SUPREME COURT OF QUEENSLAND

CITATION:	*Cook's Construction P/L v SFS 007.298.633 P/L (formerly trading as Stork Food Systems Australasia P/L)* [2009] QCA 75
PARTIES:	**COOK'S CONSTRUCTION PTY LTD** ACN 004 782 558 (plaintiff/appellant) **v** **SFS 007.298.633 PTY LTD (FORMERLY TRADING AS STORK FOOD SYSTEMS AUSTRALASIA PTY LTD)** ACN 007 298 633 (defendant/respondent)
FILE NO/S:	Appeal No 9301 of 2008 SC No 10993 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	3 April 2009
DELIVERED AT:	Brisbane
HEARING DATE:	26 February 2009; 27 February 2009
JUDGES:	Keane and Fraser JJA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Appeal dismissed** **2. Appellant to pay the respondent's costs of the appeal on the standard basis**
CATCHWORDS:	RESTITUTION – MISTAKE: RESTITUTION ARISING FROM A PLAINTIFF'S MISTAKEN ACTIONS – RECOVERY OF MONEY PAID UNDER MISTAKE – RELEVANT PRINCIPLES – where appellant and respondent related as sub-contractor and contractor – where appellant warranted to respondent that appellant licensed builder – where respondent paid to appellant moneys for services rendered on that basis – where appellant not licensed builder – where respondent claimed against appellant for moneys had and received insofar as respondent paid appellant on mistaken belief as to appellant's entitlement under contract – where appellant claimed respondent's action should fail insofar as the respondent did not disprove the appellant's entitlement to reasonable remuneration under s 42(4) of the *Queensland Building Services Authority Act* 1991 (Qld) – whether

respondent's action for moneys had and received maintainable

RESTITUTION – GENERAL PRINCIPLES – *restitutio in integrum* – where appellant claimed respondent not entitled to claim for moneys had and received insofar as respondent cannot restore appellant to pre-transaction position – whether *restitutio in integrum* element of respondent's claim for moneys had and received

EVIDENCE – BURDEN OF PROOF, PRESUMPTIONS, AND WEIGHT AND SUFFICIENCY OF EVIDENCE – GENERALLY – SUFFICIENCY – where appellant claimed respondent's claim for moneys had and received reduced by appellant's claim for reasonable remuneration under s 42(4) of the *Queensland Building Services Authority Act* 1991 (Qld) – where appellant claimed respondent's claim failed insofar as it did not particularise appellant's reasonable remuneration to be deducted from claimed amount – whether burden of proof held by appellant or respondent with respect to demonstrating reasonable remuneration on the evidence

INTEREST – RECOVERABILITY OF INTEREST – AWARD OF INTEREST ON DEBTS AND SUMS CERTAIN – OTHER MATTERS – where trial judge awarded interest against appellant from date of last payment by respondent – where appellant claimed interest should not be awarded because respondent received value for money – whether interest should be awarded

APPEAL AND NEW TRIAL – GENERAL PRINCIPLES – POINTS AND OBJECTIONS NOT TAKEN BELOW – WHEN NOT ALLOWED TO BE RAISED ON APPEAL – COURSE OF CONDUCT AT TRIAL – where three of the appellant's contentions on appeal were not litigated at trial – where respondent argued that it would have met these contentions with evidence if they had been run at trial and, as such, that the appellant should not now be permitted to raise these contentions on appeal – where appellant answered this by arguing that the respondent had counterclaimed only the full amount of what it had paid and that the evidence that the respondent claims it would have led would not have supported that counterclaim in any case – whether the appellant should be permitted to raise these contentions on appeal

Queensland Building Services Authority Act 1991 (Qld), s 42, s 43
Queensland Building Services Authority Amendment Act 1999 (Qld), s 21
Retail Tenancies Reform Act 1998 (Vic), s 8
Supreme Court Act 1995 (Qld), s 47
Uniform Civil Procedure Rules 1999 (Qld), r 150

Alati v Kruger (1955) 94 CLR 216; [1955] HCA 64, cited
Australia & New Zealand Banking Group Ltd v Westpac Banking Corp (1988) 164 CLR 662; [1988] HCA 17, cited
Bank of New South Wales v Murphett [1983] 1 VR 489, cited
Barclays Bank Ltd v W J Simms Son & Cooke (Southern) Ltd [1980] QB 677, cited
Batchelor v Burke (1981) 148 CLR 448; [1981] HCA 30, cited
Chugg v Pacific Dunlop Ltd (1990) 170 CLR 249; [1990] HCA 41, cited
Clarke v Dickson (1858) 120 ER 463, cited
Cook's Construction Pty Ltd v Stork ICM Australia Pty Ltd [2004] QSC 66, cited
Cook's Construction P/L v Stork Food Systems Aust P/L [2008] QSC 179, cited
Cook's Construction P/L v Stork Food Systems Aust P/L [2008] QSC 220, cited
Coulton v Holcombe (1986) 162 CLR 1; [1986] HCA 33, cited
David Securities Pty Ltd v Commonwealth Bank of Australia (1992) 175 CLR 353; [1992] HCA 48, cited
Flett v Deniliquin Publishing Co Ltd [1964-5] NSWR 383, cited
Gino D'Alessandro Constructions Pty Ltd v Powis [1987] 2 Qd R 40, cited
Haines v Bendall (1991) 172 CLR 60; [1991] HCA 15, cited
Iezzi Constructions Pty Ltd v Watkins Pacific (Qld) Pty Ltd [1995] 2 Qd R 350; [1994] QCA 49, cited
Kiriri Cotton Co v Dewani [1960] AC 192, cited
Lejo Holdings Pty Ltd v Deutsche Bank (Asia) AG [1988] 2 Qd R 30, cited
Marshall v Marshall [1999] 1 Qd R 173; [1997] QCA 382, cited
Mayfair Trading Co Pty Ltd v Dreyer (1958) 101 CLR 428; [1958] HCA 55, cited
Ovidio Carrideo Nominees Pty Ltd v The Dog Depot Pty Ltd (2006) V ConvR 54-713; [2006] VSCA 6, cited
Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221; [1987] HCA 5, cited
Roxborough v Rothmans of Paul Mall Australia Ltd (2001) 208 CLR 516; [2001] HCA 68, cited
Sutton v Zullo Enterprises Pty Ltd [2000] 2 Qd R 196; [1998] QCA 417, cited
Suttor v Gundowda Pty Ltd (1950) 81 CLR 418; [1950] HCA 35, cited
Vadasz v Pioneer Concrete (SA) Pty Ltd (1995) 184 CLR 102; [1995] HCA 14, cited
Vines v Djordjevitch (1955) 91 CLR 512; [1955] HCA 19, cited
Water Board v Moustakas (1988) 180 CLR 491; [1988] HCA 12, cited

Whisprun Pty Ltd v Dixon (2003) 200 ALR 447; [2003] HCA 48, cited

COUNSEL: J K Bond SC, with P D Hay, for the appellant
K E Downes SC, with S R R Cooper, for the respondent

SOLICITORS: HWL Ebsworth for the appellant
McCullough Robertson for the respondent

[1] **KEANE JA:** The respondent's predecessor in title was a contractor engaged in the construction of an ammonium nitrate plant at Moura in central Queensland. By an agreement in writing made in June 1998 ("the subcontract"), the respondent engaged the appellant as its subcontractor to undertake the construction of earthworks and concrete works for the project.

[2] Between July 1998 and April 2000 the appellant made claims for progress payments for work done under the subcontract which were certified for payment and paid. The total amount paid during this period was $15,528,924.03.

[3] In March 2001 the appellant commenced proceedings against the respondent claiming payment of moneys unpaid for work done under the subcontract.

[4] On 17 August 2001 the respondent filed a defence which resisted the appellant's claim for further payment. The respondent also made a counterclaim for the recovery of some of the money paid by it to the appellant under the contract.

[5] The respondent's case was that, under s 42(3) of the *Queensland Building Services Authority Act* 1991 (Qld) ("the Act"), the appellant was "not entitled to any monetary or other consideration for" carrying out that part of the subcontract works which were "building work" within the meaning of the Act because it was not licensed under the Act. In consequence, so it was said, the appellant was not entitled to payment for building work for which it had not been paid and, further, the respondent was entitled to recover the payments made by it for building work as having been made by mistake as to the appellant's entitlement. The principal basis on which the appellant resisted this contention was that none of the work in question was "building work" for which a licence was required under the Act.

[6] On 22 August 2008 the learned trial judge gave judgment for the appellant on its claim and for the respondent on its counterclaim. The amount recoverable by the respondent in respect of payments to the appellant for building work was $9,893,796.54. This sum vastly exceeded the amount recovered by the appellant on its claim in the action. On 18 September 2008 his Honour consolidated the judgments on claim and counterclaim and, after including an award of interest upon the balance in favour of the respondent, gave judgment for the respondent in the sum of $15,216,484.16.

[7] At first blush it may seem surprising, to say the least, that the appellant should be required to disgorge payments made for work actually performed for the respondent. Mr Bond of Senior Counsel who appeared with Mr Hay of Counsel for the appellant on the appeal (neither Counsel appeared at first instance) was disposed to describe this outcome as "scandalous". I would not disagree with this description. I do not, however, agree that this epithet is warranted by any aspect of the learned trial judge's determination of the issues of law or fact tendered to him

for decision by the parties. The unhappy outcome of the case becomes understandable when regard is had to the way in which the case was litigated below.

[8] The notice of appeal originally filed by the appellant raised many grounds. The three grounds of appeal which were pressed on the hearing of the appeal relate in varying ways to the operation of s 42 of the Act. It is fair to say that none of the arguments agitated by the appellant in this regard were advanced at first instance.

[9] The appellant also argued that interest should not have been awarded on the moneys paid to it by the respondent. As to this last point, which was argued below, the respondent argued that the appellant had not appealed against this aspect of the judgment, but it is tolerably clear that the notice of appeal is in wide enough terms to encompass this argument.

[10] It is now common ground that much of the work which the appellant carried out was " building work" within the meaning of the Act. It is accepted that, contrary to the requirements of the Act, and in breach of the terms of the subcontract, the appellant was not licensed to carry out building work under the Act.

[11] I shall discuss the arguments agitated by the parties on the appeal directly; but first I shall set out the terms of s 42 of the Act and summarise the judgment at first instance insofar as the learned trial judge's findings and conclusions are material to the arguments raised on appeal.

Section 42 of the Act

[12] Prior to October 1999, s 42 of the Act provided:

> "(1) A person must not carry out, or undertake to carry out, building work unless that person holds a contractor's licence of the appropriate class under this Act.
>
> …
>
> (3) A person who carries out building work in contravention of this section is not entitled to any monetary or other consideration for doing so.
>
> …
>
> (7) A person who contravenes this section commits an offence."

