SUPREME COURT OF QUEENSLAND

CITATION:	*CMF Projects Pty Ltd v Riggall & Anor* [2014] QCA 318
PARTIES:	**CMF PROJECTS PTY LTD** ACN 114 539 212 (appellant) **v** **BRIAN NOEL MANSON RIGGALL** (first respondent) **JANE REIMAN RIGGALL** (second respondent)
FILE NO/S:	Appeal No 4459 of 2014 DC No 4085 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	2 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	17 September 2014
JUDGES:	Holmes, Gotterson and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed.** **2. Vary Order 1 made on 29 April 2014 to read:** **"Paragraph 7, 8, 9 and 12 of the amended statement of claim and paragraphs 4(d), 10 and 11 of the reply and paragraphs 1, 3(b) and 4 of the answer to the amended counterclaim be struck out."** **3. Set aside Order 2 made on 29 April 2014 and substitute the following order:** **"There be no order as to costs."** **4. Order that the respondents pay the appellant's costs of the appeal on the standard basis except those costs with respect to Grounds 2(a) and (c) in the notice of appeal filed on 8 May 2014.** **5. Order that the appellant pay the respondents' costs of Grounds 2(a) and (c) in the said notice of appeal on the standard basis.**
CATCHWORDS:	CONTRACTS – BUILDING, ENGINEERING AND RELATED CONTRACTS – REMUNERATION – RECOVERY ON QUANTUM MERUIT – IN GENERAL – where the home owner respondents entered into an agreement

with the builder appellant to renovate the former's home – where the contract was a "cost plus contract" for the purposes of the *Domestic Building Contracts Act* 2000 (Qld) ("DBCA") – where the appellant carried out the work between 10 June 2011 and 2 May 2012 – where the respondents made payments on 10 progress claims totalling $1,938,932 – where in October 2013 the appellant commenced proceedings against the respondents for an outstanding sum of $182,252 – where the respondents defended the action on the basis that the agreement was unenforceable for non-compliance with the DBCA – where the appellant filed an amended statement of claim pleading quantum meruit – where the learned primary judge struck out the amended statement of claim – whether the provisions of the DBCA preclude an action based on quantum meruit

PROCEDURE – COSTS – POWERS OF COURT – ORDER FOR COSTS ON INDEMNITY BASIS – where the learned primary judge ordered the appellant to pay the respondents' costs of the application on the indemnity basis – whether the quantum meruit argument was unreasonably maintained

Domestic Building Contracts Act 2000 (Qld), s 3, s 30, s 55(3), s 55(4), s 84

Berowra Holdings Pty Ltd v Gordon (2006) 225 CLR 364; [2006] HCA 32, applied
Gemini Nominees Pty Ltd v Queensland Property Partners Pty Ltd [2008] 1 Qd R 139; [2007] QSC 20, reversed
PACD Pty Ltd v Depas Pty Ltd [2007] VCC 1683, cited
Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221; [1987] HCA 5, cited
Sargood Bros v The Commonwealth (1910) 11 CLR 258; [1910] HCA 45, applied
Thompson Residential Pty Ltd v Tran & Anor [2014] QDC 156, cited

COUNSEL: A Crowe QC, with G Coveney, for the appellant
J K Bond QC, with G I Thompson, for the respondents

SOLICITORS: Arrow Law for the appellant
HWL Ebsworth for the respondents

[1] **HOLMES JA:** I agree with the reasons of Gotterson JA and the orders he proposes.

[2] **GOTTERSON JA**: CMF Projects Pty Ltd ("the appellant") is a builder. Brian Noel Manson Riggall and Jane Reiman Riggall ("the respondents") own a home at Chelmer in Brisbane. The appellant and the respondents entered into an agreement ("the Agreement") whereby the former was to carry out renovation work on the latters' home between April 2011 and May 2012. The Agreement was a "cost plus contract" for the purposes of the *Domestic Building Contracts Act* 2000 (Qld) ("the DBCA"). It was also a "regulated contract" as that term is defined in the DBCA.

[3] The appellant carried out renovation work at the respondents' home for which it rendered 10 progress claims between 10 June 2011 and 2 May 2012, for a total amount of $2,121,234. The respondents made payments on the progress claims in a total amount of $1,938,982.

