SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY
COURT OF APPEAL

Case Title:	**Liu v A & A Martins Pty Limited**
Citation:	**[2019] ACTCA 8**
Hearing Date:	14 February 2019
Decision Date:	1 May 2019
Before:	Burns, Elkaim and Charlesworth JJ
Decision:	See [61]-[63]
Catchwords:	APPEAL – Appeal from decision of the ACT Supreme Court – claim for restitution based on unjust enrichment – whether the respondent was entitled to recover on restitutionary grounds – whether the respondent was doing work at the appellants' request – whether Anshun estoppel could be raised – whether the claim was an abuse of process
Cases Cited:	*A & A Martins Pty Limited v Liu* [2018] ACTSC 102 *Australia and New Zealand Banking Group Limited v Westpac Banking Corporation* (1988) 164 CLR 662 *Australian Financial Services and Leasing Pty Limited v Hills Industries Limited* [2014] HCA 14; 235 CLR 560 *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 & Anor* [2015] ACTSC 58 *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 *Ramsay v Pigram* (1968) 118 CLR 271 *Roxborough v Rothmans of Pall Mall Australia Limited* [2001] HCA 68; 208 CLR 516 *Steele v Tardiani* (1946) 72 CLR 386 *Tomlinson v Ramsey Food Processing Pty Limited* [2015] HCA 28; 256 CLR 507
Parties:	Bin Liu (First Appellant) Chen Huan Li (Second Appellant) A & A Martins Pty Limited (ACN 072 578 271) (Respondent)
Representation:	**Counsel** Mr R Arthur (First and Second Appellants) Mr D Stretton (Respondent) **Solicitors** Bradley Allen Love Lawyers (First and Second Appellants)

	Sneddon Hall & Gallop Lawyers (Respondent)	
File Number:	ACTCA 25 of 2018	
Decision under appeal:	Court/Tribunal:	Supreme Court of ACT
	Before:	McWilliam AsJ
	Date of Decision:	20 April 2018
	Case Title:	A & A Martins Pty Limited v Liu
	Citation:	[2018] ACTSC 102

THE COURT

1. This is an appeal from a decision of McWilliam AsJ, decided on 20 April 2018 in which her Honour entered a judgment for the plaintiff in those proceedings, now the respondent in these proceedings, in the sum of $198,484.20 plus interest of $52,492.28.

2. The respondent is a construction company which brought proceedings in the Supreme Court to recover a sum of money to compensate it for work done and monies expended by it at the request of the appellants in the construction of a residential property in the ACT. The appellants are husband and wife, and the owners of the property.

3. In the proceeding before the primary judge, the respondent asserted that the appellants had entered into a written contract with a company, Maples Winterview Pty Ltd (Maples) for Maples to construct a residence on land owned by the appellants. The respondent further alleged that Maples engaged it to undertake the construction of the residence on 12 July 2011. The contract between Maples and the appellants was terminated on or about 10 October 2012. The respondent alleged that it had accrued expenses in the construction of the residence from about 20 July 2011 to 15 August 2012. It claimed that it was owed $251,974.14 for the work undertaken and materials supplied, together with interest on that sum totalling $80,577.27. The basis of the claim was that the appellants had directed the respondent to undertake the building construction work and the respondent had taken direction from the appellants and performed the work. The respondent alleged that the appellants had unjustly enriched themselves at the cost of the respondent. The appellants have always denied any liability to the respondent, on the basis that this contract was with Maples, and that work done and materials provided by the respondent was done or provided in its capacity as subcontractor to Maples.

4. Before considering the decision of the primary judge, it is necessary to provide a little more history. One of the directors of Maples, and of the respondent, at that time was Mr Agostinho Martins, known as Tony Martins. Unfortunately, during the course of construction of the residence Mr Martins fell ill and died on 9 October 2011. The contract for the construction of the premises was between the appellants and Maples. The contract required Maples to build a house on the appellant's land for $289,000.00. Between July 2011 and March 2012 work was carried out in accordance with the contract. The contract provided for periodic payments by the appellants to Maples when certain building milestones were achieved. On 10 August

2011 the appellants paid Maples $14,600.00 for "Progress Claim No. 1", an amount due on the signing of the contract. On 27 February 2012 Maples served in accordance with the contract a claim for adjustment of the contract price in the sum of $3,585.70 for certain supplementary items requested by the appellants and provided by Maples. The appellants apparently did not pay the sum demanded by Maples, and Maples alleged that this was a breach of the terms of the contract, and suspended building work on 6 March 2012.