[13] With effect from 1 October 1999,[1] s 42 was relevantly amended to provide:

> "(3) Subject to subsection (4), a person who carries out building work in contravention of this section is not entitled to any monetary or other consideration for doing so.
>
> (4) A person is not stopped under subsection (3) from claiming reasonable remuneration for carrying out building work, but only if the amount claimed–
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> (a) is not more than the amount paid by the person in supplying materials and labour for carrying out the building work; and
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> (b) does not include allowance for any of the following–
>
> (i) the supply of the person's own labour;

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[1] Section 42 was amended by s 21 of the *Queensland Building Services Authority Amendment Act* 1999 (Act No 43 of 1999). Section 21 came into force on 1 October 1999 by virtue of s 1 of SL 1999 No 226 made by the Governor on 30 September 1999.

(ii) the making of a profit by the person for carrying out the building work;

(iii) costs incurred by the person in supplying materials and labour if, in the circumstances, the costs were not reasonably incurred; and

(c) is not more than any amount agreed to, or purportedly agreed to, as the price for carrying out the building work; and

(d) does not include any amount paid by the person that may fairly be characterised as being, in substance, an amount paid for the person's own direct or indirect benefit.

…

(9) A person who contravenes this section commits an offence.

(10) Subsection (4) applies to building work carried out on or after 1 July 1992, unless the entitlement to payment for the carrying out of the building work was …"

The judgment at first instance

[14] The subcontract provided for a lump sum payment to the appellant of $8,753,389.83. The subcontract also contained a schedule of rates to be applied in the valuation of variations to the works and the assessment of claims by the appellant for progress payments. The subcontract provided for the certification of claims for progress payments on account of the price payable under the subcontract.

[15] Mr Peter Jewell was retained by the respondent as its Senior Project Manager for the Moura project. It was Mr Jewell who certified that the appellant was entitled to be paid progress payments under the subcontract.

[16] The learned trial judge found that Mr Jewell would not have certified as payable amounts claimed for building work had he not been under the mistaken belief that the appellant held the necessary licence required under the Act[2] and as, indeed, it had promised by cl 16 of the subcontract. In this regard, his Honour said:[3]

> "Stork called Mr Peter Jewell on this issue. He was 'Stork's representative' for the purposes of the Subcontract but he was not an employee of Stork. He was also the person who was responsible for certifying the payments by Stork to CCPL. His evidence was that:
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> (a) when he certified those payments, he expected the plaintiff to hold all licences it was required to hold do the contract works within Queensland;
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> (b) if he had discovered that the plaintiff did not hold the licences it was required to hold, he would have taken legal advice and acted in accordance with that advice: 'I would have adjusted their payment accordingly in relation to the legal advice I was given'; and

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2 *Cook's Construction P/L v Stork Food Systems Aust P/L* [2008] QSC 179 at [345] – [346].

3 [2008] QSC 179 at [344] – [346].

> (c) during the course of the Subcontract he did not discover that the plaintiff did not hold any licence that it was supposed to hold.
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> Mr Jewell was cross-examined on this area:
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> 'Among the many things you might have done is it correct to say that had you discovered that one of your subcontractors was not appropriately licensed under that Act, you nevertheless would have insisted on the subcontractor continuing to perform its work under the subcontract?-- No.
>
> Well, let's look at it from a different angle. Had you discovered that the subcontractor was unlicensed is it your evidence that you would have stopped it then and there from continuing to work under its subcontract?-- Until they were licensed, yes.'
>
> Stork was, through its representative, mistaken as to its obligation to pay CCPL. It is clear from his evidence that had he discovered that CCPL was unlicensed he would have stopped it from working and taken legal advice."

[17] At trial the principal basis on which the appellant resisted the respondent's counterclaim was that the work in question was not building work within the meaning of the Act. Not surprisingly, this issue was resolved against the appellant and, as I have noted, the appellant does not now seek to reopen this issue.

[18] At trial, the appellant also sought to defeat the respondent's counterclaim by invoking the provisions of s 42(4) of the Act with a view to establishing an entitlement to reasonable remuneration for the work which it had actually performed for the respondent. The learned trial judge found that "there is no evidence upon which the provisions of s 42(4) can act."[4]

[19] The learned trial judge proceeded on the footing that s 42(4) of the Act allows the making of a claim by an unlicensed builder for reasonable remuneration even though the unlicensed builder is denied an entitlement to payment under its contract by operation of s 42(1) and s 42(3) of the Act. Consistently with the evident policy of the Act, however, s 42(4) provides that a claim by an unlicensed builder for reasonable remuneration may not include a component for the supply of either the builder's own labour or the making of a profit by the builder, or the costs of materials and labour supplied not reasonably incurred. In this way the amended Act ameliorates in a limited way the position of an unlicensed builder which has actually provided valuable services to its customer. The outcome in this case, which would otherwise be an affront to basic ideas of justice, is understandable on the basis that the appellant did not prove its claim to reasonable remuneration in conformity with the strictures in s 42(4) of the Act. In a system of justice which is adversarial in nature, responsibility for this failure lies with the appellant.

[20] It is apparent that the formulation of the appellant's claim paid scant regard to s 42(4) of the Act. In this regard, the learned trial judge said:[5]

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4 [2008] QSC 179 at [316].

5 [2008] QSC 179 at [290] – [291].

"… Stork argues that while CCPL pleads that s 42(3) of the *QBSA Act* operates subject to s 42(4) it does not claim any entitlement to reasonable remuneration pursuant to that subsection. That is not quite correct. In paragraph 39 of CCPL's second amended reply and answer, it pleads, in [39], as follows:

> 'Further to paragraph 37 hereof if it did undertake building work as defined by the QBSA Act, which is not admitted but for the reasons set out in paragraphs 26 to 36 hereof specifically denied, pursuant to s 42(4) of the QBSA Act it is entitled to reasonable remuneration for carrying out the building work.'

That is not, of course, a pleading of a claim. It is only the pleading of an entitlement which is a prerequisite to the making of a claim. It does not descend to any particularity; it does not identify any amount that might be claimed. Also, any such claim should be in the Statement of Claim."

[21] The presentation of the appellant's claim at trial exhibited some unusual features. In this regard the learned trial judge observed:[6]

"The plaintiff came closest to making a formal claim in the final oral submissions made on the last day of the trial. Mr Digby QC, for CCPL, said:

> 'Your Honour will be aware that in paragraph 39 of the reply the - can I call it a defence for the moment, your Honour?-- the defence under clause 42(4) of the QBSA is raised by the plaintiff. Your Honour is also aware, having presided over the trial, that the case [has proceeded] on the basis of evidence being put forward by both parties and tested in relation to what would be an appropriate reasonable remuneration: Mr Same's report on the part of the plaintiff and Miss Janine Smith's report on the part of the defendant.
>
> Now, we're not sure precisely how this point in the opening is put and whether it [is] said that notwithstanding that - the question of reasonable remuneration is raised in the reply the plaintiff puts forward and has been addressed in the evidence and in submissions, including opening submissions -- the defendant is saying at the end of the day [that] your Honour is precluded from applying the provisions of clause 42(4) because of the matter arising not as a positive claim, but as a reply to the counterclaim which is put forward in our learned friend's [pleadings].
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> If that were how the matter was put, then we would seek leave to draft that same paragraph in the reply into the statement of claim [if there needs] to be a positive allegation to enable your Honour to deal with 42(4) of

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6 [2008] QSC 179 at [292] – [294] (citation footnoted in original).

> the QBSA and the particulars of the reasonable remuneration that is advanced would be by reference to the report of Mr Same from […] KNP.'

That was a curious submission given the requirements of the *Uniform Civil Procedure Rules* and the remarks and reasons of Moynihan SJA in his decision given on 16 March 2004 (almost four years to the day before Mr Digby QC made his submission) where, in respect of the same point, he said:

> '[55] The claims do not seem to me to be pleaded in terms of a claim under s 42(4) of the Act. The point needs to be clarified. Any claim under s 42(4) should be properly pleaded in the statement of claim. In an earlier round of pleadings the plaintiff pleaded (in an amended reply of 2 November 2001), a claim under s 42(4). There is, however, correspondence suggesting that such a claim is not being pursued. (*Cook's Construction Pty Ltd v Stork ICM Australia Pty Ltd* [2004] QSC 066).'

Notwithstanding the unsatisfactory nature of the pleading on this point, the plaintiff called evidence, without objection, ostensibly on the topic of reasonable remuneration."

[22] The appellant adduced evidence from a forensic accountant, Mr Norman Same, with a view to establishing some external standards by reference to which reasonable remuneration for the appellant's work could be assessed. The appellant also relied upon evidence from a quantity surveyor, Mr Rodney Alsop. The respondent called a forensic accountant, Ms Janine Smith. The learned trial judge found that he derived no assistance from this evidence for a number of reasons including the unavailability of supporting documents to establish primary facts,[7] the absence of evidence of market prices for the work,[8] Mr Same's lack of qualifications to express an expert opinion as to reasonable remuneration,[9] and the absence of an assessment as to whether reasonable remuneration was more than the amount actually charged.[10]

[23] The evidence of Mr Same was of no assistance in the assessment of the amount of the appellant's claim. In this regard, the learned trial judge said:[11]

> "The evidence from Mr Norman Same was contained in a written report. It is of no assistance, for two reasons. First, notwithstanding the importance of this issue, the plaintiff did not instruct Mr Same until mid-December 2007 – some two months before the trial and some eight years after the events in question. It is not surprising, given the delay by the plaintiff in dealing with this issue, that important documents upon which Mr Same might have been able to rely in his report were unavailable. Mr Same noted in [5] of the summary of his opinion:

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7 [2008] QSC 179 at [302].
8 [2008] QSC 179 at [302].
9 [2008] QSC 179 at [304] – [305].
10 [2008] QSC 179 at [310].
11 [2008] QSC 179 at [302] – [303].

> '5.1 My ability to accurately calculate the expenditure that qualifies as reasonable remuneration for carrying out building works as defined at 1.2 is limited as Cook's could not locate:
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> (a) project costing work papers or estimates relating to the ANP project.
>
> (b) third party invoices or statements detailing costs of various items purchased for the ANP project.
>
> (c) any other supporting documentation or work papers that would assist in confirming the expenses incurred.
>
> 5.2 Allocated overheads are apportioned by project revenue as a percentage of company revenue. This allocation has not yet been tested.'

Further, his conclusion on the profit and loss statements provided to him by CCPL was based on that company's general ledger and no verification was possible which distinguished the project the subject of this action and any other project undertaken by CCPL at that time. Thus, there was no way of identifying costs and expenses which were solely related to the project, let alone any individual part of the project.

