DISTRICT COURT OF QUEENSLAND

CITATION:	*CMF Projects P/L v Riggall & Anor* [2014] QDC 90
PARTIES:	**CMF PROJECTS PTY LTD (ACN 114 539 212)** Respondent/plaintiff v **BRIAN NOEL MANSON RIGGALL** applicant/first defendant and **JANE REIMAN RIGGALL** applicant/second defendant
FILE NO/S:	BD4085 of 2013
DIVISION:	Civil Applications
PROCEEDING:	Application
ORIGINATING COURT:	Brisbane
DELIVERED ON:	24 April 2014
DELIVERED AT:	Brisbane
HEARING DATE:	15 April 2014, written submissions to 16 April 2014
JUDGE:	Andrews SC DCJ
ORDER:	**1. That 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 counter-claim be struck out.** **2. That the plaintiff pay the defendants' costs of the application on the indemnity basis.** **3. That with respect to the order for costs the plaintiff have liberty within seven (7) days to make submissions on notice to the defendants seeking to set aside the order for costs and seeking an alternative order for costs.**
CATCHWORDS:	BUILDING ENGINEERING AND RELATED CONTRACTS – REMUNERATION – STATUTORY REGULATION OF ENTITLEMENT TO AND RECOVERY OF PAYMENT – DOMESTIC BUILDING CONTRACTS ACT 2000 ss 55(2), 55(3), 55(4) – effect on other remedies – where building contractor did building work pursuant to cost plus contract – where contract a regulated contract – where contract did not contain a fair and reasonable estimate by the

building contractor of the amount which the building contractor was likely to receive under the contract as required by s 55(3) – whether builder may recover on *quantum meruit* basis from District Court

ESTOPPEL – BY REPRESENTATION – EFFECT OF STATUTORY PROHIBITION AGAINST CONTRACTING OUT – where builder alternatively claims that owners estopped from disputing that builder's *quantum meruit* claim may be brought in the District Court – whether s 55 confers rights which it is in the public interest to maintain – where s 93(2) prohibits contracting out of the Act – whether s 93(2) relevant to whether owner estopped from disputing builder's *quantum meruit* claim – whether builder confined to claim in tribunal under s 55(4)

PRACTICE AND PROCEDURE – Pleadings – whether to strike out statement of claim and parts of reply and answer – where plaintiff seeks to allege that monies claimed are a debt due upon a fully executed contract rather than money payable pursuant to contract – whether plaintiff obliged to plead that contract fully executed or whether defendant obliged to plead that the contract was not fully executed – UCPR r 153 – whether the allegation that contract was fully executed is a condition precedent for the case of the plaintiff which may be implied in the plaintiff's pleading

PRECEDENTS – stare decisis – whether statement in a judgment of the Supreme Court was obiter dictum or ratio decidendi – where obiter dictum on interpretation of statute – whether appropriate to follow the obiter dictum without reconsidering the point

Domestic Building Contracts Act 2000 ss 3, 30, 55(2), 55(3), 55(4), 84 and 93

Property Agents and Motor Dealers Act 2000 (Qld)

Queensland Building Construction and Commission Act 1991

Uniform Civil Procedure Rules 1999 (Qld) r 171

Beckford Nominees Pty Ltd v Shell Co of Australia Ltd (1987) 73 ALR 373

Day Ford Pty Ltd v Sciacca [1990] 2 Qd R 209

Gemini Nominees Pty Ltd v Queensland Property Partners Pty Ltd [2008] 1 Qd R 139

Keen v Holland [1984] 1 WLR 251

Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] AC 993

Maritime Electric Co v General Dairies Ltd [1937] AC 610

Metropolitan Health Service Board v Australian Nursing Federation [2000] FCA 784; (2003) 176 ALR 46

Neumann Contractors Pty Ltd v Traspunt No. 5 Pty Ltd [2011] 2 Qd R 114

Pavey & Matthews Pty Ltd (1987) 162 CLR 221

Plaintiff S157/2000 v Commonwealth of Australia (2003) 211 CLR 476
Sultana Investments Pty Ltd v Cellcom Pty Ltd (No 1) [2008] QCA 357; [2009] 1 Qd R 589

Telstra Corp Ltd v Treloar (2000) 102 FCR 595; [2000] FCA 1170

COUNSEL: G I Thomson for the applicant/defendants

G Coveney for the respondent plaintiff

SOLICITORS: H W L Ebbsworth for the applicant/defendants

Arrow Law for the respondent/plaintiff

Issues

[1] The defendants apply to strike out an amended statement of claim and, to prevent an estoppel being raised, some parts of the reply and some parts of the answer to an amended counterclaim. As well, the defendants require particulars.