[4] On 23 October 2013, the appellant commenced proceedings against the respondents by filing a claim and statement of claim in the District Court at Brisbane. The sum of $182,252, being the difference between the respective total amounts, was claimed. Claims were also made for interest on the amount claimed and costs.

[5] As the short summary of the evolution of the pleadings set out in these reasons reveals, the respondents defended on the basis that the Agreement was unenforceable for non-compliance with the DBCA. They also counterclaimed repayment of what they had paid the appellant on a related restitutionary basis. The appellant put in issue the basis of the defence and counterclaim by way of a reply and answer.

[6] The respondents filed an application to strike out the statement of claim dated 23 October 2013 and certain paragraphs in the reply and answer on 1 April 2014. On 11 April 2014, and several days before the date of hearing of the application, an amended statement of claim was filed by the appellant. A substantial amendment made to the pleading was the addition by paragraph 7A, as an alternative, a claim in quantum meruit for the $182,252. At the hearing of the application on 15 April 2014, the respondents filed by leave an amended application by which they sought striking out of the "the proposed amended statement of claim dated 11 April 2014" and the same paragraphs in the reply and answer.

[7] On 24 April 2014, reasons for judgment were delivered.[1] Orders giving effect to those reasons were made on 29 April 2014.[2] The amended statement of claim and the nominated paragraphs in the reply and answer were struck out (Order 1) and the appellant was ordered to pay the respondents' costs of the application on the indemnity basis (Order 2). A third order gave the appellant liberty to make written submissions within seven days seeking to have the indemnity costs order set aside in favour of an alternative order. After consideration of further submissions from each party, the learned primary judge published reasons on 8 May 2014 for his decision not to set aside the indemnity costs order.[3]

[8] On 8 May 2014, the appellant filed a notice of appeal to this Court. The notice of appeal identifies the judgment appealed against as having been given on 24 April 2014. The appeal evidently is also against the orders made on 29 April 2014.

The pleadings

[9] The statement of claim filed on 23 October 2013[4] pleaded a basis of recovery that was entirely contractual in nature in that it was based upon breach of an implied term of the Agreement by the respondents in failing to pay in full the progress claims submitted to them: paragraph 7; and that the unpaid amount was payable pursuant to the terms and conditions of the Agreement: paragraph 12. This pleading also contained two arguably curious allegations for a pleading of this nature. One was

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1 AB210-223.
2 AB224.
3 AB225-228.
4 AB147-150.

that by their conduct in making payments on progress claims that had been submitted to them, the respondents were estopped from denying that any money was owing on the unpaid progress claims: paragraph 8. The other was that in order to mitigate its loss, the appellant had offered to accept the sum of $120,000 in satisfaction of its claim: paragraph 9.

[10] The respondents' initial pleading was superseded by a defence and amended counterclaim document filed on 14 January 2014 in which the paragraphs in the defence were numbered 1 to 13 and those in the amended counterclaim 1 to 38 respectively. This pleading maintained the defence that had been pleaded in the initial pleading. The essence of that defence was pleaded in paragraph 2 thereof. Entry into the Agreement for the renovation work was admitted: paragraph 2(a).

[11] Paragraph 2(c), however, pleaded a number of facts and certain legal conclusions that flowed from them. Significantly, it was there pleaded that the Agreement was a "cost plus contract" and a "regulated contract" as those terms are defined in the DBCA: paragraph 2(c)(ix); that the Agreement was not signed by the respondents: paragraph 2(c)(x); and that the Agreement did not contain any estimate of the amount which the appellant was likely to receive under it: paragraph 2(c)(xi).

[12] The respondents' pleading then alleged that by virtue of their not having signed the Agreement and the operation of s 30 DBCA, the Agreement was unenforceable by the appellant: paragraph 4(b)(i); and that by virtue of the omission from the Agreement of a fair and reasonable estimate of the amount that the appellant was likely to receive under it as required by s 55(2) DBCA, the Agreement was also unenforceable pursuant to s 55(3) thereof. The respondents pleaded that, accordingly, they owed no amount to the appellant: paragraphs 10, 11.