Secondly, although Mr Same says that he had been 'instructed to calculate the amount, in accordance with section 42(4) of the Act, that Cook's is entitled to claim as reasonable remuneration for carrying out building works assuming all the work alleged to be 'building work' as defined by the act was 'building work' for the project conducted on behalf of Stork …', he did not undertake that exercise. In his calculation of reasonable remuneration he recreated a profit and loss statement for *the project* rather than for any of the parts of the undertaking alleged to be building work. This conclusion, accurate or not, does not allow any opinion to be formed as to the reasonable remuneration of each of the items of 'building work'. It did not refer to any 'external standard' to define the quantum."

[24] Mr Same's evidence could not be related to the "building work" in question. His Honour said:[12]

> "Mr Same … admitted, he was not an expert in determining reasonable costs associated with building work. Further, no effort was made in that report to identify the reasonable remuneration for any one of the individual claims made by CCPL alleged by Stork's to be 'building work'. Instead, Mr Same provides four alternative amounts which, he says, could be reasonable remuneration for carrying out all of the building work under the Subcontract.
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> At [6.25] of his report, Mr Same says:

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12 [2008] QSC 179 at [310] – [313].

> 'In order to calculate the reasonable remuneration that Cook's is entitled to, I have recreated a profit and loss statement for the project based on the ANP profit and loss statements concluded on above in 6.4.'

He then sets out profit and loss statement in which he arrives at a conclusion relating to the 'reasonable cost of project'. At the foot of the table there is a note:

> 'The reasonable cost of project also equals the sum of total expenses per general ledger plus total other expenses.'

The conclusion is irresistible that the figure referred to by Mr Same in his report as being the 'reasonable cost of project' is, indeed, his assessment of the cost of the entire undertaking engaged in by CCPL. There is nothing to suggest that he has in any way attempted to provide any amount which is able to be related to either any single one of the 'building work' claims or all of them. That conclusion is supported by the response by counsel for CCPL during final submissions where he agreed that Mr Same based his report on the entire project."

[25] The learned trial judge remarked upon the dismal attempt made by the parties to address in the evidence the reasonable cost of the items of building work for which remuneration was claimed. His Honour said:[13]

> "It is unfortunate that no attention was given by two of the witnesses called on this topic, to the fact that, in a case such as this, it will be necessary to identify the work the subject of contention and, then, to assess the reasonable remuneration in respect of each item (*Hansen v Mayfair Trading Co Pty Ltd* [1962] WAR 148; *Re Allison, Johnson & Foster Ltd; ex parte Birkenshaw* [1904] 2 KB 327). Each claim should have been the subject of an individual assessment by those witnesses, if they were otherwise qualified."

[26] As to the evidence of Mr Alsop, the learned trial judge said:[14]

> "Mr Alsop's report, like others tendered by the plaintiff, was only made available during the trial. He was first engaged in mid December 2007 and he says he was retained to 'present an indication of the fair value of the works, based on the Contractual Documentation and Other matters made available to me.' Why he was asked to consider 'fair value' rather than 'reasonable remuneration' was not explained. It was not a concept which was pleaded. It is not a term found in the *QBSA Act*.
>
> In re-examination, Mr Alsop said that, in his opinion, there is no difference between a reasonable rate and the concept of a fair value. That may well be correct, but it does not deal directly with the concept of 'reasonable remuneration', of which a rate may only be one part of the assessment.

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13 [2008] QSC 179 at [304].

14 [2008] QSC 179 at [306] – [308].

> His report is called in aid for other claims which are considered elsewhere, but on the issue of 'reasonable remuneration' it is of no assistance for the following reasons:
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> (a) Some of the documents upon which he relied were not in evidence, namely:
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> (i) Report of Simon Tormey & Associates, Chartered Quantity Surveyors, 16 August 2005;
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> (ii) Claim for Differences following Stork April Assessment, undated;
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> (iii) file marked Miscellaneous Documents including 'Notes on Major differences between Cook's April Progress Claim and Stork's Assessment' and two affidavits of Warren Eddie;
>
> (iv) the drawings (listed in Appendix B) which were supplied to Mr Alsop.
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> (b) Mr Alsop relied upon measurements obtained using a digitiser but it was not established that the plans he used were those which were pleaded or in evidence.
>
> (c) It cannot be determined from his report whether he used the profiles or dimensions marked up on the pleaded drawings.
>
> (d) When he expressed a view with respect to the 'building work' claims he referred to the 'value' of each item and not the 'reasonable remuneration' for each item."

[27] It was not argued on the appeal that any of these observations by the learned trial judge were affected by error of fact or law.

[28] His Honour accepted the abstract proposition that a contract, though unenforceable by a builder as a source of a right to payment for its work, might be referred to as evidence of reasonable rates for the purpose of calculating reasonable remuneration under s 42(4) of the Act.[15] But in the circumstances of this case, the subcontract provided no assistance in the assessment of reasonable remuneration for the building work the subject of the counterclaim. In this regard, the subcontract was concerned with, and gave a price and rates for, work which included, but did not consist solely of, "building work" within the meaning of the Act. More importantly, the subcontract rates clearly included an element of profit to the appellant: there was evidence that the appellant's rates for some of the building work under the subcontract were higher than the rates quoted to the appellant by subcontractors engaged by the appellant to actually do the work; and the appellant was a commercial, not a charitable, enterprise.

[29] His Honour concluded:[16]

> "I was invited by the plaintiff to engage in an exercise whereby I would compare the reasonable remuneration assessed by Mr Same

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15 [2008] QSC 179 at [295].

16 [2008] QSC 179 at [314] – [315].

> ($16.153 million) with the amount paid to the plaintiff ($16.425 million) and that I could then order a reimbursement of the defendant by the plaintiff in an amount equal to the difference between those two figures. Other means of arriving at the 'reasonable remuneration' for the total of the items included in the 'building work' were also suggested in submissions, but none of them could overcome the principal problem – no attempt had been made to assess 'reasonable remuneration'.
>
> Another argument was advanced that CCPL, having made a loss on the entire operation, should be able to claim anything that was expended by CCPL as 'reasonable remuneration'. Apart from the doubtful integrity of that as an accounting exercise, it does not necessarily follow that the making of a loss means that the amount charged was reasonable. History is replete with instances of businesses making losses even when their prices were unreasonably high."

[30] The learned trial judge awarded the respondent $5,526,148.20 by way of interest pursuant to the discretion conferred by s 47 of the *Supreme Court Act* 1995 (Qld). In making this award the learned trial judge rejected the appellant's submission that interest should not be awarded as it would give the respondent a windfall.[17] His Honour said:[18]

> "The plaintiff argued that the defendant was not entitled to any interest. It submitted that Stork had not suffered damage, loss or injury by reason of CCPL being unlicensed under the *Queensland Building Service Act* but that Stork had received a very substantial windfall gain. It was submitted that Stork had the benefit of the building works performed by CCPL but will not be required to pay for them. I do not accept that Stork 'had the benefit of the building works'. It was a contractor, not the principal. As I have observed earlier in these reasons, it is possible that Stork has not been paid by the principal for the relevant work. It must also be observed that the amount of the counterclaim which might, on a preliminary reading, seem extraordinarily large compared to the claim of the plaintiff, must be viewed in the light of the finding that the plaintiff failed to prove any amount by which it could be afforded reasonable remuneration as contemplated under the *Queensland Building Services Authority Act*. Had such evidence been provided then it would have been likely that the counterclaim would have been substantially diminished."

The arguments on appeal

[31] The appellant's first submission on the appeal is that the respondent's counterclaim should have been dismissed by the learned trial judge because the respondent failed to prove that the progress payments for the building work were made under a mistaken belief that the appellant was not entitled to receive the payments made to it. The appellant's point here is that, although Mr Jewell caused the payments to be made on the basis of his mistaken belief that the respondent was obliged to make

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17 *Cook's Construction P/L v Stork Food Systems Aust P/L* [2008] QSC 220 at [42].

18 [2008] QSC 220 at [42].

the progress payments under the subcontract, the respondent failed to show that the appellant was not entitled to any reasonable remuneration in accordance with s 42(4) of the Act.

[32] The appellant's second submission is that the learned trial judge erred in failing to reject the counterclaim because the respondent was unable to make *restitutio in integrum* of the benefit it had received from the appellant's work.

[33] The third submission pressed for the appellant on appeal is that the learned trial judge erred in concluding that there was "no evidence upon which the provisions of s 42(4) can act."[19] The appellant says that because there was a claim of some, albeit unquantified, value under s 42(4) of the Act, the respondent's claim was bound to fail *in toto*. Alternatively, the appellant contends that on any view of the evidence, there was a sufficient basis for a claim which might be made out in conformity with s 42(4) of the Act. In this latter regard the appellant contends that reference to the terms of the subcontract and to the certifications by the respondent's own representative allows a calculation of reasonable remuneration within the meaning of s 42(4) of the Act.

[34] The parties to the appeal are at odds as to the incidence of the onus of proof of the appellant's entitlement to reasonable remuneration in accordance with s 42(4) of the Act. The respondent says that this dispute is of academic interest only because, by its pleadings, the appellant assumed the burden of proving its entitlement to reasonable remuneration under s 42(4) of the Act. The appellant simply failed to make out its claim, and that conclusion is sufficient to dispose of the appeal. The respondent also says that it was for the appellant to make good the claim which it asserted for reasonable remuneration in conformity with the requirements of s 42(4) of the Act, rather than for the respondent to negative the appellant's entitlement under s 42(4).

[35] The appellant's fourth argument is that the learned trial judge's exercise of the discretion to award interest miscarried in that his Honour failed to appreciate that the respondent "obtained from the appellant the value which it had contracted to obtain; never returned what it had obtained and never contended that the value was not worth what it paid."

[36] As the first three arguments concern s 42 of the Act, it is convenient to address now the true operation of s 42 of the Act.

The operation of s 42 of the Act

[37] Section 42(1) renders illegal the making and performance of a contract for building work by an unlicensed builder. It is the conduct of the builder which is struck at. The provision is plainly intended to operate for the benefit of the other party to the building contract.

[38] It is clear from the terms of s 42(3) and s 42(4) that neither provision purports to **create** a right of action to recover money in any person. Rather, each subsection is concerned to regulate a cause of action for payment which is assumed to have arisen, either under contract or under the principles of the common law which permit claims for payment for work done at the request of another. These common

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19 [2008] QSC 179 at [316].

law claims have been variously described as claims for quantum meruit or in quasi-contract or to prevent unjust enrichment.[20]

[39] Section 42(3) is, in terms, concerned to sterilise any claim which might otherwise be made under a contract or under the common law by an unregistered builder. Section 42(4) is concerned to impose limitations upon the right of action at common law which it preserves against the sterilising effect of s 42(3). Without s 42(4), the entitlement of an unregistered builder to payment which would, apart from the Act, arise upon the performance of work by the builder, would be defeated by s 42(1) and s 42(3).

