SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY

Case Title:	**A & A Martins Pty Limited v Liu**
Citation:	**[2018] ACTSC 102**
Hearing Date:	23 February 2018
Final Submissions:	6 March 2018
Decision Date:	20 April 2018
Before:	McWilliam AsJ
Decision:	1. The name of the plaintiff be amended to A & A Martins Pty Limited (ACN 072 578 271) trading as A & A Martins Constructions; A & A Constructions; and Martins Building Group. 2. Judgment for the plaintiff in the sum of $198,484.20. 3. The defendants are to pay interest on the judgment sum of $52,492.28. 4. The defendants are to pay the plaintiff's costs.
Catchwords:	**RESTITUTION** – QUANTUM MERUIT – unjust enrichment – where plaintiff substantially constructed a house for the defendants – where defendants refused to pay for work completed on the basis that the contract was signed with a different corporate entity – whether defendants knew or ought to have known that services and goods were being performed or supplied by the plaintiff.
Legislation Cited:	*Limitation Act 1985* (ACT) s 11 *Court Procedures Rules 2006 (ACT)* rr 30, 501,1619, Sch 2
Cases Cited:	*Australia and New Zealand Banking Group Ltd v Westpac Banking Corp* (1988) 164 CLR 662 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14; 253 CLR 560 *Batchelor v Burke* (1981) 148 CLR 448 *Beagle v Australian Capital Territory and Southern New South Wales Rugby Union Limited* [2017] ACTCA 29 *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 *Champerslife Pty Ltd v Manojlovski & Anor* [2010] NSWCA 33; 75 NSWLR 245 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 *Equuscorp Pty Ltd & Anor v Acehand Pty Ltd & Ors* [2010] VSC 89 *Habib v Radio 2UE Sydney Pty Ltd* [2009] NSWCA 231 *Helmhout v Apostoloff & Ors; Dempsey-Fiddes v Commonwealth of Australia & Anor; Reynders v Commonwealth of Australia & Anor* [2011] ACTSC 2 *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd [No*

	3] [2014] WASC 162 *Lumbers v W Cook Builders Pty Ltd (in Liquidation)* [2008] HCA 27; 232 CLR 635 *Maples Winterview Pty Ltd v Liu and Li* [2015] ACTSC 58 *Meriton Apartments Pty Ltd v Industrial Court of New South Wales* [2009] NSWCA 434; 263 ALR 556 *Muschinski v Dodds* (1985) 160 CLR 583 *Notaras & Anor v St George Bank Ltd & Ors* [2005] ACTSC 5; 157 ACTR 1 *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR *Roxborough v Rothmans of Pall Mall* [2001] HCA 68; 208 CLR 516
Texts Cited:	K Mason, J W Carter and G J Tolhurst, *Mason & Carter's Restitution Law in Australia* (LexisNexis Butterworth, 3rd ed, 2016)
Parties:	A & A Martins Pty Limited (ACN 12 072 578 271) trading as A & A Martins Constructions; A & A Constructions Pty Limited; and Martins Building Group (Plaintiff) Bin Liu (First Defendant) Chen Huan Li (Second Defendant)
Representation:	**Counsel** Self-represented (Plaintiff) Self-represented (First Defendant) Self-represented (Second Defendant) **Solicitors** Self-represented (Plaintiff) Self-represented (First Defendant) Self-represented (Second Defendant)
File Number:	SC 235 of 2017

Introduction

1. The dispute before the Court concerns a residential property in Bonner in the Australian Capital Territory (**property**). The plaintiff is a construction company. The defendants are husband and wife and the owners of the property. Stripped of the detail, the plaintiff's claim is that it substantially built a residential dwelling on the property for the defendants between July 2011 and August 2012 and has not been paid for most of that work, including for all the construction materials that the plaintiff supplied to the defendants.

2. The defendants' case is that a house was substantially built, but by a different corporate entity to the plaintiff, and that the matter has already been decided, through the decision of Mossop AsJ (as his Honour then was) in *Maples Winterview Pty Ltd v Liu and Li* [2015] ACTSC 58 (***Maples Winterview***).

3. The defendants contend that the reason they have not paid for the construction of the dwelling arises from what they say are major building defects regarding the insulation for the slab, which may need to be reconstructed, with all the building structure above the slab possibly needing to be removed. The defendants contend the plaintiff was a subcontractor and that they had no obligation of payment to the plaintiff. Further, in their Defence filed 5 October 2017, the defendants argue that the first time they became aware of the plaintiff's involvement was when the decision of *Maples Winterview* was handed down.

4. At the commencement of the hearing, the plaintiff was granted leave to be represented by Ms Maria de Lurdes Martins, one of its company directors pursuant to r 30(4) of the *Court Procedures Rules 2006* (ACT) (**Rules**), for reasons which I gave at the time, having regard to the considerations set out in *Helmhout v Apostoloff & Ors; Dempsey-Fiddes v Commonwealth of Australia & Anor; Reynders v Commonwealth of Australia & Anor* [2011] ACTSC 2, and in particular at [45].

5. The defendants were also self-represented and it was apparent that English was not their first language. This, combined with the lack of anyone with legal expertise, has caused difficulties with the way the case was pleaded, defended, presented and argued.