[13] As noted, the respondents' counterclaimed for repayment of the payments they had made on the basis of payment under a mistake as to the legal enforceability of the Agreement: paragraphs 2, 6. In the alternative, they counterclaimed for lesser amounts as damages pursuant to s 236 of the *Australian Consumer Law*: paragraph 22; and for breach of warranties implied into the Agreement pursuant to the provisions of the DBCA: paragraph 30. It is unnecessary to consider the counterclaims for damages as they have no relevance to the issues on appeal.

[14] The appellant pleaded to the defence and amended counterclaim by a reply and answer thereto[5] filed on 3 February 2014 in which the paragraphs in the reply were numbered 1 to 12 and those in the answer 1 to 20 respectively. Significantly, all of the allegations in paragraph 2(c), including those in paragraphs in 2(c)(ix), (x) and (xi), were admitted: paragraphs 2(b) and 4(b). There was a denial that the Agreement was unenforceable on account of the matters alleged in paragraphs 2(c)(x) and (xi): paragraph 4(c). There followed in paragraph 4(d) a list of alleged facts and circumstances which culminated in an allegation that, in any event, it would be unconscionable for the respondents to rely upon the provisions in the DBCA "to render the Agreement unenforceable": paragraph 4(d)(viii). Paragraphs 10 and 11 of the reply put in issue the allegations in paragraphs 10 and 11 of the defence on the basis of the preceding allegations in paragraph 4 of the appellants' reply. With regard to the answer, paragraphs 1 and 3(b) thereof denied that the Agreement was unenforceable, placing reliance upon the matters pleaded in paragraph 4(d). Paragraph 4 of the answer put in issue the respondents' restitutionary claim, relying in part upon the same matters.

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5 AB163-171.

[15] It is convenient to mention at this point that the respondents' amended application sought the striking out of paragraphs 4(d), 10 and 11 in the reply and paragraphs 1, 3(b) and 4 of the answer to which reference has been made in the immediately preceding paragraph. All of those six paragraphs were struck out by the order which struck out the amended statement of claim.

[16] I now turn to 7A of the amended statement of claim. It contained the alternative quantum meruit claim in the following terms:

> "7A. Alternatively:
>
> (a) the Plaintiff has performed the work the subject of the invoices at the instruction and for the benefit of the Defendants;
>
> (b) the Defendants have accepted the benefit of that work without payment of all of the Invoices and have been unjustly enriched thereby;
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> (c) the Plaintiff is entitled to be paid a reasonable sum for the work on the basis of quantum meruit;
>
> (d) a reasonable sum for the work is the amount of the invoices rendered by the Plaintiff to the Defendants, being $2,121,234.00;
>
> (e) to date, the Defendant have only paid the Plaintiff the sum of $1,938,982.00;
>
> (f) it would be unjust for the Defendants to retain the benefit of the work without making payment of the entire $2,121,234.00 to the Plaintiff;
>
> (g) in the premises, the Defendants are liable to the Plaintiff in the sum of $182,252.00 as quantum meruit."[6]

[17] The respondents did not plead to the amended statement of claim prior to the hearing of the application. As noted, however, by amendment of the application, that pleading became the principal object for the strike out relief. At the hearing of the application, the respondents' challenge to it disputed that the appellant could seek payment on a quantum meruit basis in the pending proceedings in the District Court.

The applicable legislation

[18] A number of the provisions of the DBCA were referred to in oral and written submissions on appeal. They are:

> "**3 Purpose of Act**
>
> The purpose of this Act, in regulating domestic building contracts, is—
>
> (a) to achieve a reasonable balance between the interests of building contractors and building owners; and
>
> (b) to maintain appropriate standards of conduct in the building industry.
>
> …

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6 AB180-181.

30 Contracts must be signed

A regulated contract has effect only if it is signed by the building contractor and building owner (or their authorised agents).

…

55 Cost plus contracts

(1) A building contractor must not enter into a cost plus contract that would be a regulated contract unless—

(a) the contract is included in a class of contracts prescribed under a regulation; or

(b) the cost of a substantial part of the subject work can not reasonably be calculated without some of the work being carried out.

Maximum penalty—100 penalty units.

(2) A building contractor must not enter into a cost plus contract that would be a regulated contract unless the contract contains a fair and reasonable estimate by the building contractor of the total amount the building contractor is likely to receive under the contract.

Maximum penalty—100 penalty units.

(3) If a building contractor enters into a cost plus contract in contravention of this section, the building contractor can not enforce the contract against the building owner.