[2] The plaintiff is a builder. The defendants are home owners. The home owners requested that the plaintiff renovate their house. The builder and the home owners reached an agreement which was a "cost plus contract" within the meaning of the *Domestic Building Contracts Act* 2000 ("the *DBCA*"). The agreement was also a "regulated contract" as that term is defined in the *DBCA* and it was not signed by the home owners and it did not itself contain any estimate of the amount which the builder was likely to receive under the agreement.

[3] A consequence of that is that the builder "can not enforce the contract against the" home owners.[1]The builder maintains that its amended statement of claim does not seek to enforce the contract, (the amended statement of claim does seek to enforce the contract) that it has pleaded a claim in debt (it has not). The builder pleaded an alternative claim in *quantum meruit* and argues that it may do so in this court notwithstanding the wording of *DBCA* s 55 (3) and (4). (It may not).

Statutory framework

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1 *DBCA* s 55(3).

[4] For understanding arguments raised in this application, relevant sections of the *DBCA* 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.
>
> …
>
> **30 Contracts must be signed**
>
> A regulated contract has effect only if it is signed by the building contractor and building owner…
>
> **55 Cost plus contracts**
>
> …
>
> (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…
>
> (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…
>
> (4) the tribunal may approve the recovery of an amount by the 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 sub-section (2)(a)…; and

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

93 Contracting out prohibited

(1) a domestic building contract is void to the extent to which it –

(a) is contrary to this Act; or

(b) purports to annul, exclude or change a provision of this Act.

(2) an agreement (other than a domestic building contract) is void to the extent to which it seeks to exclude, change or restrict a right conferred under this Act in relation to a domestic building contract…"

Does the amended statement of claim contain a claim under a contract for money owing?

[5] The answer to the question posed immediately above has become relevant only to costs of the home owners' application to strike out. It became clear in the builder's counsel's written submissions[2] delivered minutes before the application was heard and crystal clear in his oral submissions that the builder's claim for $182,252.00 is not a claim for moneys payable pursuant to contract and that the proceeding "is not brought upon or to enforce the contract".[3]

[6] The home owners' submissions in support of their application to strike out the statement of claim were clearly premised upon the home owners' assumption that the statement of claim included a claim for money owing pursuant to contract, that is to say a claim "brought upon or to enforce the contract". It did not become clear that the builder disavowed such a basis until one read the builder's counsel's submissions.

[7] Before the statement of claim was amended, it contained no quantum meruit claim. The home owners filed their application to strike out the builder's statement of claim on 1 April 2014. Before the application was heard, the builder filed an amended statement of claim to include an alternative basis, being quantum meruit, claiming an identical $182,252.00.

[8] When the application was heard before me the amended statement of claim included the following paragraphs which appear consistent with a claim for money pursuant to contract:

"2 By an agreement entered into between the Plaintiff… and … the Defendants… the Plaintiff at the request of the Defendants agreed to provide Services to the Defendants…

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2 Para 6

3 Submissions on behalf of the plaintiff, para 8

> 2A The Agreement between the Plaintiff and the Defendants was partly oral and partly written.
> 2B Insofar as the Agreement was in writing it consisted of:
> (a) ongoing email correspondence… as follows…
> (b) the following progress claims as agreed between the parties.
> …
> ("the Agreement")
> 3. It was an implied term of the Agreement that the Defendants would pay the Plaintiff for the progress claims provided at the request of the Defendants.
> 4. Pursuant to the Agreement… the Plaintiff provided the Services…
> 5. During the Period, the Plaintiff rendered its progress claims to the Defendants…
> 7. Despite demand by the Plaintiff and in breach of the Agreement, the Defendants have neglected, failed and/or refused to pay the Plaintiff the final invoice, being Invoice Number CMF074-10 and Progress Claim 10, in the sum of… $182,252.00 ('the Debt')…
> 12. The Plaintiff is entitled to claim and does claim from the Defendant the Debt as moneys due, owing and payable pursuant to the terms and conditions of the Agreement or alternatively as quantum meruit…"