The proper plaintiff

6. One of those difficulties is that the Originating Claim describes the plaintiff as A & A Martins Pty Limited (ACN 12 072 578 271) t/a A & A Martins Constructions; A & A Constructions Pty Limited; and Martins Building Group. This appeared to be a mixture of separate corporate entities, and business names which do not have the ability to bring proceedings in their own right.

7. Raising this with the plaintiff brought confusion as to whether only one entity was bringing proceedings, trading under a number of different business names, or whether A & A Constructions Pty Limited was also intended to be a plaintiff. As the claim in these proceedings focuses on precisely who did the work for the defendants, it was important to understand who it is that makes the claim.

8. Accordingly, the plaintiff was given the opportunity to file further evidence by way of an ASIC search as to the proper plaintiff, which establishes that the relevant legal entity with the ability to sue is A & A Martins Pty Limited (ACN 072 578 271), and that one of the names under which it trades is A & A Martins Constructions. Its ABN is 12 072 578 271.

9. The further evidence confirmed there is an error in how the plaintiff was described in the Originating Claim, with the inclusion of the words 'Pty Limited' after A & A Constructions as one of the trading names. Pursuant to r 501 of the Rules, the plaintiff's name will be amended to read A & A Martins Pty Limited (ACN 072 578 271) trading as A & A Martins Constructions; A & A Constructions; and Martins Building Group.

Nature of claim

10. The basis of the claim is described as *quantum meruit*, resulting in an alleged unjust enrichment, being that the defendants now have the benefit of a house that was substantially built by the plaintiff, using materials purchased by the plaintiff, and yet

they have not paid the plaintiff. The plaintiff claims $251,974.14 plus interest on that sum in the amount $80,577.27.

11. The plaintiff does not make any claim in contract or for any builder's fee or labour costs by it directly. The reason for that will be apparent from the discussion of the earlier decision of *Maples Winterview* below. The claim is limited to the expenses that the plaintiff incurred in building the property, examples being the buying of the timber, tiles, and bathroom fittings, or paying contractors for services, such as doors to be fitted, roofing to be completed, and electrical and plumbing work to be undertaken.

12. Where goods are supplied as opposed to services, historically that aspect of the claim has been characterised as one of *quantum valebat* (or *valebant*) meaning 'as much as it was worth': *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783 at 805. See also the discussion in *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 (***Pavey & Matthews***) at 251 per Deane J.

13. These forms of action have gone since *Pavey & Matthews* (discussed further below), based as they were in quasi-contract, with the right to recover for such a claim now depending on a claim to restitution, based on unjust enrichment. The common feature of claims for *quantum meruit* and *quantum valebat* is the recovery of a reasonable sum of money representing the value of work, services, or goods requested and/or accepted by the defendants: K Mason, J W Carter and G J Tolhurst, *Mason & Carter's Restitution Law in Australia* (LexisNexis Butterworth, 3rd ed, 2016) pp 15, 19-20, 83.

14. Accordingly, although a claim of *quantum meruit* was pleaded, I have taken the nature of the claim to be one seeking restitution based on unjust enrichment, in the form of payment of a fair and reasonable sum for services rendered or goods supplied to the defendants.

Background to the proceedings

15. The dispute between the parties takes place in the context of other litigation to which each party referred during the hearing. In 2015, an entity related to the present plaintiff brought proceedings against the defendants on the basis of breach of contract: see *Maples Winterview*. The proceedings before Mossop AsJ dealt with the same building project on the property as that now the subject of these proceedings. Maples Winterview Pty Ltd (**Maples**) had sought to enforce progress payment claims against the defendants on the basis that it was the contracting party with the defendants and had carried out work for them. The plaintiff was not a party to those proceedings.

16. Mossop AsJ found that Maples was not entitled to recovery of any moneys because it had not completed the stage of the build that would have entitled it to a progress payment. Specifically, Maples had not constructed the slab on which the house was built in accordance with the requirements of the contract. Further, Maples had not validly terminated the contract before it had completed the entire project. The consequence of that finding was that Maples was not entitled to payment for the work that had already been carried out, or materials that had already been supplied or ordered under the contract.

17. However, for completeness, his Honour went on to consider further arguments in *obiter*, one of them being the relationship between Maples and A & A Martins Pty Limited. His Honour found that the intercompany arrangements between Maples and

the plaintiff in the present proceedings did not demonstrate that the labour costs were separately identifiable so as to prove that they were incurred by Maples.

18. Mossop AsJ made a number of findings that are clearly the genesis for the present proceedings. His Honour stated at [129]-[131] (emphasis added):

> 129. Notwithstanding that it was the contracting party, no building work was in fact undertaken on the site by the plaintiff. Rather, building work was undertaken by A & A Martins Pty Ltd (A & A Martins). The costs incurred by A & A Martins were then the subject of accounting entries in the accounts of the companies. …
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> 130. There is no evidence of any contract between A & A Martins and the plaintiff. There was however evidence that by reason of the companies being part of a group of companies controlled by a single family that the costs incurred by the plaintiff were treated as liabilities of the plaintiff and recorded in A & A Martins' financial records as work in progress. …
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> 131. **In the absence of a contract it is clear enough that the work was carried out by A & A Martins at the request of the plaintiff and that there would be an entitlement to reasonable remuneration. That remuneration would be assessed on the basis of the market value of the services provided.** In the present case there was no evidence to indicate that the contract price under the Contract did not represent the market value of the services provided. In those circumstances I accept that it is evidence of reasonable remuneration for the construction of the house on the defendants' land. Therefore while a claim for reasonable remuneration in relation to an ineffective contract is not capped by reference to the contract price (see *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234 at 276-278), in the case of an entitlement to reasonable remuneration as between A & A Martins and the plaintiff the claim could not exceed $289,000.

