 In this case, it is clear that the provision of services, and the payments to subcontractors on behalf of the Lumbers, were at Builders' expense. The correspondence from Sons to which we earlier referred makes it clear that the expense incurred on the Lumbers' behalf was solely incurred by Builders.

Injustice

87 There is an unjust enrichment if there was an element of injustice, unfairness or inequity in the circumstances in which the enrichment was conferred. Alternatively, the conduct by which the defendant seeks to retain the enrichment must be capable of being described as unjust, unfair or unconscionable. An enrichment may be unjust even though it was not obtained at the plaintiff's expense by commission of a wrong.[36]

88 As noted above, free acceptance can satisfy the requirement of injustice or unconscionability. In our opinion, the Lumbers freely accepted the benefit. It is true that the Lumbers had a contract with Sons, which Sons breached by failing to perform the work. It is also true that Builders, who performed the work, was not a company with whom the Lumbers would have chosen to contract. However, we consider that these factors are not determinative of whether there was free acceptance. As we stated above in discussing the nature of the benefit, the Lumbers were not under any misconception as to the nature of the benefit they were receiving, nor did their mistaken belief in the source of the benefit affect the quality or nature of the benefit received. While the existence of a mistaken belief that it was Sons who was completing the work may have affected the question of whether there was a valid assignment of the contract, it is not relevant to the question of whether it would be unconscionable for the Lumbers to retain the benefit provided by Builders. It may, however, go towards what is conscionable for the Lumbers to provide by way of restitution.[37]

89 In this respect, it is necessary to consider only the position as between Builders and the Lumbers. The fact that the Lumbers did not receive all the benefits that they sought – and in particular, that they did not receive the "pedigree" associated with the house being constructed by Sons – does not affect the unconscionability of their retaining the benefits, identified above, that they did receive from Builders.

90 However, weighing against that is the conduct of the plaintiff, and of Sons, and the effect of that on the conscionability of the Lumbers retention of the benefit. We have recounted above the fact that Sons advised the Lumbers by letter dated 1 February 1999 that there was no remaining liability to Sons. The Lumbers believed, as a consequence of the conduct of the Cook companies, that they were dealing exclusively with Sons. It was reasonable for the Lumbers to assume that, as they had no liability to Sons, they no longer had any outstanding liabilities associated with the construction of their house. Builders served the notice of demand on the Lumbers on 8 November 1999.

91 An analogy may be drawn with the case of ***Rowe v Vale of White Horse District Council***.[38] The defendant Council provided sewerage services to tenants of Council houses. The fees were included in the rent paid to the Council. After 1987, some tenants began to purchase their homes. Between 1982 and 2001, the Council made no claim for payment for the sewerage services from the owners of the houses it had sold. Until 1995, this was due to administrative oversight. After 1995, there was uncertainty about whether the Council had the statutory power to retain and continue to operate the sewerage works and pumping stations. This uncertainty in the mind of the Council continued until 2000, when leading counsel advised that the Council did have the power. In 2001, the Council wrote to residents, including Mr Rowe, advising that they would be charged for the services provided from 1995.

92 Mr Rowe had paid Council rates during this time, and water rates to the Thames Water Authority. He had no reason to believe that he was receiving a separately chargeable sewerage service. The Council did not offer a contract, nor was there a covenant for payment made in the conveyance (as there was in some conveyances).

93 In that case, Lightman J considered that a householder in the position of Mr Rowe, who accepted services provided by the Council, had the opportunity to reject the provision of the services, and must have known that the services were not being rendered gratuitously, should be liable to make restitution under the principle of free acceptance. Lightman J did not consider that the free acceptance was affected by the fact that Mr Rowe was unaware of the identity of the supplier of the services. As we have noted above, free acceptance can satisfy two elements of unjust enrichment, and in *Rowe*, the plaintiff Council had, therefore, *prima facie* satisfied all the elements of unjust enrichment.