[9] For the builder it was submitted that, in the amended statement of claim, references to an agreement between the builder and the home owners were not intended to suggest that the builder was suing upon an agreement. Instead, the references to the agreement were pleaded to show that work done by the builder was not intended to be done gratuitously. Where the basis for a claim for money is not the usual basis that it is payable according to the terms of an agreement it can be appropriate to plead an agreement to do the work even where the agreement is not enforceable. This would be so where it is necessary to prove an intention that the work be paid for and to disprove that there was no intention to perform work gratuitously.[4]

[10] To reinforce his submission that the proceeding "is not brought upon or to enforce the contract", counsel for the builder during oral argument orally applied to amend the amended statement of claim at paragraph 7 to delete the words "and in breach of the Agreement" and "the final invoice, being Invoice Number CMF074-10 and Progress Claim 10, in" and from paragraph 12 the words "pursuant to the terms and conditions of the Agreement".

[11] The impression from the amended statement of claim that the builder was basing one cause of action on a claim for money payable pursuant to contract was reinforced by the builder's pleading at paragraph 3(b) of the Answer to the Amended Counterclaim which alleged that "the Agreement was and is enforceable." Counsel submitted that this plea was intended to assert an estoppel. If that is correct, the plea at 3(b) failed to reveal its intent. I contrast a hypothetical plea foreshadowed in the builder's submission that the home owners "are estopped from

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4 *Pavey & Matthews Pty Ltd* (1987) 162 CLR 221 at 257.5 per Deane J.

relying on s 55(3) of the *DBCA*" and from denying that "the Agreement was and is enforceable."

[12] The application to strike out the statement of claim was plainly justified when it was filed.

[13] When the amended statement of claim was filed to include a claim for quantum meruit the home owners were justified in applying to strike out at least those parts of the statement of claim which appeared to claim money pursuant to contract. Thus, the home owners were justified in seeking leave to file an amended application to strike out the amended statement of claim. The justification for this was because the amended statement of claim created the clear impression that the alternative to the quantum meruit claim was a claim for money due pursuant to an agreement.

If not a claim for money payable pursuant to a contract, what are the bases of the builder's claim?

[14] The builder explained by submissions that it claims $182,252.00 by:

(a) "an action to recover money for a fully executed agreement" which is "an action for debt and not an action brought under the contract"; and further and alternatively;
(b) an action for quantum meruit; and
(c) by the amended statement of claim the builder also alleges that the home owners are "estopped from denying that any money is owing as a result of their conduct." The builder gave as particulars of this that the home owners "acquiesced and agreed to the terms of the agreement, by making payment of progress claims 1 to 9". By written submissions the builder added that it will amend the relevant paragraph of the amended statement of claim to refer to paragraph 4(d) of the builder's reply. That sub-paragraph alleges matters which create another basis for arguing an estoppel. Instead of founding an estoppel on the home owners' payment of invoices for progress claims, after amendment it would be clear that it is founded on the allegation that the home owners knew or ought to have known that the agreement did not comply with the *DBCA*, that the home owners represented to the builder that they knew the agreement did not comply with the *DBCA* and represented that they did not intend to rely on the *DBCA* to defend any claim, that the builder relied on those representations to commence and continue performing works and "therefore" did not formally contract in accordance with the *DBCA* and that it is unconscionable for the home owners to rely on the *DBCA* to render the agreement unenforceable.

Does the statement of claim contain a claim to recover money on a fully executed agreement?

[15] The builder surprised the home owners with a submission that the builder maintains an action to recover money for a fully executed agreement, that as such it is an action for debt and not an action brought under the contract. I do not mean to

suggest that the home owners' counsel was unaware of the law relating to such an argument but rather that the home owners were unaware that the builder founded its claim for $182,252.00 on an allegation that there was a fully executed agreement: that the builder for its part had performed all work that it had agreed to do.

[16] Has the builder pleaded a fully executed agreement? Its counsel does not expressly submit so. The amended statement of claim does not expressly allege that the builder has fully executed an agreement. The builder's counsel submitted that there is no dispute that the services requested have been fully provided and that this emerges from reading paragraph 4 of the amended statement of claim with the admission at paragraph 4(a) of the defence. I reject the submission. Since "the Services" alleged at paragraph 4 of the amended statement of claim are defined at paragraph 1 (c) of paragraph 4 of the amended statement of claim to be "building and construction services" generally and without reference to any agreement with the home owners, an admission that the builder provided "the Services" is an admission that it provided "building and construction services" generally and without reference to any agreement. The amended statement of claim does not plead sufficient facts from which one may infer that the builder for its part has fully executed an agreement.