19. The evidence fell short of establishing that the costs incurred by A & A Martins Pty Limited could be tied to the plaintiff in those proceedings, being Maples. Mossop AsJ stated at [136]-[140] (emphasis added):

> 136. In my view the plaintiff has not established that the amounts claimed for labour were costs to it of the building work. That is because, firstly, the evidence as to intercompany arrangements did not extend to demonstrating that the costs of company employees were allocated to other companies in the group. Consistent with a lack of intercompany accounting in relation to labour was the absence of any allocation within the company records of the time spent by employees on particular jobs and hence the necessity to undertake the exercise undertaken in exhibit 13.
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> 137. Secondly, the plaintiff has not established the accuracy of the assumption about how much time the particular workers spent working on the different jobs. No business records (such as timesheets) were tendered to support the allocation of time devoted by different employees to the Bonner job.
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> 138. Thirdly, in my view the cost of the building works for the purposes of clause 25.8 does not extend to an apportionment of overhead costs such as time spent by directors in the general management of the company. The evidence in the present case was insufficient to tie the activities of office staff or directors to the building works. While I accept that there may be situations where off site costs could be recoverable, the evidence in the present case was insufficiently detailed to demonstrate that what was claimed was a 'cost of the building works' to the date of the termination of the Contract.
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> 139. Based on the evidence I am satisfied that the plaintiff incurred a liability of $247,543.96 in relation to the construction of the dwelling for the defendants. **That is a liability because of the entitlement of A & A Martins to reasonable remuneration for the work undertaken. There is no doubt that it is entitled to the reasonable costs of materials and subcontractors employed on the site and no evidence that the costs of materials or subcontractors identified in the materials annexed to Mr Riley's affidavit were not reasonable.** Further, the amount bears a reasonable relationship with the contract price between the plaintiff and the defendants having regard to the unfinished state of the premises and the absence of evidence as to the amount of work necessary to

> complete the house to a point where a certificate of occupancy could be issued. However I have not found any amount beyond that to be a liability of the plaintiff to A & A Martins because the evidence does not establish the entitlement to the amounts asserted to be labour costs and the building was not completed so as to permit the assessment of reasonable remuneration to be made by reference to the contract price of $289,000.
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> 140. I have not found that there was a contract between A & A Martins and the plaintiff. …

20. In concluding remarks, his Honour stated at [158] (emphasis added):

> I observe that this outcome is less than satisfactory. **It appears to be an inappropriate outcome that a building company which has incurred the expense of substantially constructing a house for the owners does not recover any of the costs of that exercise.** However the conclusion that I have reached is the result of my finding that the plaintiff had no entitlement to insist upon payment of its progress claims because of its failure to complete the stage of the construction relating to the slab. The failure to install insulation under the slab was an issue which inevitably created difficulties in complying with the terms of the Contract. Had the matter been addressed at an early stage it would have been possible to formally vary the Contract so as to address the issue one way or another or alternatively to remove the slab that had been poured and construct a new slab in accordance with the contractual requirements. Alternatively it would have been open to the plaintiff to complete the Contract without insisting on the making of progress payments and then claim payment for the entire cost of the works at the conclusion of the project at which point it could take the benefit of the definition of practical completion so long as a certificate of occupancy could be obtained. In that situation some agreement would need to be reached as to the consequences of the failure to install insulation under the slab or damages would have been payable. The quantum of those damages may have been a contested issue under the statement of principle in *Bellgrove v Eldridge* [1954] HCA 36; (1954) 90 CLR 613. Plainly enough continuing with the project would have increased the financial exposure of the plaintiff but would have met its obligation to complete the entire Contract.

21. Following the comments highlighted in the extracts above, with Maples having been unsuccessful in contract in those proceedings, the present plaintiff now seeks to recover some of the costs incurred by it from the defendants. No claim for direct labour costs is made.

Applicable principles

22. Given the parties were unrepresented, and the nature of the defendants' arguments in defence of the claim, it is useful to explain here the legal concepts that apply to this case.

23. 'Unjust enrichment' is a label or a unifying concept, not a legal principle applied as a direct source of liability or a cause of action: *Pavey & Matthews* at 256-257 per Deane J, *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 378-379, per Mason CJ, Deane, Toohey, Gaudron, McHugh JJ, and 401 per Dawson J.

24. This informative generic label describes the type of circumstances where the law recognises an obligation on the part of the defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff: *Muschinski v Dodds* (1985) 160 CLR 583 at 617.