94 However, Lightman J considered that there were additional circumstances which took the case beyond the realm of the ordinary. In particular, Lightman J regarded as significant the fact that the Council created and perpetuated a reasonable belief that no payment was necessary. Lightman J also noted that it was necessary for the plaintiff Council to establish the unconscionability of Mr Rowe retaining the benefit of the services he received (and thus to establish that Mr Rowe should make restitution); in the circumstances, this could not be established.

36 Keith Mason and J W Carter, ***Restitution Law in Australia*** (1995), [224], [319].
37 ***Pavey & Matthews Pty Ltd v Paul*** (1987) 162 CLR 221, 263-4 (Deane J).
38 [2003] 1 Lloyd's Rep 418.

95 The position in *Rowe* is distinguishable from this case. In *Rowe*, the Council, knowing that it intended to charge for the service if it was legally able to do so, provided the service and failed to inform the residents. Although Builders failed to advise the Lumbers that it was providing the services, nevertheless the Lumbers obtained the benefit always expecting to pay a reasonable fee and the reasonable charges of subcontractors. The Lumbers never queried the work or the cost of the work. Although Sons informed them that no amount was payable to Sons, that letter was written at the time of the liquidation of Builders, when the liquidator was pursuing the Lumbers for payment. It would be unconscionable for the Lumbers to retain the benefit without payment.

Summary

96 In the present case, the benefit received by the Lumbers was the construction of the house. We consider that this was an incontrovertible benefit to the Lumbers. Further, although Warwick Lumbers said that they would not have accepted the benefit if they had known that it was Builders rather than Sons who were building the premises, it seems to us that they, in fact, did accept the benefit of the house, despite not receiving the full extent of what they sought, which included the "pedigree" associated with having Sons construct the house.

97 In the circumstances, it seems that on an objective valuation Builders have conferred a benefit and it is conscionable that Lumbers should have to pay for it.

98 In our view, there is no injustice to the Lumbers to require them to remunerate Sons. There is no suggestion that delay has affected the position. There is no suggestion that failure to insure has affected the position. There is no effect of Builders not having been licensed. There has been no evidence that there has been a diminution in the value of the benefit by Builders having undertaken the work, rather than Sons having performed its obligations under the contract.

Conclusion

99 Builders' claim based on there being an assignment of the benefit of the contract from Sons fails. We agree with the trial Judge that the requisite intention to assign has not been established by Builders. In any event, s 39 of the *Builders Licensing Act* precludes recovery in contract by builders that are unlicensed for a reason other than inadvertence. Builders' failure to hold a licence in the circumstances precludes their recovering contractual damages.

100 Builders have established that the Lumbers have been unjustly enriched by Builders' provision of services. We consider that the provision of building services, and the coordination and payment of subcontractors, provided the Lumbers with an incontrovertible benefit, which they accepted and retained. It would be unconscionable for the Lumbers to retain that benefit without making restitution to Builders.

101 We would allow the appeal. We would order that the first and second respondents pay Builders the sum of $261,715. We will hear the parties on the question of interest and costs.

VANSTONE J:

Introduction

102 The appellant, W Cook Builders Pty Ltd (In Liq) ("Builders"), took proceedings in the District Court seeking payment for certain building work carried out at the premises of the first and second defendants, Matthew and Warwick Lumbers ("the Lumbers"). It was not contended that there was a contract between Builders and the Lumbers. The claim was based on an assertion that there was an oral contract between the third defendant, W Cook & Sons Pty Ltd ("Sons") and the Lumbers and that such a contract had been assigned by Sons to Builders. Alternatively (though faintly) the claim was put as one for payment on the *quantum meruit* or restitution.

103 After a trial in the District Court the plaintiff's claim was dismissed, the trial judge finding that there had been no assignment of the contract and that the prerequisites for a claim for restitution had not been met.

104 Upon the appeal the claim of Builders was principally addressed to restitution, although the equitable assignment claim was also maintained.

Background

105 In a detailed judgment the trial judge set out comprehensive findings as to the nature of the relationships between the parties and of the events which occurred. I shall mention only those features which are essential to the issues on the appeal.