(4) However, the tribunal may, on an application made, as provided under the QCAT Act, to the tribunal by the building contractor, award the building contractor the cost of providing the contracted services plus a reasonable profit if the tribunal considers it would not be unfair to the building owner to make the award.

…

84 Right of building contractor to recover amount for variation

(1) This section applies if—

(a) the building contractor under a regulated contract gives effect to a variation of the contract; and

(b) the variation consists of—

(i) an addition to the subject work; or

(ii) an omission from the subject work that results in the building contractor incurring additional costs.

(2) If the variation was originally sought by the building owner, the building contractor may recover an amount for the variation—

(a) only if the building contractor has complied with sections 79, 80, 82 and 83; or

(b) only with the tribunal's approval given on an application made, as provided under the QCAT Act, to the tribunal by the building contractor.

(3) If the variation is not a variation that was originally sought by the building owner, the building contractor may recover an amount for the variation—

(a) only if—

(i) the building contractor has complied with sections 79, 80, 82 and 83; and

(ii) the ground of unforeseen circumstances applies; or

(b) only with the tribunal's approval given on an application made, as provided under the QCAT Act, to the tribunal by the building contractor.

(4) The tribunal may approve the recovery of an amount by a building contractor for a variation only if the tribunal is satisfied that—

(a) either of the following applies—

(i) there are exceptional circumstances to warrant the conferring of an entitlement on the building contractor for recovery of an amount for the variation;

(ii) the building contractor would suffer unreasonable hardship by the operation of subsection (2)(a) or (3)(a); and

(b) it would not be unfair to the building owner for the building contractor to recover an amount. …"

[19] Two of these provisions, ss 30 and 55, were relied upon by the respondents in their defence. The latter was a focus for argument in the appeal.

[20] It may be noted that a number of other provisions and definitions in the DBCA were referred to in paragraph 2(c) of the defence for the purpose of pleading that the Agreement was a "regulated contract" as defined in s 8 thereof. In view of the admission of paragraph 2(c)(ix), it is unnecessary to set out those provisions and definitions.

The reasons at first instance

[21] At first instance, the learned primary judge considered a range of arguments addressed to him. An argument advanced by the appellant in order to avert the operation of s 55 was that the claim for payment of the unpaid progress claims was a claim in debt arising from a fully executed agreement, and not a claim to enforce the Agreement. His Honour found it inappropriate to consider the argument on the footing that the appellant had not pleaded that the Agreement had been fully executed.[7]

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[7] Reasons [15]-[20].

[22] His Honour accepted an argument advanced by the respondents based on s 55(3) DBCA that the appellant was not entitled to pursue recovery of the unpaid amount in the proceeding on a quantum meruit basis as was pleaded in paragraph 7A.[8]

[23] Lastly, his Honour accepted an argument by the respondents that the contracting-out provisions in s 93(2) DBCA precluded the appellant from invoking the doctrine of estoppel against them in their reliance upon s 55(3), or otherwise.[9]

The grounds of appeal and orders sought on appeal

[24] The notice of appeal filed on 8 May 2014[10] set out four grounds of appeal. Ground (a) challenged the conclusion on the debt argument and Ground (c) the conclusion on the estoppel argument. Neither of those grounds was maintained in an amended notice of appeal filed on 15 September 2014 for which leave was given at the hearing of the appeal.

[25] The two other grounds which were maintained in the amended document, became the sole grounds of appeal. They are:

> "(b) The primary judge erred in holding that s 55(4) of (the DBCA) prevented the appellant from maintaining a claim for quantum meruit in the District Court proceeding.
>
> (d) The primary judge erred in ordering indemnity costs against the appellant."

[26] In an apparent concession that the contractually-based claim is not maintainable in the District Court proceeding, the orders on appeal sought by the appellant include a variation to Order 1 made on 29 April 2014 so that it reads:

> "Paragraphs 7, 8, 9 and 12 of the amended statement of claim and paragraphs 4(d), 10 and 11 of the reply and 1, 3(b) and 4 of the answer to the amended counterclaim be struck out."

[27] Thus, the two issues on appeal concern the quantum meruit claim and costs, including costs of the appeal.