5. On 10 October 2012, Maples, having received no further payment from the appellants, purported to terminate the contract and thereafter commenced proceedings in the Supreme Court to recover the cost of the building works it alleged it had carried out in accordance with the contract, which it said amounted to $326,227.42, and the cost of materials supplied or ordered amounting to a further $3,101.70. Maples' claim was based on alleged breach of the terms of the contract. The appellants defended the claim on the basis that the milestones specified in the contract as triggering an obligation to pay progress payments had not been achieved, and in particular they alleged defects in the work, as set out in an expert's report they had obtained. The claim by Maples proceeded to hearing before Mossop AsJ (as his Honour then was) over four days in February 2015, in which Maples was represented by lawyers and the appellants were self-represented.

6. On 16 July 2015 Mossop AsJ entered judgment for the appellants against Maples (*Maples Winterview Pty Ltd v Liu & Anor* [2015] ACTSC 58 ('*Maples Winterview Pty Ltd v Liu*') and ordered Maples to pay the appellant's costs of the proceeding. His Honour published reasons to the effect that because of a failure by Maples to install underslab insulation, it had no entitlement to any progress payments for Stage 2 and following. He further found that as Maples had no entitlement to make the progress claims, it had no entitlement under the contract to further monies by way of adjustment of the contract price. As a consequence, Mossop AsJ determined that the appellants had not been in breach of contract by failing to pay the sums demanded by Maples, and Maples had not been entitled to terminate the contract on the basis that it did.

7. Because of the way in which the proceeding before Mossop AsJ had been pleaded, his Honour was unable to determine what, if any, legal relationship subsisted between the parties after the purported termination by Maples. His Honour said, at [158]:

> 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) 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.

8. The proceeding from which the present appeal lies was commenced on 3 July 2017, and was heard by the primary judge on 23 February 2018. On 20 April 2018 her Honour entered judgment for the respondent in the sum of $198,484.20, plus interest in the sum of $52,492.28: *A & A Martins Pty Limited v Liu* [2018] ACTSC 102. We will return to her Honour's reasons shortly. By an amended notice of appeal dated 9 August 2018, the appellants seek orders that the orders made by the primary judge be set aside, and in lieu thereof judgment be entered for them with costs. The grounds upon which the appellants seek these orders may be summarised as follows:

    (a) The primary judge erred in concluding that the appellants were aware, or ought to have been aware, that the respondent through its trading names was undertaking the building project at their request from September 2011;

    (b) The primary judge erred in finding that the appellants had requested the respondent to do the building work;

    (c) The primary judge erred in finding that it was not inconsistent with the appellants' contract with Maples to hold that it was proper to impose an obligation on the appellants to restore to the respondent the benefit received by them;

    (d) Her Honour erred in the manner in which she dealt with the death of Mr Agostinho Martins as affecting the relationship between Maples and the appellants.

    (e) The primary judge erred in finding that the respondent was not estopped, or alternatively in failing to find that the respondent was estopped, from claiming that the building work had been undertaken by the respondent at the request of the appellant in circumstances where:

        (i) the individuals who controlled the respondent company also controlled Maples at all relevant times;

        (ii) Maples issued progress claims to the appellants, brought proceedings to recover the amounts claimed for the building work in which it claimed that the building work had been undertaken by the respondent at the request of Maples;

        (iii) it would have been natural and reasonable for Maples, in the proceeding before Mossop AsJ, to have pleaded an alternative claim in quantum meruit in respect of the building work; and

        (iv) the contention that the respondent undertook the building work at the request of the appellants is inconsistent with the decision of Mossop AsJ, giving rise to conflicting judgments, and is thus an abuse of process.

The decision of the primary judge

9. All parties were self-represented in the proceeding before the primary judge. In addition, English was not the appellants' first language. This undoubtedly made the hearing and determination of the proceeding challenging.

10. The primary judge began with a consideration of identifying the proper plaintiff. In that regard her Honour said in the primary judgment:

> 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.
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> 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.
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> 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.
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> 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.

11. The primary judge identified the claim as one for restitution based on unjust enrichment, in the form of payment of a fair and reasonable sum for services rendered or goods supplied to the appellants.

12. In the course of her reasons, the primary judge referred to the proceeding before Mossop AsJ, and in particular to certain obiter statements made by his Honour. At [129]-[130] of *Maples Winterview Pty Ltd v Liu*, Mossop AsJ noted that while Maples was the contracting party, it had not undertaken any building on the site, and all such work had been undertaken by the respondent. There was, he said, no evidence of any contract between the respondent and Maples. At [131] his Honour said:

> In the absence of a contract it is clear enough that the work was carried out by [the respondent] at the request of [Maples] 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…

13. In his reasons, at [136], Mossop AsJ said that Maples had not established that the amounts claimed for labour were costs to it of the building work. This was because the evidence as to intercompany arrangements did not extend to demonstrating that the costs of company employees were allocated to the companies in the group, Maples had failed to establish the accuracy of assumptions made about the time particular workers spent working on different jobs, and certain costs claimed by Maples did not fall within the costs for building work that could be claimed by Maples under the contract. His Honour went on to say, at [139]:

> Based on the evidence I am satisfied that [Maples] incurred a liability of $247,543.96 in relation to the construction of the dwelling for the [appellants]. That is a liability because of the entitlement of [the respondent] 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…

14. By reference to the decisions in *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 ('*Pavey & Matthews v Paul*'); *Roxborough v Rothmans of Pall Mall Australia Limited* [2001] HCA 68; 208 CLR 516; *Australia and New Zealand Banking Group Limited v Westpac Banking Corporation* (1988) 164 CLR 662; *Australian Financial Services and Leasing Pty Limited v Hills Industries Limited* [2014] HCA 14; 235 CLR 560; and *Lampson (Australia) Pty Ltd v Fortescue Metals Group Ltd [No. 3]* [2014] WASC 162, the primary judge stated at [25] that an entitlement to restitution on the basis of unjust enrichment will arise when, subject to defences, three circumstances exist, being:

    (i) the defendant is enriched or benefited;

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

    (iii) the enrichment, or its retention, is unjust.

15. The primary judge found that it was clear that there was a contract between Maples and the appellants for the construction of the residential dwelling on the property. Maples was the builder named in the contract, and its ABN was stated. Attachments to the contract recorded the prime cost items and provisional sums as being "as per inclusions list". The inclusions list displayed the letterhead of Martins Building Group, and the ABN of the respondent.

16. The primary judge found that it was the respondent who commenced the building work. A Building Commencement Notice Application form signed by the appellants listed the builder as the respondent (not Maples), with the nominee as Mr Martins. The respondent, and not Maples, was the holder of the residential builders' warranty policy of insurance which named the appellants as beneficiaries. The building commencement notice, certified on 15 August 2011, was issued to the respondent.

17. The respondent's nominee, Mr A Martins, died suddenly on 9 October 2011. In September 2011, the primary judge found, Ms Ruth Martins started communicating with the female appellant, using the same email address that Mr Martins had previously used, being "aaeons@iinet.net.au". Her signature block referred to the "Martins Property Group". The second appellant was asked to complete an external colour selection sheet and, in reply, she asked for the name of the roof supplier.

18. The building work continued after the death of Mr Martins, and building inspection reports signed by the building certifier all recorded the respondent as the builder. The primary judge noted that on a building inspection report dated 5 December 2011 there was a notation stating: "A change of builder will be required – Mr Martin (sic) is deceased".

19. The primary judge was satisfied that in December 2011, Ms Martins issued quotations to the first appellant for additional items. Underneath her signature was the word "director". The letterhead was that of Martins Property Group and A & A Constructions. The ABN on the letterhead was that of the respondent. The quotations were not accepted, but the primary judge nevertheless considered that they served as

"further evidence of who the [appellants] were dealing with, directly, on their building project".

20. On 1 February 2012 there was an email from the male appellant to Ms Martins confirming selections for tiles and flooring.

21. The primary judge, after referring to this evidence, said, at [45]-[46]:

> 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.
>
> 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.

22. The primary judge accepted that the appellants had received a benefit, being the goods delivered and used in the construction of the dwelling, and the services provided by the respondent. The primary judge also accepted, by reference to accounting records, that it was the respondent who paid for the goods and services.

23. In *Pavey & Matthews v Paul*, 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…

24. In the subsequent case of *Lumbers v W Cook Builders Pty Ltd (in Liquidation)* [2008] HCA 27; 232 CLR 635 (*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 [*Birmingham & District Land Co Ltd v London & North Western Railway Co* (1886) 34 Ch D 261 at 274 per Bowen LJ; *Way v Latilla* [1937] 3 All ER 759 at 765 per Lord Wright]. Builders would have an action for work and labour done or money paid for and at the request of the Lumbers.

25. By reference to these decisions, the primary judge found that the respondent's case fell into one of the established categories in which it has been held that it would be unconscionable for a party to retain the benefit of goods and services supplied.

26. The primary judge noted that the facts in the present case bore some resemblance to those in *Lumbers*. In *Lumbers*, the Lumbers entered into a building contract for the construction of a house on land. Unknown to them, the company with which they contracted entered into an arrangement with another company ('Builders') to carry out the work. After the work was done, the Lumbers paid the company with which they had contracted the full amount owing under the contract. The company failed to pay Builders in full for the work that Builders had carried out. Builders sought payment from the Lumbers. The claim by Builders was ultimately unsuccessful, because there had been no contract between it and the Lumbers, and it had not done any work or paid any sub-contractors at the request of the Lumbers.

27. After having referred to apparent similarity between the facts of the case before her and those in *Lumbers*, the primary judge said, at [54]-[56]:

> 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.
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> 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.
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> 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.