[17] The builder's counsel had an alternative argument. He implied that the pleading does not plead a fully executed agreement by his alternative submission that it is for the defendant home owners to plead that performance by the builder was not complete.

[18] No authority for or argument in support of that submission was given by the builder's counsel. UCPR r 153 permits the implication of performance of a condition precedent for the case of a party and places an onus on the other party to deny performance of the condition precedent. The allegation of facts to show that there has been a fully executed agreement seems to me to be qualitatively different from a mere condition precedent. Such facts would be material facts which are a substantial component of an action in debt. They are in the case before me to distinguish the debt actio from an action in contract, so as to show that the builder seeks to recover money for a fully executed agreement. I reject the builder's submission that it was for the home owners to raise the issue in their defence and the implied submission that there is no need for the builder to plead the material facts supporting its claim of a fully executed agreement in its statement of claim.

[19] The home owners submit that the pleading does not allege that an entire contract was performed. I accept that submission.

[20] A nice question arises as to whether the builder may bring a claim in debt notwithstanding *DBCA* s 55. I infer that the builder desires a finding on that issue. As the claim that the agreement was fully executed was not pleaded and as there is no identifiable claim for a debt due on a fully executed contract, a finding on the nice question would be an advisory opinion by the court. As such, it would be inappropriate to decide it. It would also be obiter and would not bind the parties.

Can the builder maintain a claim for quantum meruit in this court notwithstanding that it may not enforce the contract because of s 55(3) of the *DBCA* and that it may obtain a *quantum meruit* style of remedy it may seek from QCAT?

[21] In *Gemini Nominees Pty Ltd v Queensland Property Partners Pty Ltd* [2008] 1 Qd R 139 Mullins J was required to consider s 55 of the *DBCA* and her Honour made an unequivocal interpretation that "the Legislature has restricted a builder who breaches s 55(1) or (2) of the *DBCA* to recovering costs for the work undertaken pursuant to that contract to the extent provided in s 55(4)".[5] Her Honour added that "It cannot be concluded that in addition to s 55(4) a builder who breached s 55 of the *DBCA* would be able to make a claim based on *quantum meruit*."[6] There is a plausible argument that her Honour's two observations were *obiter dictum*. The builder's counsel submits they were *obiter* and the home owner's counsel submits they were part of the *ratio*. It is difficult to determine whether her Honour regarded the findings as integral to the reasoning that led to her finding that the scheme under the *Building and Construction Industry Payments Act* 2004 "which seeks to facilitate progress payments under a construction contract could" not "apply to facilitate a progress payment in respect of an amount that may be awarded under s 55(4) of the *DBCA* where the domestic building contract has been made unenforceable pursuant to s 55(3) of the *DBCA*". One might have reached that same conclusion without finding that s 55(4) of the *DBCA* was the exclusive source of a restitutionary *quantum meruit* remedy. On balance I conclude that it was not necessary to so hold for the purpose of determining that a builder cannot claim to be entitled to a progress payment under an unenforceable contract. I conclude that her Honour's additional observation was obiter, that I am not bound to accept it by the rule of *stare decisis.* That raises the issue of whether I am obliged to consider the correctness of her Honour's construction of s 55(4) and to determine the construction myself. I infer that the builder would submit that I must.

[22] When a judge of the District Court of Queensland is assisted by reference to obiter dicta of a single judge of the Supreme Court of Queensland the dicta are treated as persuasive though not binding. While the situation for appellate courts confronted with other appellate decisions on point is quite different, some of the practical considerations which guide appellate courts in determining whether to reconsider a point previously decided by another appellate court are helpful to bear in mind for this court when considering whether to reconsider a point about a Queensland Statute's interpretation upon which there is obiter dictum from a single judge of the Supreme Court of Queensland. The Full Court of the Federal Court of Australia in *Telstra Corp Ltd v Treloar*[7]observed, so far as is relevant to the issue of a District Court's application of obiter relating to statutory interpretation:

> [23] The doctrine of stare decisis takes its name from the Latin phrase "stare decisis et non quieta movere" which translates as "stand by the thing decided and do not disturb the calm". It is a doctrine based on policy. The rationale for the doctrine can be grouped into four categories: certainty, equality, efficiency and the appearance of justice. Stare decisis promotes certainty because the law is then able to furnish a clear guide for the conduct of individuals. Citizens are able to arrange their affairs with confidence knowing that the law that will be applied to them in future will be the same as is currently applied. The doctrine achieves equality by treating like cases alike. Stare decisis promotes efficiency. Once a court has determined an issue, subsequent courts need not expend the time and resources to reconsider it. Finally, stare decisis promotes the appearance of justice by creating impartial rules of law not dependent upon the personal views or biases of a particular judge. It achieves this result by impersonal and reasoned judgments.
> …

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5 At [36] on pg 150 lines 4-8
6 At [36] on pg 150 line 10
7 (2000) 102 FCR 595; [2000] FCA 1170

> [27] The problem is very real when what is at issue is the construction of a statute. For one thing, statutory language is often ambiguous. Courts can struggle to determine the legislative intent. It is often impossible to discover any legislative intent. In many instances the generality of the statutory language is deliberate and allows the courts to develop a body of law to fill the gaps. This may lead to disagreement among judges about what the statute means. It would be sound policy that once that intent has been discerned by an appellate court then that should be the end of the matter.
> [28] The view which we prefer is that unless an error in construction is patent, or has produced unintended and perhaps irrational consequences not foreseen by the court that created the precedent, the first decision should stand. In other areas of the law a precedent may be reconsidered if its underlying reasoning is outdated or is inconsistent with other legal developments. Perhaps, with some modification, in some instances these factors could also be applied to cases concerned with the construction of statutes…

[23] The builder submits that her Honour's construction of s 55 is wrong. The submission targets more particularly her Honour's finding that "It cannot be concluded that in addition to s 55(4) a builder who breached s 55 of the *DBCA* would be able to make a claim based on *quantum meruit*." The builder implies an argument which was not put to her Honour and which is plausible, that s 55(4) creates a jurisdiction in the tribunal to entertain a restitutionary claim of the type described in s 55(4). The builder implies that the creation of the tribunal's jurisdiction was not intended to remove jurisdiction from any courts which otherwise had jurisdiction to give a builder restitution when its contract was unenforceable. The builder supports its submission by reference to *Plaintiff S157/2000 v Commonwealth of Australia*[8] which is authority for the proposition that common law rights are not curtailed unless an intention is manifested by unmistakeable and unambiguous language. The builder implies that the language in s 55(4) is ambiguous and contrasts it with the wording used in s 84(2).[9] I have not found a case directly considering the meaning of the words of s 84(2). In my opinion, s 84(2) excludes a builder's capacity to recover an amount on account of a variation[10] on any basis other than by satisfying one of the subparagraphs in s 84(2)(a) or s 84(2)(b). This is for two reasons. The first is that that is the natural meaning of the words used at s 84(2). The second is that there would be little point in the legislature creating a specific, and quite restricted right at s 84(4) to, in effect, a restitutionary remedy in certain circumstances if the legislature did not intend otherwise to exclude any right to recover, including in restitution. I accept that the wording at s 84 is clearer than the wording at s 55 in expressing an intention to limit the builder's remedy to the remedy the tribunal may grant (where the builder failed to give the required estimate). I accept the builders' argument that the words of s 84(2) more clearly demonstrate an intention to curtail other common law rights than the words of s 55(3). But a comparison of s 55(4) and 84(4) gives some support to the home owners. Section 84(4) is an instance of the legislature creating a specific and restricted right to a restitutionary remedy for builders who failed to obtain properly documented variation agreements, a remedy available only from the tribunal and to the exclusion of other rights of recovery. It would be odd if the legislature took a different approach with s 55(4) when creating a specific and restricted right to a restitutionary remedy for builders who failed to supply properly documented estimates of the total amount the builder is likely to receive. It would

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8 (2003) 211 CLR 476
9 Set out above.
10 Of a domestic building contract which is a regulated contract

be more likely that the legislature would take a consistent approach with the remedy created at s 55(4) by making that remedy the only remedy available to the builder.

[24] If her Honour's construction of s 55 is applied, it does not follow that all builder's common law rights to seek a restitutionary remedy in *quantum meruit* are curtailed. Only the rights of a building contractor who enters into a domestic building contract which is a cost plus contract that would be a regulated contract and who has not included a fair and reasonable estimate of the total amount the building contractor was likely to receive under the contract is affected and is affected to the limited extent that its common law right to claim restitutionary *quantum meruit* is replaced by a statutory right to claim in the tribunal for the cost of providing contracted services plus a reasonable profit if it would not be unfair.