25. Common features for a successful restitutionary claim for unjust enrichment may be drawn from a number of the authorities: see *Pavey & Matthews* at 256-257, *Roxborough v Rothmans of Pall Mall* [2001] HCA 68; 208 CLR 516 at [139] fn 257; *Australia and New Zealand Banking Group Ltd v Westpac Banking Corp* (1988) 164

CLR 662 at 673-674 (per curiam); *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* [2014] HCA 14; 253 CLR 560 at [16]-[20], [73], [74], [141]; *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd [No 3]* [2014] WASC 162 per Edelman J at [51] and the cases there-cited. Although it is perhaps obvious from the very words 'unjust enrichment', an entitlement to restitution on that basis will arise when, subject to defences, three components exist:

(a) The defendant is enriched (or benefited);

(b) The enrichment has come at the expense of the plaintiff; and

(c) The enrichment (or its retention) is unjust.

26. *Mason & Carter's Restitution Law in Australia* (supra) then raises two further questions before restitution for unjust enrichment may be awarded (at pp 9, 49):

(d) Is there any recognised defence to the claim?; and

(e) Is a personal or proprietary remedy appropriate?

27. It is not necessary on the facts of the present case to give detailed consideration as to what constitutes a benefit or the circumstances in which the benefit obtained might be 'unjust'. The relevant underlying principles are sufficiently encapsulated in *Pavey & Matthews* at 263 and in *Lumbers v W Cook Builders Pty Ltd (in Liquidation)* [2008] HCA 27; 232 CLR 635 (***Lumbers***) at [79], [89].

28. In *Pavey & Matthews*, Deane J observed at 263 that the concept of monetary restitution:

> …involves ... the payment of an amount which constitutes, in all the relevant circumstances, fair and just compensation for the benefit or 'enrichment' actually or constructively accepted. Ordinarily, that will correspond to the fair value of the benefit provided (e.g. remuneration calculated at a reasonable rate for work actually done or the fair market value of materials supplied).

29. In *Lumbers*, Gummow, Hayne, Crennan and Kiefel JJ said:

> [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* [(1946) 72 CLR 386], 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. …
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> ...
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> [89] 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. Builders would have an action for work and labour done or money paid for and at the request of the Lumbers.

30. Both *Pavey & Matthews* and *Lumbers* were discussed by the Court of Appeal in *Beagle v Australian Capital Territory and Southern New South Wales Rugby Union Limited* [2017] ACTCA 29 at [79]-[84], [92].

The evidence

31. In support of the claim, the plaintiff relies on business records of the plaintiff, such as planning approval documents and emails between the plaintiff and the defendants. These documents are said to demonstrate that the plaintiff was known by the defendants to be the builder at the property. In this regard, the first defendant was also cross-examined as to his conduct throughout the building project, in signing documents and in attending at various suppliers to select items such as tiles and tapware.

32. A bundle of invoices was also before the Court, for items such as construction materials, fittings and fixtures and electrical and plumbing work. These invoices in large part identified the property, had a 'paid' stamp, a date and the cheque number by which the invoice was paid. The plaintiff also tendered from its business records the accounts to demonstrate the payment of each invoice.

33. A letter of demand dated 25 May 2017 was also in evidence. The plaintiff demanded payment for $229,067.40 being for costs incurred in the construction of the property. GST was claimed in the sum of $22,906.74 (although as discussed below, the additional GST was incorrectly charged). It is uncontroversial that the defendants have not paid the amount requested.

Findings of fact

34. It is clear that there was a contract between Maples and the defendants dated 12 July 2011 for the construction of a residential dwelling on the property. The builder named in the contract was 'Maples Winterview Pty Ltd (Agostinho Martins)'. The ABN listed on the contract for Maples was ABN 112 495 879. That is consistent with the findings in *Maples Winterview*.

35. However, Attachments D and E (clauses 17 and 18 of the contract), record the prime cost items and provisional sums as being: 'as per inclusions list'. The contract is defined in clause 2 of the contract to include those attachments. The list was not physically attached to the copy of the contract tendered, but it was in evidence, being a document titled 'building quotation' dated 10 July 2011. The document listed the defendants as the client, the property as the site address and the inclusions as being 'as per attached inclusions list plus sub items'. It is signed by each of the defendants and by Mr Martins. There is a handwritten amendment to the inclusions list, bringing the total cost to $289,000, which is the same amount listed on the contract with Maples.

36. The inclusions list displays the letterhead of Martins Building Group, and the ABN of the plaintiff on the front page. On the last page of the document, next to the date, the words 'Bonner Inclusions List A & A Martins Building Group Pty Ltd' are stated.

37. The evidence before the Court discloses that it was the plaintiff who commenced the building project. A building commencement notice application form, signed by the plaintiff and each of the defendants on 6 August 2011, listed the builder as the plaintiff (not Maples), with the nominee as Mr Martins.

38. The holder of the residential builders' warranty policy of insurance taken out for the property on 12 August 2011 was also the plaintiff (not Maples). The beneficiaries named on the insurance policy held by the plaintiff were the defendants.

39. The building commencement notice, certified on 15 August 2011, was issued to the plaintiff.

40. Sadly, Mr Martins developed a brain tumour, it appears rather suddenly, and died on 9 October 2011.

41. In September 2011, 'Ruth' (who is later identified in correspondence as Ms Ruth Martins) started communicating with the second defendant, using the same email address as Mr Martins had previously used, being 'aacons@iinet.net.au'. Her signature block was listed as the Martins Property Group. The second defendant was requested to complete the external colour selections sheet and in reply, she asked the identity of the roof supplier.