28. The primary judge then considered whether the appellants were able to raise an Anshun estoppel: see *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589. Her Honour noted that the principle derived from that case prevents a party to litigation in which a final judgment is given, or that party's privy, from raising in subsequent litigation an issue or cause of action which was, or should have been, raised in the earlier litigation. The primary judge accepted that the proceeding before Mossop AsJ and the proceeding before her had similarities, as they both involved the same building project, the same land and the same owners, as well as there being common directors between the respondent and Maples. She considered, however, that the issues litigated before Mossop AsJ centred around the contract between Maples and the appellants, whereas the proceeding before her was concerned with a claim for restitution based on the premise that there was no contract between the respondent and the appellants. Her Honour concluded at [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.

An application to lead further evidence on appeal

29. By an application dated 15 January 2019 the appellants gave notice that they proposed to seek leave pursuant to rule 5606 of the *Court Procedures Rules 2006* (ACT) to adduce further evidence at the hearing of the appeal. That application was abandoned at the hearing of the appeal, but it is appropriate to set out the transcription of what was said at that time:

> BURNS J: All right. Thank you. Yes, now, Mr Arthur, do you want to deal initially with the application to lead further evidence?
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> MR ARTHUR: The application is not pressed.
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> BURNS J: It's not pressed.
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> MR ARTHUR: Its purpose was to highlight the fact that certain progress claims made under the building contract were served by Maples Winterview Pty Ltd and not the respondent. That is something which Mr Stretton advises me is accepted by the respondent and hence there's no need to press the application, which would only put in documentary form what is already common ground.
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> CHARLESWORTH J: To be clear, is that proposition accepted in relation to all the progress claims, which appear at least to me to date back to July 2011 and continue through for most of the project?
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> MR ARTHUR: I think that's so. They would number about four in total. They were all delivered at one time.
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> CHARLESWORTH J: Yes, but they relate to work over a longer period of time.

Submissions of the appellants

30. The appellants submitted that the work done by the respondent had not been done at the request of the appellants, and in the absence of any such request the respondent was not entitled to recover against them on restitutionary grounds. Alternatively, the appellants submitted that the respondent was estopped from recovering on its claim or that the claim was treated as an abuse of process.

31. The appellants submitted that in determining that they were aware, or ought to have been aware, that the respondent, through its trading names, was undertaking the building work at their request from September 2011, the primary judge relied on the following evidence:

    (a) The appellants entered into a building contract on 12 July 2011 with Maples. The builder named in the contract was "Maples Winterview Pty Ltd (Agostinho Martins)". The ABN of Maples was shown;

    (b) An inclusions list was incorporated into the contract, signed by the appellants and by Tony Martins. The letterhead of "Martins Building Group" and the ABN of the respondent were on the front page, with the words "Bonner Inclusions List A & A Martins Building Group Pty Ltd" on the last page;

    (c) The respondent commenced the building project, as demonstrated by:

(i) a building commencement notice application form signed by the respondent and each of the appellants on 6 August 2011 showing A & A Martins Pty Ltd as the builder with Tony Martins as the nominee; and

(ii) the commencement notice issued on 15 August 2011 in its name;

(d) A & A Martins Pty Ltd was the holder of the residential builders warranty policy of insurance;

(e) In September 2011 "Ruth" (later identified as Ruth Martins) communicated with the second appellant over the signature block "Martins Property Group", asking her to complete the external colour selections sheet and in reply, the second appellant asked the identity of the roof supplier;

(f) Tony Martins died suddenly on 9 October 2011;

(g) The building project continued with inspection reports all recording the respondent as the builder, but on 5 December noting that a change of builder would be required following Tony Martins' death;

(h) In December 2011 Ruth Martins (her signature over the word "director") issued a quotation for additional items on letterhead of Martins Building Group and A & A Constructions, again with the ABN of the respondent;

(i) An email exchange between the first appellant and Ruth Martins on 1 February 2012 confirms the appellants' selection of tiles and then a request for carpet in the bedroom and lounge with another area being a timber floor.

32. The appellants identified other relevant evidence in the proceeding before the primary judge to which she did not refer in her reasons:

(a) The appellants dealt with Tony Martins "from Martins Building Group" from the outset;

(b) Tony Martins signed the contract for Maples;

(c) The same email address, telephone numbers, street address, post office box number appeared variously on all communications emanating from Tony Martins and other representatives of the respondent, and the same telephone numbers and post office box number appear on the building contract as being those of Maples;

(d) The appellants made a deposit payment to Maples at the time of contract;

(e) Substantial building work had been undertaken in the period after contract and before Tony Martin died;

(f) Progress claims were issued in February 2012 by Maples, not by the respondent.

33. In addition, the primary judge determined that the appellants did not receive any formal communication from the respondent concerning any change in the arrangement on foot prior to the death of Mr Martins. There being no positive evidence that the appellants knew of any change, or expressly requested the respondent to carry on the building work, any finding that the appellants had requested the respondent to carry on the works must be implied. The appellants submitted that, in the circumstances, no such request could be implied.