[25] On the hypothesis that her Honour's finding is obiter I am not satisfied that there is a patent error in her Honour's construction and related obiter finding. I am not satisfied that her Honour's finding is wrong. As it was a finding about the proper interpretation of a statute it seems to me sensible that having satisfied myself that there is no patent error in her Honour's construction I should be at liberty to apply her Honour's finding without taking the time to reconsider the issue. It is sensible that I apply her Honour's finding and I do.

[26] The process of concluding that there was no patent error did result in my reconsidering the point. I am, with respect, also satisfied that her Honour's obiter finding is correct.

[27] It follows that, subject to one further argument, the builder may not maintain its *quantum meruit* claim in this court. That finding means that I am required to consider the merits of the builder's estoppel arguments which are designed to preserve its right to proceed in this court on a *quantum meruit* claim even if by s 55 of the *DBCA* the legislature had intended that builders should be restricted to seeking a *quantum meruit* style of restitutionary remedy from the tribunal.

Can the builder rely upon an estoppel to maintain its quantum meruit claim in this court?

[28] The amended statement of claim purports to raise an estoppel at paragraph 8. That paragraph alleges:

> "The Plaintiff will further rely upon the Defendants' conduct in making payment of all invoices in line with each progress claim and the Defendants are estopped from denying that any money is owing as a result of their conduct."

Counsel for the builder accepts that paragraph 8 "ought to include the much more fulsome plea that now appears in the reply".

[29] I infer that the builder does not rely upon paragraph 8 of the amended statement of claim as being satisfactory to set out all the matters necessary to establish an estoppel and infer that, subject to my finding about the builder's argument that it may maintain the estoppel point raised in its reply, the builder will either incorporate matters set out in paragraph 4 of its reply into paragraph 8 of its amended statement of claim or alternatively that the builder will delete paragraph 8 of its statement of claim and rely exclusively on paragraph 4 of its reply. Paragraph

4 of the builder's reply alleges, in essence, that "at all material times" the home owners knew and understood their rights under the *DBCA*, knew that the agreement did not comply with the *DBCA* and gave instructions to allow the builder to undertake the works and thereby represented to the builder that they knew the agreement did not comply with the *DBCA* and that they did not intend to rely on the *DBCA* and the builder acted to its detriment by relying on those representations and not contracting in accordance with the *DBCA* rendering it unconscionable for the home owners to rely on the *DBCA*.

[30] The builder submits that it may raise an estoppel against the home owners' reliance upon s 55 because that section is enacted for a private benefit and may be disclaimed by the home owners and that it can be distinguished from a provision which is enacted for the protection of the public generally.

[31] In most cases there is no estoppel against a defendant who wishes to set up the statutory invalidity of some contract.[11] Whether an estoppel is to be allowed or not has been said to depend on whether the obligation imposed by the statute will be nullified by an estoppel.[12]It is probably more correct to enlarge the question to ask whether an obligation imposed for the public benefit will be nullified by an estoppel.

[32] The builder submits that the *DBCA*, unlike, for example, the *Property Agents and Motor Dealers Act* 2000 (Qld), does not state that the protection of consumers is one of its objects, that s 3 of the *DBCA* states that the purpose of the *DBCA* is to achieve a reasonable balance between the interests of building contractors and building owners. I do not accept that object is unequivocally for conferring a private benefit.

[33] Another of the purposes of the *DBCA* is "to maintain appropriate standards of conduct in the building industry" which is concerned with the public interest. I accept the builder's submission that the limitations imposed upon builders by the *DBCA* are less in scope than those imposed by the *Queensland Building Construction and Commission Act* 1991 whose objects are set out in s 3 of that Act. Those objects include some which are more easily recognisable as public interest objects. I refer, for example, to the object of regulating the building industry to ensure the proper maintenance of standards in the industry.

[34] The builder submits that s 55 of the *DBCA* is enacted for a private rather than for a public purpose and that building owners are not a general class of consumers who would require protection. I note that the building owners protected by s 55 are defined partly by their interest in "domestic building work" and a "domestic building contract" for, at most, the construction of one detached dwelling. A member of that class of "building owner", generally speaking, is likely to be much less often a party to a domestic building contract than the builder with whom the agreement is reached. One of the *DBCA*'s objects may be the achievement "of a reasonable balance between the interests of building contractors and building owners" but that does not mean that it is not also for a purpose of protecting the

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11 *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993 at 1015-1016 and *Sultana Investments Pty Ltd v Cellcom Pty Ltd (No 1)* [2008] QCA 357; [2009] 1 Qd R 589 at [50].