42. The building project continued and the building inspection reports signed by the building certifier all record the plaintiff as the builder. There is a notation on the report dated 5 December 2011, stating 'A change of builder will be required – Mr Martin [sic] is deceased'.

43. In December 2011, Ms Ruth Martins issued a quotation for additional items to the first defendant. Underneath her signature is the word 'director'. The letterhead clearly states that the communication was coming from Martins Building Group and A & A Constructions. The ABN identified on the letterhead was 12 072 578 271. The quotation for additional work in evidence was for bricks for retaining walls, concrete footing, extending the height of external plumbing and backfilling retaining walls.

44. Although the quotations were not accepted, they serve as further evidence of who the defendants were dealing with, directly, on their building project. On 1 February 2012, there is an email exchange between the first defendant and Ms Ruth Martins. I have inferred that the first defendant was also acting on the second defendant's behalf, given he was the partner of the second defendant and the email address he used to communicate was the same Hotmail address (identifying her name) that the second defendant had previously used to communicate with Ms Ruth Martins. The email exchange confirms the defendants' selections of tiles from a company described as Volare and then a request for carpet in the bedroom and lounge, with another area being a timber floor.

45. There may have been some confusion arising from the fact that the plaintiff was not listed as the contracting party and the fact that there are references to A & A Martins Building Group Pty Ltd and A & A Martins Property Group. However, this was not a case where the plaintiff was an unknown subcontractor. Even though they did not receive a formal communication from the plaintiff, the defendants knew that the licensed builder who signed the contract had died and they were communicating on a regular basis with representatives known to be from a different corporate entity, being the plaintiff (by virtue of the use of the plaintiff's letterhead and ABN). The plaintiff is listed on all the formal approval documents as the builder undertaking the work.

46. Accordingly, from the evidence set out above, I have concluded on the balance of probabilities that the defendants were aware, or ought to have been aware, that the plaintiff, through its trading names, was undertaking the building project at their request from September 2011.

47. As to any alleged defect in the building work, to the extent that it is relevant, there was insufficient evidence to support the argument that the building structure above the slab

may need to be removed. The parties each referred to the decision of *Maples Winterview* and there was a finding by Mossop AsJ at [102] that a particular insulation was not installed beneath the concrete slab. However, there was nothing beyond allegations of such a defect in the present proceedings and even regard were had to the findings in *Maples Winterview* of a lack of insulation, that does not mean the entire dwelling constructed on the slab is defective or should be removed. The affidavit evidence of the building certifier, Mr Bates, was to the contrary, namely that he recommended the issue of the Certificate of Occupation and Use, and the certificate (which was in evidence) was issued on 26 November 2013.

48. I note that the defendants pleaded there were significant defects in building works that have not been remedied. To the extent that was a complaint about other defects, there was insufficient evidence led to support the allegation.

The defendants have been enriched at the expense of the plaintiff

49. I accept that the defendants have received a benefit, being the goods delivered and used in the construction of the dwelling, and the services provided as set out in the invoices in evidence, subject to some limited qualifications set out below.

50. This was an arm's length commercial dealing between the parties and there could be no suggestion that the plaintiff was purchasing materials, such as bricks and window frames, or paying for services, such as the engagement of roofing contractors or the installation of doors, for the defendants at no charge.

51. I also accept that it was the plaintiff who paid for the materials and services, to the extent that I have been able to match the amounts invoiced to the plaintiff or one of its trading names with the accounting records of the payments made.

The retention of the benefit without payment would be unjust

52. Following *Pavey & Matthews* and *Lumbers*, the facts of this case fall into one of the established categories (or archetypal cases) in which it has been held that it would be unconscionable for the defendants to retain the benefit of the building materials supplied and services provided without any payment.

53. The defendants contend that their liability to pay was governed by the contract and that *Winters Mapleview* determined that there was no further liability to pay any money under the contract. The argument, on first consideration, appears to be similar to the facts of *Lumbers*. In that decision, two people ('the Lumbers') entered into a building contract for the construction of a house on land. Unbeknown to the Lumbers, the company with whom they had contracted then entered into an arrangement with an associated company ('Builders') to carry out the building project. There was no assignment or novation of the contract. The work was done and the Lumbers paid the company the full amount owing under the contract. However the company then failed to pay Builders in total for the work it had carried out. Builders sought payment from the Lumbers as the customer directly, on a *quantum meruit* basis for the work it had done and from which the Lumbers had derived a benefit, where it was not in dispute that the work of the company was not referable to any contract between it and the customer. In that case, and as pointed out by the Court of Appeal in *Beagle* at [86], the plaintiff could point to no request from the customer that it do the relevant building work.

54. Here, there was no contract between the plaintiff and the defendants and the plaintiff was plainly a company associated with Maples, although the precise company arrangements and structure were not in evidence. It is an essential step to consider how the plaintiff's claim fits with the contract the defendants made with Maples: *Lumbers* at [79]. I have given careful consideration to whether the rights and obligations of the defendants were governed solely by the contract they signed with Maples and whether to impose liability in the circumstances of this case would be to force liability on the defendants behind their backs (and thus be contrary to the principle articulated in *Lumbers* at [80]), in the sense of directly contradicting the terms under which the defendants contracted with Maples.