34. The appellants submitted that in the absence of a request by them for the respondent to continue with the works, there was no basis upon which the respondent could recover for the materials and labour supplied. The appellants submitted that they had a contract with Maples to construct the residence, and that Maples then made an arrangement with the respondent. If either the contract between the appellants and Maples, or the arrangement between Maples and the respondent, has not been fully performed (because all that is owed by one party to the other has not been paid), that is a matter for the parties to the relevant contract or arrangement. A failure by Maples to perform its part of the arrangement with the respondent is no reason, the appellants submitted, to conclude that the respondent has some claim against them. The appellants further submitted that any determination that they "accepted" work or materials supplied by the respondent is irrelevant, and distracts attention from the legal relationships between themselves, Maples and the respondent. To the extent that the contract between the appellants and Maples may remain unperformed, the appellants may remain liable to Maples, and, by the same token, the appellants would have a claim against Maples.

35. Finally, the appellants submitted that the primary judge should have found that the respondent was estopped from recovering under its claim, or alternatively should have found that the respondent's claim was an abuse of process. In the proceeding before Mossop AsJ, the appellants submitted, Maples ran its case on the basis that the amount it was entitled to recover against the appellants was the amount expended by the respondent, and which was recorded in the books of Maples as a liability to the respondent. Mossop AsJ found that the work was carried out by the respondent at the request of Maples, thereby entitling the respondent to reasonable remuneration, and thus establishing the measure of Maples claim against the appellants under the building contract. As Maples and the respondent had common directors at the time, the appellants submitted that the respondent should be considered to be the "alter ego" of Maples, and in this proceeding now asserts that it did the work at the request of the appellants and not Maples. It does so, the appellants submitted, because bringing a claim against Maples would bring no net benefit to the corporate group of which it is a part.

Submissions of the respondent

36. The respondent observed that there was no suggestion that it had not supplied materials and undertaken building works. It submitted that the inclusion list "forming part of the signed building contract" contained the ABN and "trading names of A & A Martins". Thus, the respondent submitted, as per the primary judgment at [55], A & A Martins was "disclosed as the entity responsible for the supply of the materials from the inclusions list that the [appellants] signed". The respondent submitted that the appellants' execution of the building contract was thus an implied request for "A & A Martins" to supply the materials in the inclusion list. Similarly, by signing, or accepting, the Building Commencement Notice Application Form listing the builder as "A & A Martins Pty Ltd", and not Maples, the appellants were impliedly asking the respondent to do the work.

37. The respondent further submitted that from September 2011 the appellants communicated with or issued instructions to the respondent in regard to the garage timber and slab, external colour selections, the identity of the roof supplier, retaining walls and other additional items, tiles, carpets and flooring. The respondent submitted

that in so dealing with it, the appellants were expressly or impliedly accepting (or acquiescing to) the work done and payments incurred to date, and requesting that the work continue.

38. The respondent submitted that the appellants were aware, or ought to have been aware, from September 2011 that the respondents were doing work and expending money on the building works based on the following material:

    (a) The email from Tony Martins to the first appellant on 7 June 2011 offered a quotation on behalf of "Martins Building *Group*" (emphasis added), suggesting more than one entity would be involved in the building project;

    (b) The ABN of A & A Martins (12 072 578 271) appears in the initial quotations dated 13 June 2011, 22 June 2011 and 29 June 2011;

    (c) The building contract dated 12 July 2011 was between Maples (ACN 112 495 879) and the appellants, but the final inclusions list forming part of that contract contains the ABN of A & A Martins (12 072 578 271). Thus, A & A Martins "was disclosed as the entity responsible for the supply of the materials from the inclusions list that the defendants signed";

    (d) The building contract did not require Maples to use its own employees to do the work;

    (e) The following documents, which would ordinarily come into the appellants' possession as the property owners, listed A & A Martins as the builder:

        (i) the "Building Commencement Notice Application Form" signed by A & A Martins and the appellants on 6 August 2011;

        (ii) the residential builders warranty policy of insurance dated 12 August 2011;

        (iii) the "Building Commencement Notice" certified on 15 August 2011;

        (iv) the building inspection report dated 15 August 2011;

        (v) the building inspection report dated 5 September 2011;

        (vi) the building inspection report dated 5 December 2011;

    (f) The quotations for additional work issued on 21 December 2011 and 10 January 2012 contained the ABN of A & A Martins (12 072 578 271);

    (g) The appellants knew that Mr Martins had died, so that they knew that the builder specified in the building contract could not carry out the work. This, the respondent submitted, put the appellants on notice that they were dealing directly with a different entity, being the respondent.

39. The respondent submitted that in these circumstances, in which the contract was between the appellants and Maples, the appellant ought to have known that the respondent was the entity carrying out the building work and with whom they were dealing directly.