Ground (b) – quantum meruit claim

[28] In *Pavey & Matthews Pty Ltd v Paul*,[11] the High Court held that a right of a builder to recover on a quantum meruit does not depend upon the existence of an implied contract but on a claim to restitution independent of contract.[12] For the builder to have pursued a quantum meruit claim in that case was not to have sought to enforce a building contract. That cause of action was therefore not prohibited by a New South Wales legislative enactment which provided that a building contract was not enforceable in circumstances that prevailed in that case.

[29] The addition of the quantum meruit claim to the pleading here is explained by the principle affirmed in that decision; the admitted breach by the appellant of s 55(2); and the provisions of s 55(3) which provide that where a cost plus contract is entered into in breach of s 55(2), a building contractor may not enforce the contract

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8 Reasons [21]-[27].
9 Reasons [28]-[37].
10 AB230-233.
11 (1987) 162 CLR 221; [1987] HCA 5.
12 Per Mason and Wilson JJ at 228; Deane J at 263.

against the building owner. The respondents accept that were s 55(3) the only relevant provision in the DBCA, the decision in *Pavey* would make it unarguable that the section also precluded a claim in quantum meruit.[13]

[30] The parties join issue on whether, upon its proper construction, the DBCA prohibits a building contractor who has breached s 55(2) from recovery from the building owner on a quantum meruit. The respondents, who contend that it does, place reliance on provisions in the statute beyond s 55(3) itself. Principally, they rely upon s 55(4) and the purpose provision in s 3 which, they submit, clearly evince an implied legislative intention to deprive such a building contractor of a claim in quantum meruit. The appellant, on the other hand, relies upon the precise language of s 55(3) and submits that the other provisions do not disclose such an intention.

[31] The issue has not been considered before by this Court. However, it had received some attention in *Gemini Nominees Pty Ltd v Queensland Property Partners Pty Ltd.*[14] In that case, Mullins J expressed the conclusion *obiter* that, as a matter of construction of s 55 within the context of the DBCA, the legislature had restricted a builder who has breached ss 55(1) or (2) to recovering costs of the work undertaken pursuant to the contract to the extent provided in s 55(4). Her Honour added that it cannot be concluded that, in addition to s 55(4), a builder who breached s 55 would be able to make a claim based on quantum meruit.[15] The learned primary judge considered that he should adopt this conclusion, having first satisfied himself that it was not patently erroneous.[16] The conclusion was also referred to later by McGill DCJ in *Thompson Residential Pty Ltd v Tran & Anor*[17] who ventured the opinion that it was "clearly correct". That decision, however, concerned another provision of the DBCA, s 84, and not s 55.

[32] A contrary conclusion was reached by Judge Anderson of the County Court of Victoria in *PACD Pty Ltd v Depas Pty Ltd*.[18] After a consideration of provision in the *Domestic Building Contracts Act* 1995 (Vic) analogous to ss 55(2), (3) and (4), his Honour, who apparently had not been informed of the conclusion expressed by Mullins J, held that those provisions did not exclude a claim based on "unjust enrichment".[19] There does not appear to be any other decision of an Australian court directly upon the issue.

[33] The decision in *Pavey* itself illustrates that whether a given right of action has been abrogated by statute is dependent upon the statutory language used. Further illustrations of that are given by two decisions of this Court concerning the differently-worded s 42(3) of the then-named *Queensland Building Services Authority Act* 1991 (Qld). They are *Marshall v Marshall*[20] and *Sutton v Zullo Enterprises Pty Ltd*.[21] As then enacted, s 42(3) stated that "a person who carries out work in contravention of (s 42) is not entitled to any monetary or other consideration for doing so". That formulation was held to be sufficiently comprehensive to exclude a restitutionary claim by a builder based on quantum meruit.

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13 Tr1-28 L41.
14 [2008] 1 Qd R 139; [2007] QSC 20.
15 At [35].
16 Reasons [25].
17 [2014] QDC 156 at [17].
18 [2007] VCC 1683.
19 At [48].
20 [1999] 1 Qd R 173 per McPherson JA at 177.
21 [2000] 2 Qd R 196; [1998] QCA 417.