106 The arrangement between the contracting parties, the Lumbers and Sons, was an unusual one. There was a close relationship between Warwick Lumbers and one McAdam, then a director of Sons, who represented it in the negotiations and in the subsequent dealings as the house premises were built. Agreement was reached in September or October 1993 that Sons would act as builder to construct a house as specified in plans prepared by the Lumbers' architect. Some of the work, including the steel work, was to be performed or subcontracted by the Lumbers. In respect of the work commissioned or carried out by Sons, McAdam was entrusted with the task of assessing and approving invoices rendered by subcontractors and rendering invoices for any work done by Sons itself. Although a price was never determined, it was agreed that the Lumbers would pay Sons an amount to cover supervision of the project, which would be determined by McAdam. The judge was unable to ascertain more precisely the terms of the contract because it was never formalised, because of the lapse of time since the relevant discussions and because McAdam did not give evidence.

107 Warwick Lumbers' evidence, wholly accepted by the judge, was that he selected Sons to do the work because it was a well-established firm with a fine reputation, and because of his relationship with McAdam. The project

commenced in about November 1993. Payments were made by the Lumbers to Sons during the currency of the work, but they were not progress payments in the usual sense. Rather, McAdam would request of the Lumbers that they send a particular amount to be applied to the project and the Lumbers would comply. The building was finished in 1995 and was, subject to specific matters which needed addressing, satisfactory to the Lumbers. Warwick Lumbers then occupied the house.

108 In about late February 1994 there was an internal rearrangement of the relationship of Sons and the associated company, Builders, in respect of this and other projects which Sons had on foot. It was McAdam, then a director of both companies, who decided upon and implemented this arrangement. It was attested to by the plaintiff's witness, Jeffrey Cook, but very few details of it were provided to him. McAdam simply told him of it. It was not documented. McAdam was not called by either party.

109 The judge found that the arrangement, which can be called a reorganisation, was as follows. The building aspect of Sons' business was to be transferred to Builders, whilst the joinery operations remained within Sons. In relation to the Lumbers project, payments to subcontractors and other costs would now be met by Builders. However, the same personnel would work on the project, and McAdam would continue to determine the payments to be made by the Lumbers. The payments by the Lumbers would continue to be made to Sons. From an external perspective, nothing had changed at all. The trial judge did not determine whether this relationship between Sons and Builders was of a contractual nature, although he adverted to such a possibility.

110 It was common ground that Warwick Lumbers knew nothing of this reorganisation. As far as he was concerned Sons completed the project. Throughout he dealt only with McAdam. His evidence, accepted by the judge, was that had he been asked whether the project could be assigned or taken over in some way by Builders, he would have declined. He would have declined because it was his intention to deal with Sons by reason of their reputation and because of McAdam's position there. Furthermore, he would not have agreed to the project being undertaken by an unlicensed entity (which Builders was) as it would have jeopardised his insurance.

111 After completion of the project Builders went into liquidation. This action was brought by the liquidator seeking reimbursement for amounts paid to sub-contractors by Builders. The action was originally against Sons as well, but a Master of the District Court ordered that the liquidator provide security for costs and that security was never given.

Assignment of Contract

112 The first basis on which the claim was put was that there had been an assignment of the Lumbers contract from Sons to Builders. The judge found that that was not made out. He found himself unable to conclude that there was an intention on the part of Sons to assign the benefit of the contract to Builders. In particular, the judge pointed to the consequence of neither side calling McAdam to give evidence as to the nature of the arrangement between Sons and Builders. He also had regard to the absence of any written assignment, the fact that the Lumbers were never told of any assignment, and the continuing role of McAdam in determining payments, as factors which tended to suggest that there was no intention to assign the contractual benefit. In my view the judge's reticence was entirely understandable. The way in which the plaintiff conducted its case made it difficult to justify a finding of the type for which it contended.