Section 42(4) and the onus of proof

[40] In my opinion, the course taken by the appellant below in assuming the onus of proof of its claim pursuant to s 42(4) of the Act was correct. The language of s 42(3) and s 42(4) of the Act is a clear statement of legislative intention that an unlicensed builder may recover payment for building work carried out in contravention of s 42(1) and contrary to s 42(3), but only to the extent that it proves a claim in conformity with s 42(4). As I have said, no right of action is conferred by s 42(4) of the Act. Rather, s 42(4) assumes the existence of a common law right to remuneration which it preserves against the operation of s 42(3) while at the same time imposing conditions upon the availability and extent of that right. Unless the builder has a good claim conforming to these conditions, the builder's right to reasonable remuneration cannot avail the builder against the operation of s 42(3).

[41] It is true that, as the appellant argues, the operation of s 42(3) of the Act is qualified by s 42(4). But it is also clear that s 42(4) permits an unlicensed builder to claim "reasonable remuneration for carrying out building work, but only if the amount claimed" satisfies the criteria in paragraphs (a) to (d). It is only the amount of the claim so quantified that the builder may recover despite s 42(3). Absent a good claim so quantified, the operation of s 42(3) is, for practical purposes, unqualified by s 42(4). If the legislature had intended that s 42(3) as amended should read "Subject to the absence of any claim under subsection (4)", so as to cast the burden of disproof of any claim for reasonable remuneration on the other party to the contract, it could easily have said so.

[42] In my respectful opinion, it is important that the concern of the courts to avoid an unjust outcome in a particular case should not distort the operation of a statute intended to encourage the licensing of builders by disadvantaging unlicensed builders and advantaging consumers of building services at their expense. It is hardly surprising that the legislature should have left the burden of proving a claim for reasonable remuneration on the builder. What would have been surprising would have been a provision which cast the burden of disproof of an unlicensed builder's claim on the consumer of building services. What is most surprising, of course, is the failure of the builder in this case to adduce evidence capable of proving a claim for an amount of reasonable remuneration in conformity with s 42(4) of the Act.

[43] Ordinarily, the law expects that "he who asserts must prove". There is a number of textual indications that this expectation has not been altered in the case of s 42(4) of the Act. First, as I have already said, s 42(4) contemplates the making of a

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[20] Cf *Gino D'Alessandro Constructions Pty Ltd v Powis* [1987] 2 Qd R 40 at 54 – 56; *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221.

quantified claim by an unlicensed builder. There can be no doubt that where the builder is making a claim to recover payment of reasonable remuneration which has not been paid by the other party, the builder bears the onus of proving the amount to which it is entitled in conformity with s 42(4). There is no indication in the text of s 42 that the onus of proof shifts to the other party (and becomes an onus of disproof) if progress payments have been made under the contract which s 42(1) and (3) have sterilised. It would be distinctly odd if the onus of proof of a claim under s 42(4) were to be altered by the fortuitous circumstance of the making or non-making of a progress payment by the other party to the contract.

[44] Secondly, the evident policy of the Act is to improve building standards and to protect the interests of those who depend on the provision of services by builders. To this end the Act requires builders to be licensed. It is unlikely that the legislature intended to cast upon persons to whom building services are provided, many of whom will be unsophisticated consumers, the onus of establishing the reasonable remuneration payable to the unlicensed builder in conformity with s 42(4). This is especially so when one bears in mind the practical reality that the information necessary to formulate such a claim in conformity will be in the possession of the builder.

[45] The appellant's submission, as it ultimately emerged under the pressure of argument on the appeal, was that the introduction of the words "subject to subsection (4)" in s 42(3) by the 1999 amendments had the effect that, so long as there was some apparent basis for a claim by an unlicensed builder for reasonable remuneration for building work – even though that claim might be unquantified – the other party to the transaction could not enforce a claim under s 42(3) for the recovery of money paid to the unlicensed builder. The appellant argued that, although its claim in this case might not have been quantified by the evidence which it adduced, nevertheless it was sufficiently apparent that it had a real basis for a claim to some amount in conformity with s 42(4) that the respondent could not enforce a claim for recovery of payments made for the work, unless the respondent itself discharged the burden of proving that the amount properly claimed by the appellant in conformity with s 42(4) was less than the amount of payments already made by the respondent. In that event the respondent would be entitled to recover only the amount of any balance whereby the payments made by it overstepped the amount properly due to the builder by way of reasonable remuneration.

[46] This submission has the attraction of affording a plausible basis whereby the apparent injustice of the outcome in this case might be avoided. Fundamental to this submission, however, is the proposition that a person who has paid an unlicensed builder for building work is obliged to discharge the onus of proof of the amount properly recoverable by the unlicensed builder in accordance with s 42(4) as a condition of a claim for the recovery of the amount paid to an unlicensed builder. As I have endeavoured to explain, that proposition derives no support, either from the text of s 42, or from the policy of the section.

[47] For these reasons, I conclude that it is only to the extent that a claim for reasonable remuneration is made out by the builder in conformity with s 42(4) that the operative effect of s 42(3) upon the rights and liabilities of the parties is affected.

The operation of s 42(3)

[48] It is convenient now to consider more closely the legal effect of s 42(3) upon the rights and liabilities of the parties to a contract which involves the performance of building work.

[49] In *Marshall v Marshall*,[21] McPherson JA identified the entitlement in the payer to recover moneys paid to an unlicensed builder as the reciprocal of the builder's disentitlement to receive the payment. On this analysis, no other fact, such as, for example, mistake on the part of the payer, is necessary to give rise to the payer's cause of action for recovery of the moneys paid. McPherson JA said:

> "In my opinion, the effect of s. 42(3) is to prevent an unlicensed builder, in proceedings of any kind, from recovering the price or any part of it payable under a contract for building work carried out in contravention of the section. Taken by itself, that might perhaps not prevent a builder from receiving money voluntarily paid by the other party. The terms of s. 42(3) are, however, very wide. A person who carries out work in contravention of s. 42 is 'not entitled' to any 'monetary consideration' for doing so. According to the ordinary meaning of those words, a person receives a 'monetary consideration' for carrying out work if he is paid for doing it. The sum of $51,000 paid by the plaintiff to the defendant satisfies that description. Counsel were unable to refer the Court to authority bearing in any relevant way on the meaning of 'entitled' in a context like this. **But s. 42(3) expressly declares it to be money to which the recipient is 'not entitled', which can only mean that it is money to which he has in law no right or title. If that is so, there is no identifiable basis on which he can, as against the person who paid it, claim to keep or retain it or its equivalent.**" (emphasis added)

[50] This reasoning is to the same effect as that of Brennan J in *David Securities Pty Ltd v Commonwealth Bank of Australia*:[22]

> "… when a plaintiff has paid money for a consideration that has totally failed, the defendant's unjust enrichment consists in his retaining money which, when the consideration fails, he no longer has any right to retain (*Fibrosa Spolka Akcjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC at 65). Enrichment is unjust because the defendant has no right to receive or, as the case may be, to retain the money or property which the plaintiff has paid or transferred to him (Restitution lies when property has passed: *Barclays Bank v W J Simms Ltd* [1980] 1 QB 677 at 689. If mistake affects the passing of the property, the plaintiff may be entitled to proprietary remedies)."

[51] It is, I think, a compelling consideration that in the 10 years since the decision in *Marshall v Marshall* was delivered by this Court, the legislature has not expressed its disapproval of, or an intention to alter, the legal effect which McPherson JA attributed to the operation of s 42(3). The appellant says that this is not so because s 42(3) is now expressed to be subject to s 42(4), but when the legislature introduced s 42(4) into the Act, it did not seek to alter the juridical operation of s 42(3) as explained by McPherson JA. The amendments introduced in 1999 served to limit the circumstances in which s 42(3) would operate by subjecting the scope of the operation of s 42(3) to cases where s 42(4) conferred on the unlicensed builder the right to payment of an amount calculated in accordance with its provisions. But s 42(4) was not expressed to alter the consequences of the operation of s 42(3) in those circumstances where its operation was unaffected by s 42(4).

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21 [1999] 1 Qd R 173 at 176.

22 (1992) 175 CLR 353 at 393 (citations footnoted in original).

[52] In *Pavey & Matthews Pty Ltd v Paul*,[23] Deane J said of the disentitling statute there in question:

> "The section does not make an agreement to which it applies illegal or void. Nor do its words disclose any legislative intent to penalise the builder beyond making the agreement itself unenforceable by him against the other party."

[53] Section 42 of the Act exhibits a clear intention to render illegal both the making and the performance of a contract by an unlicensed builder insofar as building work is concerned. Section 42(3) makes it clear that the consequence of a contravention of s 42(1) by an unlicensed builder is that the builder is unable to recover payment for unlicensed building work. Those consequences include the recovery of payments made to the builder by the other party to a contract for unlicensed building work.

[54] In *Marshall v Marshall* McPherson JA gave, by reference to the text and legislative history of s 42(3) of the Act – which at that time had not been amended by the measures which incorporated the current s 42(4) – compelling reasons for the conclusion that the Act was intended to disentitle an unlicensed builder from receiving or retaining **any payment on any basis** for any building work performed by it. His Honour's reasons in this regard were approved by this Court in *Sutton v Zullo Enterprises Pty Ltd*.[24] It is worth setting out at length the passage from *Marshall v Marshall* because it will be seen that it was at this aspect of his Honour's reasons that the 1999 amendments were directed. McPherson JA said:[25]

> "There are several, and I consider, persuasive reasons for adopting such an interpretation of s. 42. First, there is the history of the legislation. The corresponding provision of the *Builders' Registration and Home-owners' Protection Act* 1979, which was repealed by the current Act of 1991, was s. 53(2)(d). It originally provided that a person who was not a registered builder should not be 'entitled to recover by action in a court a fee or charge under a contract to perform building construction for another…'. In *Gino D'Alessandro Constructions Pty Ltd v. Powis* [1987] 2 Qd.R. 54, it was held that, in that form, s. 53(2)(d) did not prevent recovery, as a debt due and owing, for money for work done, or, as the High Court preferred to regard it, as restitution for unjust enrichment. See *Pavey & Matthews Pty Ltd v. Paul* (1987) 162 C.L.R. 221. After that decision, s. 53(2)(d) was revised by amending it to provide that a person not a registered builder should not:
>
> > '(d) be entitled to claim, sue for or otherwise recover … any fee, charge, damages or other reward of whatever nature in respect of the building construction performed or agreed to be performed.'
>
> However, in *Mostia Constructions Pty Ltd v. Cox* [1994] 2 Qd.R. 55, White J. held that, even in that form, s. 53(2)(d) did not specifically preclude recovery of the amount of the builder's outlays on labour and materials the benefit of which had been accepted by the party who had requested them.