55. The situation is different from an unknown subcontractor attempting to leap over the head contracting party to recover money from a customer directly. The only evidence I could find of the involvement of Maples at all in the building project was that it was named on the final contract signed. The plaintiff was disclosed as the entity responsible for the supply of the materials from the inclusions list that the defendants signed and even if they had not even been mentioned in the contract, Mr Martins, who held the builder's licence for Maples, fell ill and died, and the building project continued with the full involvement of the two defendants directly dealing with the plaintiff. Although they may not have paid attention to the precise details of the corporate entity that was now carrying out the work, they were aware that these materials were being purchased at their request – they were the ones selecting the tiles, for example, and choosing the type of flooring and the colour of the roof – and that the people who were arranging for all this to happen traded as Martins Building Group.

56. It is that element of a continued general course of dealing directly with representatives of the plaintiff following the death of Mr Martins that results in this case being one of the plaintiff doing work and paying money at the defendants' request, such that it would be unjust if the law did not impose an obligation on the defendants to restore the plaintiff for the benefit received by them.

No operable defence arises

Delay

57. The defendants complained in written submissions that *Maples Winterview* was handed down in 2015 and two years passed before the present plaintiff then commenced these proceedings. However, the delay was not unreasonable, particularly having regard to s 11(1) of the *Limitation Act 1985* (ACT) which prescribes a period of six years before the remedy will be barred by statute. All invoices were paid by the plaintiff within the six-year period prior to 3 July 2017, when these proceedings were commenced. The defendants (who bear the onus in this regard) have not pointed to any other matter by which delay could be said to constitute a bar to the remedy. Accordingly, delay is not a defence to the claim.

Anshun estoppel

58. The defendants submitted that the decision of *Maples Winterview* itself barred recovery by the plaintiff here. The plaintiff was not a party to *Maples Winterview* and is not bound by that decision, subject to any question of issue estoppel, which was not pleaded here.

59. Assuming however (as the defendants were self-represented), that the defendants' argument, properly characterised, raises the question of *Anshun* estoppel, I have determined that it does not succeed, for the following reasons.

60. The principle derives from *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 597-603 per Gibbs CJ, Mason and Aickin JJ. It prevents a party to litigation in which a final judgment was given (or that party's privy) from raising in subsequent litigation an issue or cause of action which was, or which should have been, raised in the first proceedings. The principle has been referred to in this jurisdiction in *Notaras & Anor v St George Bank Ltd & Ors* [2005] ACTSC 5; 157 ACTR 1 at [8].

61. The test for whether the issue ought to have been litigated as part of the earlier proceedings is based on the reasonableness or otherwise of the conduct of a litigant in the earlier proceedings: see *Meriton Apartments Pty Ltd v Industrial Court of New South Wales* [2009] NSWCA 434; 263 ALR 556 at [60]. The mere fact that the issue *could* have been raised does not mean it *should* have been raised (for the principle to operate). Rather, it has to be so relevant as to make it unreasonable not to raise it: *Champerslife Pty Ltd v Manojlovski & Anor* [2010] NSWCA 33; 75 NSWLR 245 per Allsop P (as his Honour then was) at [4].

62. *Anshun* estoppel may arise even though the parties to the second proceeding are not the same as the first: *Habib v Radio 2UE Sydney Pty Ltd* [2009] NSWCA 231 (***Habib v Radio* 2UE**) at [83] per McColl JA (with whom Giles and Campbell JJA agreed); *Equuscorp Pty Ltd & Anor v Acehand Pty Ltd & Ors* [2010] VSC 89 at [27].

63. In *Habib v Radio 2UE*, McColl JA went on to state at [84] and [85] (with emphasis added):

> A strict approach is necessary in an *Anshun* estoppel case to the inquiry whether there exists the requisite identity between the proceedings; **the mere fact that the proceedings are closely related is insufficient;** a technical approach is not helpful, the doctrine being concerned with substance and not form: see *Bazos and Anor v Doman and Ors* [2001] NSWCA 347 (at [44]) per Stein JA (Priestley and Beazley JJA agreeing) and the authorities to which his Honour refers. In determining whether an *Anshun* estoppel has been established, the court inquires into realities and not mere technicalities: *R v Humphrys* [1977] AC 1 (at 41) per Lord Hailsham; cited with approval by Handley JA (Young CJ in Eq agreeing) in *Cleary v Jeans* [2006] NSWCA 9; (2006) 65 NSWLR 355 (at [19]). The Court can look at "any material that shows what issues were raised and decided": *Rogers v R* (at 263) per Brennan J.
>
> In considering whether an *Anshun* estoppel has been established it is necessary to bear in mind that "shut[ting] out a claim ... a party wishes to pursue, without determination of its intrinsic merit, on the ground that it ought to have been raised in earlier litigation...is a serious step, [and] **a power not to be exercised except 'after a scrupulous examination of all the circumstances'** ": *Ling v Commonwealth* [1996] FCA 1646; (1996) 68 FCR 180 (at 182) per Wilcox J, approved in *Bazos* (at [45]) per Stein JA (Priestley and Beazley JJA agreeing); see also *Brisbane City Council v Attorney-General (Qld)* [1979] AC 411 (at 425) per Lord Wilberforce.