113 Senior Counsel for the respondent made forceful submissions on the appeal to the effect that, in any event, the contract between Sons and the Lumbers was of a personal nature, such as would not allow for its assignment. This point was considered but not expressly decided by the trial judge.

114 Where a contract is, by its nature, personal between the parties, the benefit of that contract cannot be assigned: ***Southway Group v Wolff*** (1991) 57 BLR 33; ***Bruce v Tyley*** (1916) 21 CLR 277. A contract may be "*personal*" in this sense either by express stipulation in the contract or because the identity of a contracting party is of particular significance in all the circumstances.

115 In the present case, the judge found that "the Lumbers had a genuine commercial interest in seeking to ensure that they were in contractual relations only with a company which they had selected". The informal nature of the contract, whereby McAdam was left to determine what payments ought to be made, clearly evinces a high degree of trust reposed in McAdam by Warwick Lumbers. As seen, the judge also accepted that the Lumbers had chosen Sons to undertake the construction because it was long established and of good reputation – because of its "pedigree", as Warwick Lumbers put it – and that it was important to the Lumbers that the builder be licensed.

116 In my view it is no answer to this to say that the same employees conducted the construction work following the rearrangement between Sons and Builders and that McAdam continued to determine the payments to be made. If the contractual benefit had been assigned, the ultimate right to determine the payments to be made by the Lumbers would have passed from Sons to Builders. It would be inconsistent with the reposing of trust in McAdam by Warwick Lumbers to contemplate allowing another party or individual to stipulate the quantum of the payments. The fact that McAdam happened to continue in this role for most of the contract period cannot retrospectively alter the personal nature of the contract. I consider a finding that the contract was of such a personal nature that the contractual benefit could not be assigned was open to the judge.

Restitution

117 The next question is whether the trial judge was correct in his finding that Builders could not recover the outstanding amounts by way of restitution.

118 This argument invoked the principle of unjust enrichment. There are three aspects to such a claim: first, that the defendant be enriched by the receipt of a benefit; second, that the benefit be gained at the plaintiff's expense; and third, that it would be unjust to allow the defendant to retain that benefit: Goff and Jones, ***The Law of Restitution*** (6th ed, Sweet and Maxwell, 2002) at 1-016.

119 Almost all the argument addressed the first requirement. The concept of benefit requires elaboration, particularly in the context of services. The mere receipt of services is not necessarily a benefit in the relevant sense. However it will be a benefit if the defendant freely accepts the services in question.

120 In relation to the meaning of "*acceptance*" in this context, both Mr Ross-Smith for the appellant and Mr Blue QC for the respondent relied principally on the same case. In ***Angelopoulos & Ditara Pty Ltd v Sabatino & Spiniello*** (1995) 65 SASR 1 the Full Court was concerned with a claim for restitution for building and renovating work performed by the plaintiff and said to have been accepted by the defendants. The Chief Justice, with whom Duggan and Nyland JJ agreed, said (at pages 9-10) in respect of this requirement, that more than mere acceptance was involved. His Honour said the question of acceptance involved a consideration of such matters as: *the basis upon which the provider of the benefit acted, the choice which the recipient of the benefit had in deciding whether or not to accept the benefit and the conduct of the defendant, by which I mean the defendant's knowledge of what the plaintiffs were doing and the basis upon which they did it.*

In upholding the plaintiff's claim in that case the Chief Justice set out (at pages 12-13) nine significant features or circumstances of the relationship. Factor number seven was that the defendant approved of or agreed to the plaintiff performing the work.

121 Relevantly, it was observed by Doyle CJ, at page 10, that even giving to acceptance this loaded meaning, caution still needed to be employed in allowing expansion of the scope of restitution, as it could undermine central principles of the law of contract.

122 In the present case Mr Ross-Smith, for the appellant, put that all that need be shown was that the work itself was accepted by the defendant – in the sense that the work was of the type commissioned by Warwick Lumbers – and when he later found out that the work had been done by Builders rather than Sons, he did not reject it.