40. In response to a submission by the appellants that the respondent was carrying out the works by virtue of its contractual obligation to Maples, and in fulfilment of Maples' contractual obligation to the appellants, the respondent submitted that it was doing

the work both by virtue of those contractual obligations and by virtue of the appellants' express and implied requests that it continue with the works.

41. The respondent sought to distinguish the decision in *Lumbers* on the basis that the Lumbers had made no request to Builders, whereas in the present case, the respondent submitted, the appellants were aware of the existence of the respondent and that it was undertaking the building works.

42. Finally, the respondent submitted that no defence of Anshun estoppel applied because the respondent had not been a party to the proceedings before Mossop AsJ and was not a privy in interest with Maples. The respondent further submitted that there was no inconsistency between the findings of Mossop AsJ that the building work had been carried out by the respondent at the request of Maples, and the primary judge's finding that the respondent had done the work and paid monies at the request of the appellant. Plainly, the respondent submitted "more than one person can make the same request and more than one person can benefit from the same work". Thus, it submitted, it carried out the building works at the request of Maples and at the request of the appellants. The respondent submitted that in any event, abuse of process had neither been pleaded nor argued before the primary judge, and as such no evidence had been adduced, or cross-examination directed to, this issue, making it inappropriate for this Court to determine that issue.

Consideration

43. In *Lumbers*, at [79], the plurality of the High Court said that 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". In the present case the appellants entered into a contract with Maples to undertake the required building work. Maples was a company that was part of the "Martins Building Group". It may be expected that the appellants knew that there were other companies in the Group besides Maples. Maples subcontracted the building work to the respondent, another company in the Group, on or about 12 July 2011, the same day that Maples entered into the contract with the appellants. It may be inferred that it did so, rather than undertaking the work itself, because it perceived advantages to it in arranging its business this way. There is certainly no evidence that this arrangement was for the benefit of the appellants, or that they were consulted by Maples as to how it proposed to structure its allocation of resources and risk under the contract by engaging the respondent as a subcontractor.

44. It follows from the determination of the primary judge that the appellants knew or ought to have known that the respondent, through its trading names, was undertaking the building work at their request from September 2011, that any involvement of the respondent in the building works, or reference to the respondent in the contractual documentation, was with regard to the respondent in its role as subcontractor to Maples.

45. The determination of September 2011 as the time from which the primary judge was satisfied that the appellants were aware, or should have been aware, that the respondent was carrying out the work at their request would appear to coincide with the period when Ms Ruth Martins commenced communicating with the appellants, rather than Mr Martins. This appears to have been in the period of a short illness preceding Mr Martins' death on 9 October 2011. The suggestion that Mr Martins'

illness, or even his death, was contractually significant is problematic. Mr Martins was not a party to the contract and "the builder" is described in the contract as Maples. This Court was informed, without demur, in the course of submissions on appeal that companies may hold builders licences in the ACT, but where a company acts as a builder, it must nominate a natural person as the person who will supervise the works. The evidence does not establish whether Maples held a builders licence, but the Building Commencement Notice Application Form dated 6 August 2011 nominated A & A Martins Pty Ltd (the respondent) as the builder and Mr Martins as the company's nominee. This was consistent with Maples having engaged the respondent as a subcontractor and with the fact that, as a subcontractor, the respondent was the actual entity which would carry out the works. Indeed, it is possible to go further and state that the respondent in this appeal does not dispute that it was acting in the capacity as a subcontractor to Maples from 12 July 2011 until September 2011. The relevance of the Building Commencement Notice Application Form would therefore be that it confirmed to the appellants that the respondent was undertaking the work as a subcontractor to Maples. There is no suggestion that at that time Maples did not intend to carry out its obligations under the contract; the indication was that it would do so by engaging the respondent as its subcontractor. It is not possible to draw any inference from that document that the appellants were on notice that the respondent would look to them, rather than Maples, for payment. The same may be said with regards to the Building Commencement Notice dated 15 August 2011, the residential builders warranty policy of insurance dated 12 August 2011, and the building inspection report dated 15 August 2011, which all referred to the respondent as the builder.

46. The death of Mr Martins on 9 October 2011 was not an event which terminated the contract between Maples and the appellant. It has never been suggested that Mr Martins' death was a frustrating event (in the sense that term is used in contract law) which made it impossible for Maples to perform its obligations under the contract. It is clear that Maples did not, in fact, purport to terminate the contract at that point in time, as it later purported to terminate the contract on 10 October 2012. This was the basis of its case before Mossop AsJ. As Mossop AsJ observed in the proceeding before him, it is not possible to determine whether, or in what manner, the contract was terminated. All that can be said is that Mossop AsJ determined at [157](d) of that judgment, *Maples Winterview Pty Ltd v Liu*, that Maples had not lawfully terminated the contract on 10 October 2012, as it purported to do.

47. The only events referred to by the respondent as putting the appellants on notice that it was doing work and expending monies on their behalf which occurred in or after September 2011 were the issuing of building inspection reports dated 5 September and 5 December 2011, quotations for additional work issued on 21 December 2011 and 10 January 2012 and the various short email exchanges referred to at [31] above.