[34] From this background of judicial decisions, I now turn to consider the issue in dispute. The approach to resolution of it is informed by the presumption of statutory interpretation against abrogation or curtailment of common law rights. The presumption has been confirmed at the highest level of authority on many occasions. It requires that a legislative intention to take away a common law right be clearly expressed. The degree of clarity of expression of such an intention that is required has been described in slightly differing ways by justices of the High Court. In *Sargood Brothers v The Commonwealth*,[22] O'Connor J said at 279 that "an Act will never be construed as taking away an existing right unless its language is reasonably capable of no other construction". To similar effect, Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ in *Berowra Holdings Pty Ltd v Gordon*[23] restated the position thus:

> "The approach of the courts has consistently been to require very clear legislative intent before treating a statutory provision as taking away common law rights of a plaintiff, where there is an alternative construction available".[24]

[35] The legislative intention to take away a common law right may be expressly stated or it may arise by necessary implication.[25] Here, an intention to abrogate the restitutionary right to claim quantum meruit has not been expressly articulated. The question is whether a clear legislative intention to that effect is necessarily implied in the provisions of the DBCA. It is a question on which the Explanatory Memorandum for the *Domestic Building Contracts Bill* 2000 provides no assistance.

[36] The respondents argue that such an intention can be discerned from s 55(4) and the scheme of s 55. Section 55(4) empowers the Queensland Civil and Administrative Tribunal ("QCAT") on an application to it by the building contractor, to award the cost of providing the contracted services if it considers that it would not be unfair to the building owner to make such an award. The section begins with the words "However, the tribunal may …". The respondents submit that these words link s 55(4) to the preceding s 55(3) and signal an intention that where s 55(3) applies, the only remedy left to the building contractor is under s 55(4). Such a result, the respondent submits, would harmonise with the sanction in s 55(3) for contravention of s 55(1) or s 55(2), by providing some recourse for the building contractor. It would also promote the purpose of the DBCA of achieving a reasonable balance between the interests of building contractors and those of building owners: s 3(a).

[37] Furthermore, the respondents submit that it would be illogical for the legislature to have intended that a contravening building contractor have a choice between a quantum meruit claim and an award of the kind for which s 55(4) provides. Lastly, the respondents point to those provisions of s 84 DBCA which permit recovery of an amount for a variation where there has been non-compliance with the payment for variation provisions. Under s 84(2)(b), the building contractor may recover an amount only with the approval of QCAT, and not by a quantum meruit claim in a court. It is unlikely, the respondents contend, that "inconsistent" approaches would have been intended for cost plus contracts under s 55 and variations under that section.

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22 (1910) 11 CLR 258; [1910] HCA 45.

23 [2006] HCA 32; (2006) 225 CLR 364 at [23].

24 See also per Gleeson CJ in *Plaintiff S157/2002 v Commonwealth* [2003] HCA 2; (2003) 211 CLR 476 at [30] and Pearce and Geddes, *Statutory Interpretation in Australia*, 8th ed, para 5.35.

25 *Melbourne Corporation v Barry* (1922) 31 CLR 174 per Higgins J at 206.

[38] In written and oral submissions, the appellant advanced arguments against the respondents' submissions. The nature and content of those arguments are reflected in the discussion of the respondents' submission which follow.

[39] It may be accepted that the introductory word "however" in s 55(4) does provide a linkage of that section with s 55(3). In the present context, this word is used as a conjunction. Its customary grammatical use as a conjunction is to signify a concession. What follows it in s 55(4) is intended to be a concession upon the operation of s 55(3).

[40] It therefore falls to consider whether the language in which the concession is expressed necessarily implies that the right to claim in quantum meruit is abrogated. The respondents' approach is to reason by inference that because s 55(4) is concerned with a mode of recovering payment for building work and s 55(3) prevents enforcement of the contract under which the work was done, then the legislature must have intended that that be the only permissible avenue for the building contractor to pursue payment. Whilst there is attraction in that line of reasoning, I am not persuaded that it leads to the correct conclusion here.

[41] I say this for the following reasons. Section 55(4) does not confer an enforceable right to payment of any amount on the building contractor. It does not create a statutory right which might be regarded as compensating for an abrogation of rights to payment on any other basis. What the section does is regulate a jurisdiction given to QCAT to make an award in favour of a building contractor. An enforceable right to payment would arise only upon exercise of that jurisdiction in a way favourable to the building contractor.