123 In my view the judge correctly rejected this contention. The fact is there was no contract between Builders and the Lumbers, either express or implied, nor indeed any other relationship. The Lumbers had no knowledge of the role which Builders was fulfilling on the premises, commissioned by Sons. Therefore the Lumbers were not in a position to exercise a choice as to whether to accept the benefit. That is to be contrasted with the situation in *Angelopoulos*, where a relationship was established between the plaintiff and defendant and where the defendant encouraged the plaintiff to perform the relevant work.

124 I consider that on the undisputed facts, the appellant was never in a position to make out acceptance of the benefit, as that requirement has been interpreted. That is sufficient to dispose of the claim in restitution.

125 The matter may be approached from a different direction. There are numerous authorities to the effect that no restitutionary claim will lie where the plaintiff confers a benefit in performance of an obligation owed to another. (See, for example, ***Pan Ocean Shipping Ltd v Creditcorp Ltd*** [1994] 1 All ER 470). It is suggested by Goff and Jones (at 1-074) that this is so even where the defendant has incontrovertibly benefited from the actions of the plaintiff. Thus where a sub-contractor makes improvements to an owner's land pursuant to a contract with the main contractor, and the main contractor fails to pay, the sub-contractor cannot recover from the owner: *Hampton v Glamorgan County Council* [1917] AC 13. One rationale for this is that the risks accepted by parties to a contractual relationship should not be redistributed to other parties: Goff and Jones at 1-074; *Pan Ocean Shipping* at 475 per Lord Goff; ***Christani & Nielsen Pty Ltd v Goliath Portland Cement Co Ltd*** (1993) 2 Tas R 122, 171.

126 To similar effect is ***Marriott Industries v Mercantile Credits*** (1991) 160 LSJS 288. The facts were analogous to those now under consideration. The plaintiff company had contracted with Taminga Furniture to install a dust extractor system in a factory leased by it. The factory was owned by the defendant but Taminga had an option to buy it at the end of the lease. When Taminga failed to pay some of the moneys claimed by the plaintiff under the contract, the plaintiff sought to recover against the defendant. One plank of its argument was that the defendant had been unjustly enriched. The plaintiff's claim was denied by reason of its having no contract of any sort with the defendant. It was held that there was no acceptance of the work by the defendant. Nor was there evidence of actual enrichment. As pertained there, in my view, so in the present case, recourse was properly to the contracting party rather than to the owner.

127 On the present facts, it seems that the position of Builders is very much that of a sub-contractor. It was delegated building work by Sons, although McAdam remained responsible for determining what payments would be sought from the owner. Those payments were made to Sons, consistent with its position as the main contractor. Although the terms of the arrangement were left more open than in typical sub-contracting situations, this does not change the essential fact that Builders' work on the Lumbers project was performed under obligations owed to Sons as part of that arrangement. The corresponding obligation upon Sons consisted of it accounting to Builders for the moneys it received from the Lumbers.

128 Accordingly Builders is unable to sustain a claim in restitution against the Lumbers. Its remedy, if any, must lie against Sons as the party with which it had a contractual relationship.

129 Mr Ross-Smith argued that such a result would be odious in that the Lumbers would then have received the benefit of a significant quantum of work for which they had not paid. It seems to me that begs the question though. The Lumbers had agreed to pay the price determined by McAdam and did so. The evidence fell short of proving whether the total of all the amounts paid by the Lumbers represented a fair price or something else. In any event, that was what the Lumbers agreed to pay and paid. In the absence of McAdam's evidence it is difficult to draw conclusions as to those matters. Nor is it necessary to, having regard to the judge's finding. Ultimately, it seems clear that Builders must have made a loss on the project, but that would seem to be a product of the unusual and informal relationship into which Builders fell, apparently at McAdam's instigation, and the fact that Builders was not licensed under the *Builders Licensing Act 1986*.

Conclusion

130 In my opinion the appellant has not made good any of its complaints arising from the analysis of the trial judge.

131 For these reasons I would dismiss the appeal