12 *Day Ford Pty Ltd v Sciacca* [1990] 2 Qd R 209 at 216 approving *Maritime Electric Co v General Dairies Ltd* [1937] AC 610 at 620 and referred to with approval in *Sultana Investments Pty Ltd* op cit at [51].

generally less experienced "building owners". S 55 has three features which suggest that the reasonable balance is one which clearly favours and seeks to protect the other party. Only the builder commits an offence. Only the builder is prevented from enforcing the contract. The tribunal's power to award the builder the cost of providing the contracted services and a reasonable profit is conditional upon finding that it would not be unfair to the building owner.

[35] For the home owners it was submitted that s 55 has a consumer protection focus. I accept that.

[36] *DBCA* s 93(2) is set out above. It refers to "a right conferred under this Act". A proper inference from *DBCA* s 55 (2) is that the home owners have a statutory right which corresponds with the prohibition on the builder against entering into the contract without including the builder's fair and reasonable estimate of the total it was likely to receive. The home owners' right was to have the estimate included in the contract. A proper inference from *DBCA* s 55 (3) and (4) is that the home owners have a statutory right which corresponds with the prohibition on the builder's enforcing the contract other than in the tribunal pursuant to *DBCA* s 55 (4). If the builder and home owners had hypothetically gone so far as to enter into a separate contract that the home owners would give up the rights arising from *DBCA* s 55 (2), (3) and (4) the effect of *DBCA* s 93(2) would be to make that separate contract void. It would be odd if something less than a separate contract, namely a representation by the home owners relied upon by the builder, would give a greater protection to the builder than it could obtain from a separate contract. That proposition was put more eloquently in *Keen v Holland* [1984] 1 WLR 251 at 261 C-F which was applied in *Beckford Nominees Pty Ltd v Shell Co of Australia Ltd* (1987) 73 ALR 373 at 378 – 9 by Pincus J as his Honour then was and both cases were referred to with approval by Muir JA in *Neumann Contractors Pty Ltd v Traspunt No. 5 Pty Ltd* [2011] 2 Qd R 114 at 133 [69]. However, while Muir JA regarded a prohibition against contracting out as providing a strong indication that a provision conferred public rights or rights which it is in the public interest to maintain and which cannot be eroded by estoppel, it was unnecessary for his Honour to express a concluded view in that case. I note also that in *Metropolitan Health Service Board v Australian Nursing Federation* (2003) 176 ALR 46 at 54-55 French J sitting as a member of the Full Court of the Federal Court concluded that neither estoppel nor waiver applied in that case because the legislation precluded contracting out and his Honour stated the guiding principle, citing the decision of Pincus J in *Beckford Nominees*, thus:

> "There is nothing novel in the general proposition that statutes which preclude contracting out of the rights and obligations they confer will defeat the application of estoppel and waiver to like effect…"

[37] I conclude that the prohibition against contracting out confirms that *DBCA* s 55 conferred "public rights or rights which it is in the public interest to maintain" and that the builder cannot rely upon the alleged estoppel to maintain its quantum meruit claim in this court.

Particulars

[38] As a result of the findings I have made, it is unnecessary for me to consider the request for particulars of paragraph 8 of the amended statement of claim and

paragraph 4(d)(iii) of the reply which contained allegations for the purpose of maintaining the estoppel argument.

Conclusion

[39] Having regard to these findings it is appropriate to order that the amended statement of claim be struck out. Because I have held that the builder may not maintain its estoppel argument it is appropriate that paragraphs 4(d), 10 and 11 of the reply be struck out together with paragraphs 1, 3(b) and 4 of the answer to the amended counter-claim. The parties have not made submissions as to costs.

[40] The general rule is that where the court strikes out all or part of a pleading there will be an order that the costs of the application be paid by the unsuccessful party on the indemnity basis. I am reluctant to impose that order without first giving the unsuccessful builder liberty to make submissions to the contrary. However, in an effort to spare the parties from wasted expense it seems sensible to order that the plaintiff pay the defendants' costs of the application calculated on the indemnity basis and to give the plaintiff liberty for 7 days to apply to set aside that order for costs.