[42] Further, the basis and nature of the award that QCAT may make is distinctly different from an amount that a building contractor might recover on a quantum meruit. Under s 55(4) what is awarded is the cost of providing the contracted services plus a reasonable profit. By contrast, costs recoverable in a quantum meruit claim are reasonable costs of providing the services. Moreover, exercise of the jurisdiction under s 55(4) is conditioned upon QCAT considering that it would not be unfair to the building owner to make the award. That significant condition has no counterpart in recovery on a quantum meruit. These differences are obstacles to a conception of what s 55(4) provides as having been intended to displace comprehensively recovery on a quantum meruit claim.

[43] These considerations suggest a construction of s 55(4) as a provision intended to regulate a jurisdiction conferred on QCAT and not one that, of its own or in combination with other provisions in the section, is also intended to abrogate a right to claim on a quantum meruit basis. This construction is one that is more than respectably arguable. To my mind, it is the preferable construction. I would respectfully agree with the observations of Judge Anderson in *PACD* with respect to analogous provisions in s 13(3)(b) of the Victorian legislation, that it was likely that the intended role of the provisions was to spell out the precise basis upon which the Victorian Civil and Administrative Tribunal was to exercise the power given to it "rather than suggesting that a court's power to order restitution had been excluded".[26]

[44] There is therefore an alternative construction of s 55 available which does not have the consequence of abrogation of the right to recover in a quantum meruit claim. The language of the section does not indicate in a very clear way an intention to abrogate such a right, as the test in *Berowa Holdings* would require it do in order to displace the alternative construction.

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[26] At [26].

[45] Furthermore, a practical consideration which suggests that abrogation of a quantum meruit claim was not intended can be seen in circumstances where the building owner sues the building contractor in a court. Abrogation would have the consequence that the building contractor could not counterclaim in the court proceeding for an unpaid amount either under the terms of the contract or on a quantum meruit. The building contractor would have to take steps to apply to the court for a transfer of the claim to QCAT.[27] The efficacy of that step for both parties would depend upon the basis of the claims made against the building contractor. Any claim or part of a claim which was not justiciable in QCAT could not be transferred and would remain pending in the court. Such would be the case where, for example, the respondent's counterclaim is for damages under the *Australian Consumer Law*.

[46] I do not accept the respondents' submission that the availability to the building contractor of a restitutionary claim in quantum meruit would render s 55(4) redundant or obsolete. As explained, the basis of award under the one is distinctly different from that under the other. Whether one is more advantageous than the other will depend upon the circumstances of the particular case. Nor do I see force in the respondents' submissions referenced to s 84. The DBCA was enacted after the decision in *Pavey*, *Marshall* and *Sutton* were published. The formulations of ss 55 and 84 were informed by those decisions. The choice of different formulations with known different consequences is apt to suggest that the respective provisions were intended to operate with different effect.

[47] For all of these reasons, I have concluded that this ground of appeal has been established and that the appeal must be allowed.

Ground (d) – costs

[48] In light of the success of Ground (b), the indemnity costs orders made on 29 April 2014 must be set aside. The strike out application was warranted but was foiled only by a very late amendment to the statement of claim. In those circumstances, the appropriate order is that there be no order for costs on the application.

[49] As to the appeal, the appellant has succeeded on two grounds. It should have its costs of the appeal on the standard basis except with respect to the two grounds of appeal that it abandoned at the hearing of the appeal. The respondents should have their costs of those two grounds paid by the appellant on the same basis.

Orders

[50] I would propose the following orders:

1. Appeal allowed.
2. Vary Order 1 made on 29 April 2014 to read:

   "Paragraph 7, 8, 9 and 12 of the amended statement of claim and paragraphs 4(d), 10 and 11 of the reply and paragraphs 1, 3(b) and 4 of the answer to the amended counterclaim be struck out."
3. Set aside Order 2 made on 29 April 2014 and substitute the following order:

   "There be no order as to costs."
4. Order that the respondents pay the appellant's costs of the appeal on the standard basis except those costs with respect to Grounds 2(a) and (c) in the notice of appeal filed on 8 May 2014.

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[27] Pursuant to s 53(1) of the *Queensland Civil and Administrative Tribunal Act* 2009 (Qld).

5. Order that the appellant pay the respondents' costs of Grounds 2(a) and (c) in the said notice of appeal on the standard basis.

[51] **MORRISON JA:** I have read the reasons of Gotterson JA and agree with those reasons and the orders his Honour proposes.