48. The significance of all of that material must be assessed in the undoubted light that prior to September 2011 the respondent had been acting as a subcontractor to Maples and had been held out to be acting as such by Maples. The respondent must have been aware of these facts by reason of both companies having the same directors. To the extent that the respondent relied upon documents having its ABN number on them, rather than that of Maples, this is consistent with the state of affairs that pertained up until the end of August 2011, during which period the respondent

was engaged as Maples' subcontractor. Similarly, the references to the respondent as the builder in documents from September 2011 onwards is consistent with the state of affairs that pertained up until the end of August 2011. The fact that the quotations for extra building work issued on 21 December 2011 and 10 January 2012 contained the respondent's ABN number is also consistent with the state of affairs pre-September 2011. We note that these documents made no reference to the respondent company, but were under the letterhead of Martins Building Group and also referred to a trading name, A & A Constructions. The email correspondence referred to at [31] above, involved emails from "Ruth" with a footer of Martins Building Group, and an email address and phone numbers that were apparently generic for the Martins Property Group.

49. One may well ask, what happened in or after September 2011 to put the appellants on notice that the respondent no longer considered itself to be undertaking the works as a subcontractor to Maples, but under some arrangement in which it looked to the appellants directly for payment? No notification of any change of arrangements was given to the appellants either by Maples or by the respondent. It is clear from the later conduct of Maples that it continued to hold the appellants accountable to it under the contract, after the end of August 2011. It may be true, as the respondent submitted, that an owner of land may request two different entities to undertake the same construction work on their land, one pursuant to contract and one pursuant to an arrangement whereby the owners were aware that the other party would look to them for payment for work done and monies expended, but it is highly improbable that any owner of land would do so. To act in such a manner would expose the owners to liability to one party under the contract and liability to the other party for work done and monies expended for the same work.

50. It must be accepted that the appellants provided instructions to Ms Martins during the period of Mr Martins' illness and following his death. But in what capacity did they give her instructions? The evidence is equally consistent with the appellants giving instructions to Ms Martins as a director of Maples as it is with them giving her instructions in her capacity as a director of the respondent. Even ensuring that the appellants gave instructions to Ms Martins knowing that she was acting in her capacity as a director of the respondent, it is still necessary to consider the significance of that fact in the context of the contractual arrangements. Were the appellants giving the respondent those instructions in its capacity as the subcontractor to Maples, or in some different capacity such as the entity which would now undertake the work and look to them for payment?

51. It must also be accepted that the appellants accepted the work done by the respondent, and to that extent they have received a benefit. But this is insufficient to found a right on the part of the respondent to seek recompense from the appellants. No promise to pay can be inferred unless it was open to the appellants to reject the benefit of the work: *Steele v Tardiani* (1946) 72 CLR 386 at 402. It was not open to the appellants to direct the respondent not to undertake the work, because the respondent had been engaged by Maples as a subcontractor (which Maples was entitled to do under the contract) and to deny the respondent the ability to undertake the work would have been a breach of the appellants' continuing contractual obligations to Maples.

52. In the factual circumstances of the present case, where the respondent was to the knowledge of the appellants engaged by Maples as its subcontractor, something

more than knowledge on the part of the appellants of the fact that the respondent was engaged in undertaking the construction work on their land must be demonstrated to make the appellants liable to the respondent in restitution. It must be demonstrated that it would be unconscionable for the appellants to retain the benefit. Unconscionability in this context means unconscionable as between the appellants and the respondent, bearing in mind the established contractual relationship between the appellants, Maples and the respondent. To the extent that the appellants have received a benefit, or been enriched, it has been at the expense of Maples. Maples has a claim against the appellants pursuant to restitutionary principles. For some reason, it chose not to pursue such a claim in the proceeding before Mossop AsJ, instead making a claim for breach of contract. It failed in that claim, because it had not achieved the construction milestones that would entitle it to payment under the terms of the contract. It is probable that any attempt by Maples to now make a claim against the appellants on restitutionary grounds would be stymied by a limitation defence or by the raising of an Anshun estoppel. The fact that by reason of decisions made by those directing the affairs of Maples in the proceeding before Mossop AsJ, Maples is now unable, as a matter of practicality, to recover against the appellants on restitutionary grounds does not mean that any enrichment of the appellants came at the expense of the respondent. The respondent has always had an entitlement to recover against Maples, but has apparently chosen not to do so. The probable reason for this, as suggested by the appellants, is that if the respondent were to pursue Maples, this would result in no net gain to the group of companies of which they are both a part.