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23 (1987) 162 CLR 221 at 262.

24 [2000] 2 Qd R 196 at 204 [8], 206 [16].

25 [1999] 1 Qd R 173 at 176 – 178.

Section 42 is thus the third attempt by the legislature to make its meaning clear. On this occasion it may be credited with having intended to cast the net as widely as possible. An unlicensed builder is, as s. 42(3) now provides, not entitled to *any* monetary consideration for carrying out building work. A principal object of the legislation, both in its original and in its current form, is to prevent unlicensed builders from doing certain kinds of building work. Substandard workmanship and materials are, plainly enough, a principal target of the statutory prohibition: see s. 3(a)(i). Preventing incompetent and unlicensed builders from doing building work, and penalising them if they do so, is one method of achieving that object. On occasions, however, even competent builders make mistakes and, having done so, sometimes become insolvent or for other reasons are not worth suing for the loss sustained. One object of the legislation was, as I suggested in *Gino D'Alessandro Constructions v. Powis* [1987] 2 Qd.R. 40, 54–56, to establish and maintain the insurance scheme, which is now contained in Part 5 of the Act. It is funded by premiums paid by building contractors, from which claims by building owners or 'consumers' can be satisfied: cf. *Pavey & Matthews Pty Ltd v. Paul* (1987) 162 C.L.R. 221, 229.

Under the statutory scheme, a building contractor must, before commencing residential construction work, pay to the Queensland Building Services Authority the appropriate insurance premium: s. 68(1). When an insurance premium is paid in respect of residential construction work, a certificate of insurance issues: s. 69(1). The insurance policy comes into force if a consumer (meaning a person for whom the building work is carried out) enters into a contract for the performance of residential construction work, in which event the contract is imprinted with a licensed contractor's licence card endorsed to show that the licensee may lawfully enter into contracts to carry out residential construction work: see s. 69(2). It is true that s. 69(2) applies whether or not an insurance premium has been paid or an insurance certificate has issued: s. 69(3). It would nevertheless go far to diminish the funding available for the statutory insurance scheme if unlicensed builders were able to receive and retain money for doing residential construction work without complying with these provisions and with the licensing requirements of the Act. The insurance fund would be progressively depleted without receiving many of the premiums that were intended to form its source.

Another reason for concluding that an unlicensed builder is by s. 42(3) not entitled to receive or retain money paid for doing building work is to be found in analogy with other legislation of a comparable kind. The Act obviously has a regulatory function of which the main object is to protect building owners or 'consumers' from incompetent or dishonest builders: cf. the statutory objects stated in s. 3(b). In *Cornelius v. Phillips* [1918] A.C. 199, a statutory prohibition against money lending otherwise than at the lender's registered address was held to render the contract unenforceable. In *Mayfair Trading Co. Pty Ltd v. Dreyer* (1958) 101 C.L.R. 428, 449–450, Dixon C.J., with whom McTiernan J. agreed, held that a

money lender, who, in contravention of the statutory prohibition rendering the loan unenforceable, had succeeded having it repaid, was liable to disgorge the payment received. The money, said the learned Chief Justice, was 'obtained, paid over and retained without lawful authority, and there could be no answer on the facts to a simple claim on the part of the plaintiffs in a common money count. This is true of a count for money had and received …'. The prohibition being intended to protect the class of borrowing consumers, a person belonging to that class was entitled to recover moneys or securities transferred in pursuance of the illegal transaction: *Bonnard v. Dott* [1906] 1 Ch. 740. As an exception to the general rule of law, the fact that a transaction is illegal does not disbar a person whom the legislation is intended to protect from recovering money paid over in pursuance of the transaction. See *Kiriri Cotton Co. v. Dewani* [1960] A.C. 192, on which Mr Logan for the respondent plaintiff relied in this appeal."

[55] Subsection 4 of s 42 of the Act was introduced in 1999, pursuant to the *Queensland Building Services Authority Amendment Act* 1999 (Qld). The Explanatory Note to the Bill stated:

"Until the 1998 decision of the Court of Appeal in *Zullo Enterprises & Ors v Sutton* [1998] QCA 417 (15 December 1998), it was thought that s 42, which makes the carrying out or undertaking to carry out of building work unlawful, did not prevent unlicensed contractors recovering their costs under the common law of contract. The *Zullo* decision held that unlicensed contractors were prevented from recovering anything at all, and held the prospect that unlicensed contractors could be successfully sued for recovery of any moneys paid for prior performance. This potentially allows considerable injustice, such as deliberate recruiting of subcontractors from interstate and legally escaping from any obligation to pay for work performed.

Unlicensed contracting will, of course, remain an offence committed by the contractor, but **the principle that a builder or owner should not be able to enrich themselves through signing on unlicensed contractors is enshrined in this clause.**

This clause amends s 42(3) and inserts **a new subsection 42(4) to provide an unlicensed contractor with a limited statutory right to recover money which would otherwise be unavailable because of the *Zullo* decision. The new provisions will allow an unlicensed contractor to claim reasonable recovery of moneys actually expended for the supply of materials and labour, other than the contractor's own labour and profit.** Existing subsections 42(4) to (6) are renumbered.

The new provision in s 42(4)(iii) also prevents an unlicensed contractor unreasonably incurring costs and claiming for recovery under this provision.

> S 42(4)(c) prevents an unlicensed contractor recovering any more under this provision than the contract price.
>
> S 42(4)(d) is designed to attack any scheme entered into by the unlicensed contractor, for example employing the contractor's child or the charging of a management fee by a company of which the contractor is a beneficial shareholder, to use this new provision to gain personal profit from unlicensed contracting." (emphasis added)

[56] The purpose of the amendment was explained further in the Second Reading Speech for the *Queensland Building Services Authority Amendment Bill* 1999 (Qld), in which the Minister said:

> "The Bill also remedies the potential for unfairness which emerged last year following a Court of Appeal decision in Zullo Enterprises and Others versus Sutton. The intention of the regulatory scheme has always been that building contractors be licensed. It is not the intention, therefore, that builders and developers have incentives to engage unlicensed contractors. The court found that, contrary to previous belief, the Act prevents an unlicensed building contractor from recovering any money at all under a contract. This opens the door for unjust enrichment of unscrupulous developers and builders, potentially encouraging them to engage unlicensed contractors.
>
> **The Bill rectifies this situation by allowing unlicensed contractors to recover any moneys that they have reasonably spent while performing building work. But unlicensed contractors cannot recover any profit or receive any more than the contract price specified in the purported contract. They will also be penalised for the offence of operating without a licence.** In addition, building contracts are required to include the licence number of the contracted party." (emphasis added)

[57] It is apparent from these excerpts from the extrinsic materials that the 1999 amendments were not directed to dissatisfaction with the juridical nature of the operation of s 42(1) and s 42(3) of the Act as explained in *Marshall v Marshall*, but were concerned to limit the scope of the operation of these provisions by reference to a limited right to reasonable remuneration in an unlicensed builder. Subject to an entitlement in the builder under s 42(4), s 42(3) operated, both to deny a claim by an unlicensed builder for payment for building work, and to oblige the builder to disgorge payments received by it for the work. The extrinsic materials show that the mischief at which the 1999 amendments to the Act were directed was the denial of all remuneration to an unlicensed builder. The amendments were not concerned to alter the operation of s 42(3) so as to allow an unlicensed builder to retain any payments made to it by the other party. The operation of s 42(3) was to be limited only to the extent that the builder was entitled to reasonable remuneration in conformity with the criteria in s 42(4). Beyond the amount of that entitlement, the consequences of s 42(3) were to be unaltered.

[58] On the analysis of McPherson JA referred to in the passage cited in paragraph [38] above, mistake on the part of the payer as to its obligation on the payee's entitlement is not an essential element of the builder's disentitlement to receive or retain payment or the payer's reciprocal entitlement to recover. On this analysis, unless

the respondent was *in pari delicto* with the appellant, the respondent was entitled to recover the moneys paid by it to the appellant as moneys had and received by the appellant to the use of the respondent.

[59] It may well be that a payer who knowingly engaged an unlicensed builder to carry out building work in contravention of s 42 would be held to be *in pari delicto* with the builder so as to be outside the class of persons for whose benefit a right of recovery is made available in consequence of the operation of s 42(3) of the Act. So far as the present case is concerned, that would mean that, even if the respondent's payments were not made by mistake, on no view of the pleadings or the evidence could it be held that the respondent was *in pari delicto* with the appellant. The appellant had given the respondent an express contractual promise that it, the appellant, held all necessary licences, and there was no suggestion in the appellant's pleadings that the respondent knew that the appellant was unlicensed. In the case made by the appellant at trial there was, to adopt the words of McPherson JA, simply no identifiable basis on which it could, as against the respondent, claim to keep or retain the payments made by the respondent or their equivalent.

Summary as to the operation of s 42 of the Act

[60] In summary then, the entitlement of the respondent to recover the moneys paid by it by virtue of s 42(3) was circumscribed only insofar as the appellant was able to make out a right to recover an amount for reasonable remuneration in conformity with s 42(4) of the Act. Section 42(4) permits the builder that amount from the moneys paid to it. In this way s 42(4) remedies the mischief at which the 1999 amendments to s 42 were directed. But the entitlement of the unlicensed builder to recover or retain moneys paid to it is limited to the amount of reasonable remuneration claimed in conformity with the requirements of s 42(4) of the Act. This view of the operation of s 42(3) and s 42(4) has implications of relevance for the issues on the appeal. First, the onus of proving the amount of a claim in conformity to s 42(4) is upon the unlicensed builder who claims the entitlement. And secondly, to insist upon a more extensive limitation upon the payer's right of recovery, for example, one based on its inability to make *restitutio in integrum* – whether in money or money's worth – is to introduce a qualification upon the payer's right of recovery which is consequential upon the operation of s 42(3). That qualification urged by the appellant cannot be accepted: its acceptance would defeat the operation of s 42(3).

[61] Whether or not, and the extent to which, the appellant was entitled to resist the respondent's counterclaim on the basis of the appellant's entitlement to reasonable remuneration depended upon its ability to make good a claim to reasonable remuneration in conformity with s 42(4) of the Act. That, in turn, depended upon the formulation and proof of a claim for reasonable remuneration in conformity with s 42(4) of the Act. Considerations of convenience also favour this view. To the extent that the appellant was required to address the specific requirements of s 42(4) of the Act in propounding its claim, these requirements related to matters peculiarly within its own knowledge.

[62] In my respectful opinion, for the reasons set out above and which are derived from the statutory text and considerations of principle, policy and practical convenience, the onus was upon the appellant to make good a claim for an amount of reasonable remuneration under s 42(4) of the Act. Absent proof of such an entitlement, the respondent's counterclaim was bound to succeed. This conclusion reflects the text

and structure of s 42 and gives effect to the intention discernible from the relevant extrinsic evidence of legislative intention.

