

HIGH COURT RULES ON UNJUST ENRICHMENT CLAIM BY SUBCONTRACTOR AGAINST OWNER

Scott Budd , Partner

Philip Woods, Legal Executive

Mallesons Stephen Jaques,
Brisbane

The High Court of Australia's decision in *Matthew Lumbers and Warwick Lumbers v W Cook Builders Pty Ltd (in liquidation)* [2008] HCA 27 reversed a decision of the Full Court of South Australia which allowed a subcontractor to recover from the owner of the project the shortfall in the amount paid to the subcontractor under the subcontract, on the basis of unjust enrichment. This outcome was particularly alarming because the owner had no knowledge of, and had not authorised the engagement of, the subcontractor. Had it been allowed to stand, the Full Court's decision would have opened the way for subcontractors who were not fully paid by a builder to recover their losses directly from the owner who had received the benefit of their work. This would effectively override the contractual risk allocation agreed between an owner and the builder, leaving owners exposed to claims by subcontractors with whom they had no contractual relationship.

THE FACTS

The Lumbers entered into an oral agreement with W Cook and Sons ('Sons') for the construction of a residential building. Works

commenced in November 1993. In February 1994, without the knowledge or approval of the Lumbers, Sons effectively subcontracted the entirety of the work under that contract to a company related to Sons, W Cook Builders Pty Ltd ('Builders'). The Lumbers made progress payments to Sons, which Sons simply passed on to Builders. Construction was completed in May 1995 and the Lumbers paid all amounts claimed by Sons. In 1999, after going into liquidation, Builders served upon the Lumbers a notice of demand for payment of \$274,791, which Builders asserted was the difference between the actual costs it incurred in performing the works and the amounts paid by the Lumbers plus an amount on account of profit and overheads.

DECISION OF THE FULL COURT OF THE SUPREME COURT OF SOUTH AUSTRALIA

In the Full Court of the Supreme Court of South Australia, the majority found for Builders on the basis that the Lumbers had received an 'incontrovertible benefit' from the work of Builders, which they had freely accepted, and for which they should be expected to pay. The Full Court said that it would be unconscionable for the Lumbers to keep the benefit without paying a reasonable sum for it. The majority held that the fact that the Lumbers had a contract with Sons was irrelevant.

DECISION OF THE HIGH COURT OF AUSTRALIA

The High Court unanimously allowed an appeal by the Lumbers. The court found that the Full Court had erred in disregarding the contractual relationship between the Lumbers and Sons but more fundamentally, because Builders had no dealings with

the Lumbers, it had no claim against them. Builders' claim lay against Sons, with whom it had a contractual relationship. The High Court said that to impose on the Lumbers an obligation to pay Builders would constitute 'a radical alteration of the bargains the parties struck and of the rights and obligations which each party thus assumed.'

As to the difference between the amount actually paid by the Lumbers and the actual value of the works performed, the High Court said that the commercial characteristics of the bargain were not important. What was important was that the Lumbers satisfied their contractual obligations to Sons. It could not be said that just because the Lumbers had paid less for the house than the work was worth that they had received an unjust enrichment for which they should be held accountable to Builders.