53. For there to be an enrichment of the appellants at the expense of the respondent, as opposed to Maples, it would be necessary to ignore the contractual relationship and posit a situation where the respondent was no longer acting as Maples' subcontractor. To then make it unconscionable for the appellant to retain the benefit of the work done and monies expended by the respondent without making restitution to it, the appellants must have had actual or implied knowledge that the respondent was no longer acting as Maples' subcontractor, but was now looking to them for payment.

54. The evidence does not support a finding of actual knowledge on the part of the appellants that the respondent was no longer acting as Maples' subcontractor. The primary judge drew an inference that the appellants were aware, or ought to have been aware, that the respondent was undertaking the work at the appellants' request from September 2011 onwards. In using the term, "at the appellants' request", we take her Honour to mean at the appellants' request and in the knowledge that the respondent was not acting as Maples' subcontractor. In our opinion, it was not open to the primary judge to draw that inference as the most probable inference in the circumstances of this case. It would be commonplace on worksites for subcontractors to speak directly to the owners about the work, so that no inference could arise from such a circumstance. Even if it be correct that the evidence could support the inference that the appellants dealt with the respondent in some capacity other than as Maples' subcontractor, and in the knowledge that the respondent looked to them directly for payment, this is certainly not the most likely or probable inference available. For the reasons we have given, the inference that the appellants dealt with the respondent on the understanding that the respondent was Maples' subcontractor is by far more probable.

55. To summarise at this point:

(a) It was not open to the primary judge to resolve the proceeding on the basis that the appellants knew or ought to have known from September 2011 onwards that the respondent was undertaking the works in some capacity other than as Maples' subcontractor and was looking to them directly for payment;

(b) Any enrichment of the appellants by accepting the work and the benefit of monies paid by the respondent did not, in a legal sense, come at the expense of the respondent (as opposed to Maples); and

(c) The retention of that benefit by the appellants is not unconscionable as against the respondent.

Anshun estoppel and abuse of process

56. It is strictly unnecessary to consider the issues of Anshun estoppel and abuse of process raised by the appellants, but we will touch upon them briefly.

57. The appellants' defence of Anshun estoppel cannot succeed. For such a defence to succeed, it must appear that the same parties or their privies were involved in the proceeding before Mossop AsJ. In the circumstances of this proceeding, the privity alleged between Maples and the respondent must be privity in interest. In *Tomlinson v Ramsey Food Processing Pty Limited* [2015] HCA 28; 256 CLR 507 ('*Tomlinson*'), the plurality of the High Court (French CJ, Bell, Gageler and Keane JJ), after referring to the judgment of Barwick CJ in *Ramsay v Pigram* (1968) 118 CLR 271, said with regard to this form of privity, at [33]:

> Consistently with the rationale for the principle, the explanation demonstrates that a party to a later proceeding (A) can be privy in interest with a party to an earlier proceeding (B) on either of two bases. One basis is that A might have had some legal interest in the outcome of the earlier proceeding which was represented by B, or that B has some legal interest in the outcome of the later proceeding which is represented by A… The other basis is that, after that earlier proceeding was concluded by judgment, A might have acquired from B some legal interest in respect of which B would be affected by an estoppel which A then relies on in the later proceeding.

58. There was no privity in interest, in this sense, between Maples and the respondent in the proceeding before Mossop AsJ. Maples sued the appellants in contract, and the respondent was not a party to that contract.

59. The fact that Maples and the respondent had identical directors does not change this situation. In *Tomlinson,* the plurality, at [35], said:

> Subsequent applications of the principle in *Ramsay v Pigram* have for the most part correctly emphasised that the interest of the privy must in each case be a legal interest: an economic or other interest on the part of A in the outcome of the earlier proceeding is insufficient. Those applications have also correctly emphasised that, absent a legal interest, such influence as A might have had over the conduct of the earlier proceeding is irrelevant even if that influence amounted to control. Thus, directors of a company, who also held shares in its parent company, were held not to be estopped from pursuing a later action to recover damages to compensate for a loss on their own account in circumstances where they had stood to gain financially from an earlier action by the company claiming damages for loss on the company's account. That was despite the directors having been found to have exercised effective control over the company's conduct of that earlier action. The constraint on the conduct of A in such circumstances lies not in an estoppel but, in an appropriate case, in abuse of process.

(*References omitted.*)

60. With regard to the appellants' submission that the proceeding before the primary judge was an abuse of process, we would prefer not to give an answer where this issue was not raised and addressed by the parties in that proceeding, and considered by the primary judge.

Decision

61. The appeal should be allowed and the orders made by the primary judge set aside.

62. In substitution, there should be orders that there be judgment for the defendants in the proceeding before the primary judge.

63. Unless some different order is sought within 14 days of publication of these reasons, the respondent is to pay the appellants' costs of this appeal and the proceeding before the primary judge as assessed or agreed.

I certify that the preceding sixty-three [63] numbered paragraphs are a true copy of the Reasons for Judgment of their Honours Justices Burns, Elkaim and Charlesworth.

Associate:

Date: 1 May 2019