The appellant's first argument: Mistake as to liability

[63] The appellant argues that the respondent's cause of action for repayment of the moneys the subject of the counterclaim could not be established without proof that the moneys were not payable under s 42(4) of the Act. Without such proof, it could not be said, so the appellant argues, that the payments were made under a mistake as to the appellant's entitlement to receive them. The appellant's argument is that if it were the case that the appellant had, in truth, an entitlement to reasonable remuneration under s 42(4) of the Act, then, although Mr Jewell may have been mistaken in his belief that the appellant was entitled to be paid under the provisions of the subcontract, the appellant was nevertheless entitled to retain the moneys as reasonable remuneration and they were not paid because of a mistake as to its true entitlements. The appellant refers to the following passage from the reasons of Mason CJ, Deane, Toohey, Gaudron and McHugh JJ in *David Securities Pty Ltd v Commonwealth Bank of Australia*:[26]

> "… the payer will be entitled prima facie to recover moneys paid under a mistake if it appears that **the moneys were paid by the payer in the mistaken belief that he or she was under a legal obligation to pay the moneys or that the payee was legally entitled to payment of the moneys. Such a mistake would be causative of the payment**." (emphasis added by the appellant)

[64] The appellant also refers to an earlier statement in the joint judgment where their Honours said:[27]

> "For the reasons stated above, the rule precluding recovery of moneys paid under a mistake of law should be held not to form part of the law in Australia. In referring to moneys paid under a mistake of law, **we intend to refer to circumstances where the plaintiff pays moneys to a recipient who is not legally entitled to receive them. It would not, for example, extend to a case where the moneys were paid under a mistaken belief that they were legally due and owing under a particular clause of a particular contract when in fact they were legally due and owing to the recipient under another clause or contract**." (emphasis added by the appellant)

[65] The appellant's submission under this heading is that a prima facie case for the recovery of moneys paid by mistake requires not only a causative mistake as to a matter of fact or law which leads to the making of the payment, but the payer must also negative the possibility that the payee might be entitled to the payment by reason of a matter other than the mistaken matter of fact or law. The authorities are not entirely clear upon this point, but it can be seen that the observations of the High Court in *David Securities* upon which the appellant relies do not provide clear support for the appellant. That is because the High Court's observations were directed to the case where the payee's entitlement to the payment in question was established by the same charter of rights operating upon the same facts as revealed that the payment was caused by mistake. That was not the case here. The payments

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26 (1992) 175 CLR 353 at 378.

27 (1992) 175 CLR 353 at 376.

made by the respondent were made solely on the footing that it was to discharge the appellant's entitlement to a progress payment under the subcontract. Not only did Mr Jewell not advert to the possibility that the appellant's claim reflected reasonable remuneration for the building work performed by the appellant, Mr Jewell had no power or authority to certify for payment in that regard.

[66] In *Barclays Bank v W J Simms Son & Cooke (Southern) Ltd*,[28] Robert Goff J deduced the following propositions from the authorities:

> "(1) If a person pays money to another under a mistake of fact which causes him to make the payment, he is prima facie entitled to recover it as money paid under a mistake of fact. (2) His claim may however fail if (a) the payer intends that payee shall have the money at all events, whether the fact be true or false, or is deemed in law to so intend; or (b) the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee … by the payer … or (c) the payee has changed his position in good faith, or is deemed in law to have done so."

[67] In *David Securities* the High Court referred to this passage with evident approval while expanding the scope of recovery permitted for mistake to mistake of law. In *Bank of New South Wales v Murphett*,[29] Starke J, with whom King J agreed, treated the passage as confirming that it is the payee who must establish an entitlement to payment apart from the mistake which caused the payment as a matter of defence to the claim for recovery. It is not necessary to attempt to state a general rule here. It is, I think, sufficient to say that in this case the appellant's only entitlement to retain the payments made to it depends on the proof of a claim for an amount of reasonable remuneration in conformity with s 42(4) of the Act. That onus is, in my respectful opinion, clearly cast by the Act upon the unlicensed builder, ie the appellant in this case.

[68] The appellant argues that the changes made to the legislation and the extrinsic material cited above reveal legislative dissatisfaction with the position achieved in *Zullo* (and, necessarily, the earlier decision of *Marshall v Marshall*). As I have said, however, what is apparent, both from the text of the amended section and the extrinsic material, is that there was no attempt to alter that aspect of the operation of s 42(3) identified in the analysis of McPherson JA as the reason why the payer may recover from the unlicensed payee money paid as the reciprocal of the unlicensed payee's disentitlement and the absence of any pleaded basis upon which that disentitlement might be overcome.

[69] It will be apparent that I consider that the appellant's argument must fail because it misunderstands the relationship between s 42(3) and s 42(4) of the Act, and the necessary ingredients of the cause of action for recovery of the payments made to the appellant. The appellant's argument also involves a departure from the case made by the appellant at trial.

[70] At trial, the appellant did not attempt to rely upon the absence of a belief on Mr Jewell's part that the appellant had no rights under s 42(4) of the Act as a ground on which the counterclaim should fail. Mr Jewell was never asked to consider the

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28 [1980] QB 677 at 695.

29 [1983] 1 VR 489 at 492.

possibility that, although the appellant had no contractual entitlement, he might nevertheless have authorised payment on the basis that the appellant might be able to establish a claim for reasonable remuneration under s 42(4) of the Act. Simply to frame the question which was never asked of Mr Jewell is to demonstrate the extreme artificiality of the appellant's point. It is entirely unlikely that Mr Jewell would, for a moment, have considered that he might properly certify progress claims for payment outside the contract on the basis that they represented reasonable remuneration. Mr Jewell's authority and obligation to certify derived from the contract as he clearly understood. The appellant did not attempt at trial to establish the contrary.

[71] In any event, I consider that, as the second passage cited above from the reasons in *David Securities* shows, moneys paid under a mistaken belief that the payer was under a legal obligation to pay would be recoverable unless the payee had, in truth, an entitlement to the moneys. That passage was speaking of a demonstrated entitlement, not merely an arguable case, to obtain the moneys. The appellant failed to demonstrate its entitlement when it had the opportunity to do so.

Restitutio in integrum?

[72] The appellant argues that the respondent's inability to restore to the appellant the work performed by the appellant for the respondent's benefit, or its failure to offer to make an equivalent monetary restitution was fatal to the respondent's counterclaim. The submission is that the respondent's counterclaim is a restitutionary claim which is barred if *restitutio in integrum* is not possible.[30] In this regard, the appellant invokes a number of statements by academic authors such as that in *The Law of Restitution* by Goff and Jones[31] where the learned authors say:

> "The essence of the limiting principle that *restitutio in integrum* must be possible is that it would be inequitable to require the defendant to make restitution if he cannot be restored to his original position. Its application is not confined to the rescission of transactions or to transactions for the recovery of money paid. Indeed, a similar principle underlies the defences of change of position and payment over."

[73] There are a number of points to be made about this submission. The first is that the only decisions which support the necessity for *restitutio in integrum* are concerned with cases of rescission of contract, and the respondent's counterclaim does not depend upon the exercise of a right to rescind the subcontract. Accordingly, no question of a mutual restoration of the parties to their pre-contractual position arises.

[74] Secondly, the respondent's cause of action was to recover moneys paid by the respondent to the appellant in circumstances where it was a consequence of s 42(3) of the Act that those moneys were recoverable by the respondent.[32] Since the respondent's counterclaim arose by virtue of the terms of the Act, the question whether *restitutio in integrum* was a condition of the appellant's liability to refund the moneys to which it has no title was to be determined against the appellant as a matter of legislative intention. As Dixon CJ explained in *Mayfair Trading Co Pty*

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30 *Clarke v Dickson* (1858) 120 ER 463; *Alati v Kruger* (1955) 94 CLR 216 at 223 – 224; *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102.

31 2002, Sweet & Maxwell, London at [1-084].

32 *Roxborough v Rothmans of Pall Mall Ltd* (2001) 208 CLR 516 at 544 – 545.

Ltd v Dreyer,[33] while principles of equity may require *restitutio in integrum* as a condition of making orders to restore parties to their respective pre-transactional positions, that position may be altered by the terms of the legislation which allows the transaction to be impugned. To argue that the absence of restitution (in money or money's worth) is fatal to the respondent's counterclaim is necessarily to ignore that s 42(3) of the Act affords the basis for the recovery of money paid by any owner to an unlicensed builder. To the extent that s 42(4) ameliorates the position of the builder, it is an exhaustive statement of that amelioration.

[75] A third point was made by the respondent in answer to the appellant's submission under this heading. The respondent's failure or inability to make *restitutio in integrum* was not raised below on the appellant's behalf, by way of defence in answer to the respondent's counterclaim or otherwise. If it had been raised, then, so the respondent argues, that would have opened up issues as to the value of the work performed by the appellant for the respondent. The respondent was itself a contractor, and the value of the appellant's work to it cannot be measured by the value of the building work to the owner of the project. The respondent did not address these issues of valuation. It is said that it would be contrary to basic considerations of natural justice to allow the appellant to advance on appeal arguments which assume a resolution favourable to the appellant of issues which were never even argued at trial.[34]

[76] Since it is apparent that the appellant's argument under this heading must fail, it is unnecessary to resolve this argument in favour of the respondent in order to dispose of this aspect of the appellant's challenge to the judgment.

The evidence satisfied the requirements of s 42(4) of the Act

[77] The appellant's principal submission under this heading was that the possibility of a claim under s 42(4) of the Act was sufficiently apparent in this case to defeat the respondent's counterclaim. This submission must be rejected for the reasons I have already given in relation to the operation of s 42 of the Act.

[78] The appellant also submits that if regard is had to the terms of the subcontract, and Mr Jewell's certifications, it can be seen that the requirements of s 42(4) of the Act are satisfied in relation to the payments made by the respondent to the appellant. At trial the appellant did not contend that Mr Jewell's certification provided a basis from which a claim for reasonable remuneration could be assessed in conformity with s 42(4) of the Act. The appellant invites this Court to make findings of fact which the learned trial judge was not invited to make. That invitation is not attractive.

[79] The appellant contends that the learned trial judge should have regarded the contract price (and the rates of payment which it applied) as evidence of reasonable remuneration for the building work performed by the appellant. It is said that his Honour should have regarded Mr Jewell's certifications of the appellant's claims for payment as reasonable measures of the value of the work certified as payable. It is said that in the absence of some evidentiary basis for reaching a different conclusion, this process would have yielded a figure for reasonable remuneration.

[80] The appellant says that his Honour should then have considered whether there was an evidentiary basis for concluding that these amounts should be reduced by

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33 (1958) 101 CLR 428 esp at 452 – 456.