64. Here, the dispute in *Maples Winterview* concerned the same building project, same land and same defendants, as well as there being common directors of the plaintiff here and of Maples, as can be seen from *Maples Winterview* at [65] and [66]. There was certainly some factual overlap to the extent that the building project was the genesis for each proceedings.

65. However, the focus of the argument before Mossop AsJ, and the issues that were determined in *Maples Winterview*, were centred around the contract between Maples and the defendants, whether progress payments under the contract could be claimed, and whether Maples did any work for the defendants.

66. The finding of Mossop AsJ, as set out above, was that the plaintiff had done the work, not Maples, as had been claimed under the contract. That became the starting point for the present proceedings (although it was separately proven here), and in that sense, although the proceedings are closely related, they do not involve any re-litigation of issues that were already determined or should have been determined as part of the contractual dispute. The premise of the unjust enrichment claim is that there is no contract between these parties.

67. In short, the issues raised by the plaintiff here are an independent cause of action that is informed by, but does not rely upon, either the contract or its terms as addressed in the previous proceedings with a different plaintiff. The claim here is not 'so relevant' to the issues previously determined that it was unreasonable, in the context of a contractual dispute between a related company and the defendants, for the plaintiff not to have joined those proceedings to run its own unjust enrichment claim.

Defective work

68. It is no defence to the plaintiff's claim that because the work carried out in respect of the insulation under the concrete slab was defective, the defendants do not need to pay for materials used and services provided for other parts of the building project. I have already rejected the submission that the slab may need to be reconstructed in factual findings made above. Moreover, the plaintiff did not make a claim for any of the work that was done in respect of the insulation or laying of the slab.

Appropriate remedy

69. In accordance with the authorities set out above, the appropriate remedy is an order that the defendants pay a fair and reasonable sum for the goods and services supplied. That sum has been determined by reference to the actual cost to the plaintiff, as evidenced by the invoices with third parties, who I accept were all arm's length tradespeople and their invoices represented the fair market value of the materials supplied.

70. The total sum awarded is **$198,484.20**. A schedule to these reasons has been prepared for transparency of the reasoning behind that figure, as there was no summary provided to which reference could be made for that purpose.

71. Where there was a conflict between the amount of the invoice and the amount stated on the remittance advices, I have allowed the amount that was paid, as opposed to that invoiced. Further, where I could not be satisfied that the payment was referable to the property, I have not allowed the amount on that particular invoice. In this regard, there were two invoices, being materials supplied by Reece under an invoice dated 6 December 2011, and an invoice dated 5 August 2011 issued by the Australian Reinforcing Company, which did not expressly state the property as the reference. However, I was able to draw an inference on the balance of probabilities, by reference to the timing of the other invoices in evidence from these suppliers that the goods related to the property.

72. Importantly, the defendants were given the opportunity to dispute any of the invoices, annexed to the affidavit of Ms Maria Martins, however ultimately they did not take issue with the amounts or the materials supplied.

73. It will be seen that no allowance has been made for workers' compensation insurance paid, as it was not demonstrated sufficiently that such insurance was specifically referable to this project, as opposed to be a general cost of the plaintiff conducting its business.

74. Further, I do not consider that any charge of GST by the plaintiff on top of the GST already charged by the third party suppliers is fair or reasonable. GST on labour costs or services separately rendered by the plaintiff may have been appropriate, but there were no such costs claimed here.

75. As to the payment of interest, the Court has the discretionary power to award interest up to judgment pursuant to r 1619 of the Rules, including in a proceeding for the recovery of the value of goods. The Court may order that interest be paid for all or any part of the period between the day the cause of action arose and the day before judgment is entered.

76. The award of interest before judgment is to compensate the plaintiff for the loss or detriment suffered by being kept out of the amount of the debt since the cause of action arose: *Batchelor v Burke* (1981) 148 CLR 448 at 455. The payments made by the plaintiff were all made in the second half of 2011 and over the course of 2012.

77. In this case, although the cause of action arose when the money was paid, the plaintiff did not then seek payment from the defendants for a number of years. The demands for payment that were in evidence were not made until 2017, although that is partly explained by the earlier litigation with a related company, which did not conclude until July 2015. It is difficult to see how the defendants could have paid the plaintiff in light of the fact that they had not been notified of what was payable.

78. Ultimately however, and with the proceedings being fully litigated even after the defendants were notified of the amount sought to be recovered, I have concluded that it is appropriate to give effect to the compensatory nature of the rule. The defendants will be ordered to pay interest on the sum from the date that the certificate of occupancy was issued, being 26 November 2013.

79. Pursuant to Sch 2 to the Rules, interest up to judgment is to be calculated at the rate of 4% above the cash rate last published by the Reserve Bank of Australia before the start of every six month period. Interest on the amount of $198,484.20 has been calculated at the applicable rates from 26 November 2013 to 19 April 2018 (a period of 1606 days), resulting in a sum of $52,492.28.