34 Cf *Coulton v Holcombe* (1986) 162 CLR 1 at 7 – 8.

reference to the criteria in s 42(4); and because the respondent had neither pleaded nor proved a positive case for the application of any of the subparagraphs of s 42(4), the learned primary judge should have concluded that the certified payments represented reasonable remuneration in accordance with s 42(4) for the building work in question. The appellant's submission did not attempt a quantification of the appellant's claim for reasonable remuneration save to contend that the amounts certified by Mr Jewell as progress payments under the contract represented an accurate quantification of the appellant's claim in conformity with s 42(4) of the Act.

[81] There are a number of difficulties with the arguments urged by the appellant under this heading. The first is that the subcontract rates were struck on the basis that the subcontract included building work as well as other work. Further, the contract rates cannot sensibly be regarded as not including an allowance for the appellant's profit. Finally, and most importantly, the onus of proof that the reasonable remuneration claimed by the appellant conforms with the subparagraphs of s 42(4) is upon the appellant. The appellant simply failed to adduce any guidance which might have brought its claim within s 42(4), and particularly paragraphs (a) and (b).

[82] Accordingly, this aspect of the appeal fails.

Interest

[83] Section 47 of the *Supreme Court Act* provides:

> "**Interest up to judgment**
>
> (1) In any proceedings in respect of a cause of action that arises after the commencement of the *Common Law Practice Act Amendment Act 1972* in a court of record for the recovery of money (including proceedings for debt, damages or the value of goods) the court may order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of that sum for the whole or any part of the period between the date when the cause of action arose and the date of the judgment.
>
> …"

[84] In the proceedings below, it was accepted by the appellant that the date at which the calculation of interest should begin was the date of the last payment by the respondent, ie April 2000. On the appeal, no different date was suggested. The only basis on which the award of interest was challenged on the appeal was that the learned trial judge erred in principle in that, because the respondent received value for its payments to the appellant, the learned trial judge should not have made an order for the payment of interest. The appellant's argument is to the effect that the respondent was not relevantly out of pocket by reason of its payments because it received value for money.

[85] The appellant's argument fails to appreciate that the award of interest under the legislation is intended to compensate the party who makes a successful claim for the recovery of money for being out of pocket in respect of moneys which the other side should have repaid. It was on this basis that the learned trial judge proceeded.

[86] There was, in my respectful opinion, nothing unorthodox in the approach of the learned trial judge to the exercise of the discretion reposed in him by s 47 of the

Supreme Court Act. The award of interest was made in respect of the period after which the cause of action successfully asserted by the respondent arose.

[87] Accordingly, this aspect of the appellant's argument must be rejected.

Conclusion and orders

[88] The appeal should be dismissed.

[89] The appellant should pay the respondent's costs of the appeal on the standard basis.

[90] **FRASER JA:** Between about July 1998 and April 2000 the appellant ("CCPL") carried out earthworks and concrete works for the respondent ("Stork") under a subcontract made in June 1998. CCPL's subcontract work formed part of the work for the construction of an ammonium nitrate plant in Central Queensland which Stork had itself contracted to carry out. Pursuant to the terms of the subcontract Stork made progress payments totalling $15,528,924.03 to CCPL for its work.

[91] In proceedings in the Trial Division CCPL pursued further claims for payment under or for breach of the subcontract. One of Stork's defences pleaded that some of CCPL's claims were for "building work" within the meaning of that expression in s 42 of the *Queensland Building Services Authority Act* 1991 (Qld) ("the *QBSA Act*"), that CCPL did not hold the necessary contractor's licence under the *QBSA Act* when it contracted to perform and performed the work, and that the effect of s 42(3) was that CCPL had no lawful entitlement to make those claims.

[92] The effect of s 42 of the *QBSA Act* was at the heart of the issues at trial and it is also critical to the new arguments advanced for CCPL in this appeal. In the following extract I have italicised the amendments made by s 21 of the *Queensland Building Services Authority Amendment Act* 1999, which commenced on 1 October 1999:

> "(1) A person must not carry out, or undertake to carry out, building work unless that person holds a contractor's licence of the appropriate class under this Act.
>
> (3) *Subject to subsection (4),* a person who carries out building work in contravention of this section is not entitled to any monetary or other consideration for doing so.
>
> *(4) A person is not stopped under subsection (3) from claiming reasonable remuneration for carrying out building work, but only if the amount claimed--*
>
> *(a) is not more than the amount paid by the person in supplying materials and labour for carrying out the building work; and*
>
> *(b) does not include allowance for any of the following-*
>
> *(i) the supply of the person's own labour;*
>
> *(ii) the making of a profit by the person for carrying out the building work;*
>
> *(iii) costs incurred by the person in supplying materials and labour if, in the circumstances, the costs were not reasonably incurred; and*

(c) is not more than any amount agreed to, or purportedly agreed to, as the price for carrying out the building work; and

(d) does not include any amount paid by the person that may fairly be characterised as being, in substance, an amount paid for the person's own direct or indirect benefit.

. . .

(9) A person who contravenes this section commits an offence.[35]

(10) Subsection (4) applies to building work carried out on or after 1 July 1992, unless the entitlement to payment for the carrying out of the building work was—

(a) before the commencement of this section, decided by—

(i) a court; or

(ii) the tribunal; or

(iii) an arbitrator or another entity authorised to make a binding decision about the entitlement; or

(b) before 2 March 1999, the subject of—

(i) a claim or counter claim filed in a court; or

(ii) an application made to the tribunal; or

(iii) a reference to an arbitrator or another entity authorised to make a binding decision about the entitlement; or

(c) provided for as a term of a binding agreement entered into before the commencement of this subsection, but only if the binding agreement—

(i) is between—

(A) 1 or more consumers and 1 or more building contractors; or

(B) 1 or more building contractors and 1 or more other building contractors; and

(ii) was entered into to resolve a dispute between some or all of the parties to the binding agreement; and

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35 The amending Act renumbered subsection (7) as subsection (9).

> *(iii) is not the contract for the carrying out of the building work as originally entered into, or as entered into and as subsequently varied.*
>
> . . ."

[93] CCPL admitted that it did not hold the necessary licence, but the other elements of Stork's defence were in issue.

[94] Stork also counterclaimed for the recovery from CCPL of so much of Stork's progress payments under the subcontract as was for "building work". Stork alleged that it had made those payments in the mistaken belief that it was obliged to do so, that CCPL was lawfully entitled to receive them, and that CCPL had complied with a term of the subcontract requiring CCPL to comply with Queensland legislation.

[95] The relevant work, which was a substantial part of the subcontract works, largely comprised concreting and related works forming part of the foundational structures of a building. It included the construction of footings, pedestals and reinforced piers, together with works including formwork, backfilling, concreting and screeding, and excavation.[36] Unsurprisingly, the trial judge rejected CCPL's contention that this did not constitute "building work". In relation to the counterclaim, the judge found that Stork had paid CCPL $9,983,796.54 for "building work".

[96] The issues in this appeal relate to CCPL's pleaded contention that CCPL was entitled to the "reasonable remuneration" for carrying out "building work" which s 42(4) allows as an exception to the operation of s 42(3). CCPL assumed the onus of proving that entitlement by its expert evidence. The issue that was litigated was summarised by CCPL's senior counsel at the trial:

> "[Mr Digby Q.C.] Your Honour will be aware that in paragraph 39 of the reply the – can I call it a defence for the moment, your Honour? The defence under clause 42.4 of the QBSA is raised by the plaintiff. Your Honour is also aware, having presided over the trial, that the case has proceeded on the basis of evidence being put forward by both parties and tested in relation to what would be an appropriate reasonable remuneration; Mr Same's report on the part of the plaintiff and Miss Janine Smith's report on the part of the defendant."

[97] The trial judge found fundamental deficiencies in CCPL's pleading of a claim under s 42(4)[37] and, more significantly, in the expert evidence adduced to support it,[38] and concluded that there was "no evidence upon which the provisions of s 42(4) can act".[39] The trial judge therefore rejected CCPL's contention that it was entitled to payment for its building work in accordance with s 42(4), with the result that CCPL failed on some of its claims on that ground and Stork was entitled to succeed on its counterclaim.

[98] After a twelve day trial the trial judge upheld CCPL's contractual claims to the extent only of $132,657.70, and gave judgment for Stork on its counterclaim for

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36 *Cook's Construction P/L v Stork Food Systems Aust P/L* [2008] QSC 179 at [341].

37 The trial judge noted that the deficiencies in CCPL's pleading remained even though they had been pointed out in a judgment four years before the trial commenced: [2008] QSC 179 at [293], referring to *Cook's Construction Pty Ltd v Stork ICM Australia Pty Ltd* [2004] QSC 66 at [55].

38 [2008] QSC 179 at [302] – [317].

39 [2008] QSC 179 at [316].

restitution for its payments to CCPL for "building work" for $9,983,796.54.[40] In a subsequent judgment the trial judge assessed the interest payable on each of those sums, vacated the original orders, set off CCPL's entitlement against Stork's entitlement, and gave judgment for the balance in favour of Stork of $15,216,484.16.[41]

[99] CCPL now challenges so much of that judgment as reflects Stork's success on its counterclaim.

[100] The result of the trial, that Stork was found to be entitled to recover its counterclaim of nearly $10 million of the subcontract price it paid CCPL, together with some $5 million as interest on that sum, without being required to give any credit for the value of the work CCPL performed to earn the price, is so surprising as to justify concern that CCPL may have been the victim of a miscarriage of justice. CCPL invoked this view in the course of its arguments in the appeal. However CCPL did not identify any flaw in the trial judge's reasons for rejecting CCPL's arguments at trial, and I have concluded both that the new points CCPL argued in this appeal are not now open to it and that they must be rejected in any event. If Stork was the beneficiary of an unmerited windfall, that is a consequence of CCPL's failure to prove the claim for reasonable payment for "building work" which is permitted by s 42(4) of the *QBSA Act* and which it advanced at the trial.

The issues in the appeal

[101] It remains common ground that CCPL did not hold the necessary contractor's licence and CCPL does not challenge the trial judge's finding that Stork paid CCPL $9,983,796.54 for "building work". CCPL also does not dispute that the expert evidence upon which it relied at trial to make out a claim for reasonable remuneration in conformity with s 42(4) lacked probative value for the reasons given by the trial judge.

[102] CCPL's counsel confined CCPL's grounds of appeal to four contentions. Those contentions may be summarised as follows: (1) Because Stork had not proved that there was no amount of reasonable remuneration to which CCPL was entitled under s 42(4) of the *QBSA Act*, Stork had not proved that it made the progress payments because of a relevant mistaken belief; (2) It was fatal to Stork's claim that it neither made "counter-restitution" for the value to it of CCPL's building work nor negated the need to do so by proving that CCPL's work had no value; (3) The trial judge erred by failing to regard the progress certificates as sufficient evidence that the certified amounts were reasonable remuneration in terms of s 42(4); (4) The trial judge erred in awarding interest on Stork's counterclaim.