Costs

80. Costs are in the discretion of the Court. Although the plaintiff was ultimately self-represented, there was in evidence amounts of legal expenses that had been previously incurred, referable to these proceedings, and there may be disbursements, including the filing fee. I see no reason to depart from the ordinary rule that costs follow the event.

Orders

81. The orders of the Court will be:

1. The name of the plaintiff be amended to A & A Martins Pty Limited (ACN 072 578 271) trading as A & A Martins Constructions; A & A Constructions; and Martins Building Group.
2. Judgment for the plaintiff in the sum of $198,484.20
3. The defendants are to pay interest on the judgment sum of $52,492.28.
4. The defendants are to pay the plaintiff's costs.

I certify that the preceding eighty-one [81] numbered paragraphs are a true copy of the Reasons for Judgment of her Honour Associate Justice McWilliam.

Associate:

Date:

Schedule 1

Allowed expenses in respect of property located in Bonner		
Supplier	**Item**	**Amount allowed ($)**
ACT Government	Approval of hydraulic plans	90.60
ActewAGL	Natural gas	54.34
ActewAGL	Natural gas	50.67
ActewAGL	Natural gas	606.28
A-Line Excavations	Footing	506.00
Aon Risk	Home Builders' Warranty Insurance	1127.83
Austral Brick Company Pty Ltd	Bricklayer training	948.42
Austral Brick Company Pty Ltd	Bricks	1896.84
Austral Brick Company Pty Ltd	Bricks	3161.40
Austral Brick Company Pty Ltd	Bricklaying	4109.82
Austral Brick Company Pty Ltd	Universal commons plant	535.26
Austral Brick Company Pty Ltd	GP Std commons	535.26
Australian Reinforcing Company	Slab on ground spcr clip	1866.43
Australian Reinforcing Company	Reinforcing	2212.05
Bink Cement products	Cement step tread	268
Boral	Construction materials	272.80
Boral	Construction materials	3918.20
Boral	Construction materials	4842.20
Brian Milburn & Associates	Surveying	780
Bunnings	Sliding cavity door lock	257.07
Bunnings	Stud Tie	21.90
Canberra Sand and Gravel	Blue Metal Dust	41.80
Canberra Sand and Gravel	Blue Metal Dust	83.60
Canberra Sand and Gravel	White bricklayers sand	79.20
Canberra Sand and Gravel	Hire of loader	594
CRT Building Products (Trusses & Frames Pty Ltd)	Trusses	9270.80
Flexdrive Tank Solutions	Water tank	1595
Gino De Pasquale	Bricks, sills, metre box	10846
Gino De Pasquale	Bricks, double face garage wall	5687
Gino De Pasquale	Retaining wall	770
Graham Pringle	Timber porch	5368.70
Graham Pringle	Roof and garage door	7716.90
HE Plaster Pty Ltd	Plastering	7100
HE Plaster Pty Ltd	Plastering	6600
Herzog Steel	Door frame	60.74
Herzog Steel	Polythene and tape	59.90
Herzog Steel	Adhesive flex and bar chair	66.22
Herzog Steel	Mesh ribwire and spacer clip	1619.99
JD Bates	Engineering fees	4877.59
Jozo Rasic	Plumbing	4000
Jozo Rasic	Plumbing	8000
LS Martiniello	Pantry	7860
M&JM Electrics	Electrical work on site	6600
Marfel Transport Service	Hire excavator	134.20
Marfel Transport Service	Hire excavator	226.60
Magnet Mart	Door locks	694.17
Magnet Mart	Cladding and battens	264.12

Magnet Mart	Hinges	255.42
Magnet Mart	Foil fastener galv and cement	94.75
Magnet Mart	Slider statesman	812.02
Magnet Mart	Pine	16.86
Magnet Mart	Weedmat	134.84
Magnet Mart	Dampcourse	129.17
Magnet Mart	Cement and tape duct	134.36
Magnet Mart	Earmuffs and clouts	93.00
Magnet Mart	Ankascrew and cement	103.11
Magnet Mart	Pine and foam joint	30.30
Magnet Mart	Stud tie, pine, brace	2512.07
Magnet Mart	Stud tie and pine	1058.27
Magnet Mart	Treated pine	201.55
Magnet Mart	Pine	152.05
Magnet Mart	Batten pine wet	21.50
Michael Hadley	Doors	2475
Moraschi	Roofing	19295.17
Reece	Bathroom supplies	3256.21
Reece	Rush shower mixer	895.73
Reece	Gen X wall bas mix set	776.15
Regency	Laminate	1590
Rentokil	Termite barrier	294
Rentokil Termite	Termite barrier	735
Rentokil Termite	Termite barrier	273
Richard Horlock	Bricklaying services	1240.80
Territory Interiors	Tiles	2000
Trend Windows & Doors	Awning window	135.10
Trend Windows & Doors	Stacker sliding door	2025.73
Trend Windows & Doors	Windows	5322.87
Unique Kitchens & Joinery	Kitchen	12430
Valet Canberra	P/S	480
Volare	Tiles	3807.97
Volare	Tiles	437.76
Volare	Tiles	99.76
Water & Gas Doctor	Pipes	9570
Zheng Yun	Flooring	7316.75
	Total	**$198,484.20**