[103] The first three of those contentions were not raised at the trial. Stork argued that CCPL should not be permitted to advance them for the first time on appeal. It may facilitate an understanding of my reasons for accepting that argument if I first give my reasons for concluding that each of the three new contentions lacks merit in any event.

CCPL's first contention: because Stork had not proved that there was no amount of reasonable remuneration to which CCPL was entitled under s 42(4)

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40 *Cook's Construction P/L v Stork Food Systems Australia P/L* [2008] QSC 179.

41 *Cook's Construction P/L v Stork Food Systems Australia P/L* [2008] QSC 220.

of the *QBSA Act*, Stork had not proved that it made the progress payments because of a relevant mistaken belief.

[104] The evidence showed that Stork paid $13,562,238 (out of total payments under the subcontract of $15,528,924) before the commencement of the amendments to s 42 on 1 October 1999. Assuming in CCPL's favour that all of the progress payments totalling $1,966,686 made after 1 October 1999 were for "building work", the total amount of the progress payments made by Stork for "building work" before 1 October 1999 was $8,017,110.54.

[105] Fastening on those facts, Stork argued that, even if CCPL's first contention were accepted in relation to the payments it made after the amendments commenced, the contention should nevertheless be rejected in relation to the much larger amount it paid before the amendments commenced. Stork argued that although s 42(10) entitled CCPL to make a claim falling within s 42(4) in relation to "building work" it had done before the commencement of the amendments, s 42(10) was not expressed in such broad terms as retrospectively to correct the mistaken nature of Stork's belief when it paid for that work.

[106] In the way I analyse the issues that question does not fall for decision. I will discuss CCPL's first contention on the footing that the amended form of s 42 applied in relation to Stork's counterclaim to recover payments made before the amendments commenced in the same way that it plainly applied in relation to payments made after the commencement.

[107] Stork's counterclaim was based upon the principle that a payment made by mistake is "one of the categories of case in which the facts give rise to a prima facie obligation to make restitution, in the sense of compensation for the benefit of unjust enrichment, to the person who has sustained the countervailing detriment".[42] Since *David Securities Pty Ltd v Commonwealth Bank of Australia*[43] the principle has applied also to mistakes of law: "…the payer will be entitled prima facie to recover moneys paid under a mistake if it appears that the moneys were paid by the payer in the mistaken belief that he or she was under a legal obligation to pay the moneys or that the payee was legally entitled to payment of the moneys."[44]

[108] The trial judge found that Stork had established the following pleaded elements of its counterclaim:

> "(a) the work which is the subject of the Counterclaim was 'building work' within the meaning of the QBSA Act; and
>
> (b) the payments made by the defendant to the plaintiff included payment for such 'building work';
>
> (c) the payments for such 'building work' comprised 'monetary or other consideration' within the meaning of section 42(3) of the QBSA Act; and
>
> (d) the defendant made the payments in the mistaken belief that:

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42 *Australia & New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662 at 673, per Mason CJ, Wilson, Deane, Toohey and Gaudron JJ.

43 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353.

44 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 378, per Mason CJ, Deane, Toohey, Gaudron and McHugh JJ.

(i) it was obliged to do so;

(ii) the plaintiff was lawfully entitled to receive them; and

(iii) the plaintiff had complied with clause 16.1 of Exhibit D to the Subcontract (being the admitted express term of the Subcontract requiring the plaintiff to comply with Queensland legislation)."[45]

[109] CCPL's first contention accepted that if Stork had proved each of those pleaded elements of its claims it was entitled to retain its judgment, but CCPL contended that Stork had not proved the fourth element.

[110] Stork made its progress payments pursuant to clause 47 of the subcontract. Under that clause, at specified intervals CCPL was obliged to deliver progress claims for payment which identified the value of work carried out by it up to the time of the progress claim and the amount it claimed was due. Within seven days thereafter "Stork's Representative" was to issue to CCPL a progress payment certificate stating (amongst other things) the payment which in that person's opinion was to be made by Stork to CCPL. Subject to presently irrelevant exceptions, within 30 days after the issue of such a progress certificate Stork was obliged to pay CCPL an amount not less than that shown on the progress certificate. Clause 26 obliged "Stork's Representative" to act honestly and fairly and to arrive at a reasonable measure of work and time.

[111] The subcontract identified Stork's subcontracted project manager, Mr Jewell, as "Stork's Representative". Mr Jewell duly issued progress certificates in response to progress claims submitted by CCPL in apparent conformity with the terms of the subcontract and Stork duly paid the amounts shown on those progress certificates as payable by it, as the subcontract apparently obliged Stork to do. The trial judge's reasons for concluding that Stork had proved that it made the payments because of a relevant mistaken belief are contained in the following passage of his Honour's reasons:

"[344] Stork called Mr Peter Jewell on this issue. He was 'Stork's representative' for the purposes of the Subcontract but he was not an employee of Stork. He was also the person who was responsible for certifying the payments by Stork to CCPL. His evidence was that:

(a) when he certified those payments, he expected the plaintiff to hold all licences it was required to hold to do the contract works within Queensland;

(b) if he had discovered that the plaintiff did not hold the licences it was required to hold, he would have taken legal advice and acted in accordance with that advice: 'I would have adjusted their payment accordingly in relation to the legal advice I was given'; and

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45 [2008] QSC 179 at [326].

> (c) during the course of the Subcontract he did not discover that the plaintiff did not hold any licence that it was supposed to hold.
>
> [345] Mr Jewell was cross-examined on this topic:
>
> 'Among the many things you might have done is it correct to say that had you discovered that one of your subcontractors was not appropriately licensed under that Act, you nevertheless would have insisted on the subcontractor continuing to perform its work under the subcontract?-- No.
>
> Well, let's look at it from a different angle. Had you discovered that the subcontractor was unlicensed is it your evidence that you would have stopped it then and there from continuing to work under its subcontract?-- Until they were licensed, yes.'
>
> [346] Stork was, through its representative, mistaken as to its obligation to pay CCPL. It is clear from his evidence that had he discovered that CCPL was unlicensed he would have stopped it from working and taken legal advice."

[112] Stork did not call any officer or employee, or indeed any witness, to give evidence that when it paid the amounts shown on the progress certificates it was not aware that CCPL did not hold a contractor's licence under the *QBSA Act*, but in paragraph [346] of the reasons, the trial judge attributed to Stork Mr Jewell's belief to that effect. During the appeal CCPL abandoned a challenge to that conclusion. CCPL also conceded that Mr Jewell's evidence, extracted in cross-examination, that he would have stopped CCPL from continuing the work had he discovered that CCPL was unlicensed, proved that Stork would not have paid CCPL but for Stork's mistaken belief that CCPL was licensed. And although CCPL argued in its written submissions that it was debatable whether, as the trial judge also found, Stork made the payments because it mistakenly believed it was obliged to pay the amounts shown on the certificates, in the end CCPL did not challenge that finding.

[113] Accordingly the evidence of Mr Jewell, read in light of the subcontract, the evidence of CCPL's submission of progress claims, Mr Jewell's issue of progress certificates in response to those progress claims, and Stork's payment of the amounts of those progress certificates, must be regarded as justifying an inference that Stork made its payments because it believed that CCPL held the necessary licence, that the subcontract obliged Stork to make the payments, and that CCPL was entitled to receive the payments.

[114] CCPL concedes that it did not hold the necessary licence when it entered into the subcontract and when it did the work and was paid for it, that Stork had no contractual obligation to make the payments, and that CCPL had no contractual entitlement to receive them.

[115] CCPL contends that this was insufficient to establish Stork's entitlement to recover the money it had paid. CCPL's point is that Stork failed to prove that there was no amount of reasonable remuneration to which Stork was entitled under s 42(4). The argument focused upon the qualification upon the disentitling effect of s 42(3) wrought by the introductory phrase "[s]ubject to subsection (4)". CCPL's

submissions characterised the permitted claim to reasonable remuneration as "the statutory right pursuant to s 42(4)". It contended that the effect of s 42(3) and s 42(4) was to preserve out of the full panoply of rights which might otherwise have existed only the right to payment of reasonable remuneration for the work, to subject that right to the constraints set out in s 42(4)(a) - (d), and otherwise to negate the existence of any rights to payment. That description of the statute informed CCPL's proposition that the better view of the intersection between restitutionary principle and the operation of s 42(3) and s 42(4) was that the injustice of CCPL's retention of the payments could not be regarded as proved without proof that the amount paid exceeded the amount of the entitlement provided under s 42(4).

[116] Section 42, in its unamended form, was considered in two decisions of this Court, *Marshall v Marshall*[46] and *Sutton v Zullo Enterprises Pty Ltd*.[47]

[117] In *Marshall v Marshall* this Court upheld a trial judge's decision that an owner was entitled to recover payment she had made to an unlicensed builder for "building work" in accordance with her apparent contractual obligation. As the judgments in that case confirm, s 42(3) plainly prevented the unlicensed builder from recovering the price under the building contract. Pincus JA and de Jersey J (as the Chief Justice then was) affirmed the trial judge's reasoning, following *David Securities Pty Ltd v Commonwealth Bank of Australia*,[48] that the moneys were repayable because the owner had paid them in the mistaken belief that she was contractually obliged to do so.[49] McPherson JA rejected the builder's appeal on the same basis[50] and on the further ground that the owner was entitled to recover her payments because the effect of s 42 was that the unlicensed builder had no right to claim, keep, or retain the money as against the owner and she was a member of the class of persons intended to be protected by s 42.[51]

[118] It was not necessary there to decide whether s 42(3), unlike the legislation considered in other cases such as *Pavey & Matthews Pty Ltd v Paul*,[52] precluded an unlicensed contractor from recovering anything outside the contract for the reasonable value of its work, but in *Sutton v Zullo Enterprises Pty Ltd* this Court held that s 42(3) prevented the unlicensed builder both from recovering any part of the contract price and from recovering anything by way of restitution for the work done. In so concluding, McPherson JA and Pincus JA held that such claims were barred because they were for "any monetary consideration" within the meaning of s 42(3).[53]

[119] The legislature responded by enacting s 21 of the *Queensland Building Services Authority Amendment Act* 1999, which commenced on 1 October 1999. The mischief at which the amendments was aimed was the injustice in the former legislative denial to unlicensed contractors of any right to claim any remuneration by way of restitution for work carried out at the other contracting party's request and

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46 [1999] 1 Qd R 173.
47 [2000] 2 Qd R 196; [1998] QCA 417.
48 (1992) 175 CLR 353.
49 [1999] 1 Qd R 173 at 180.
50 [1999] 1 Qd R 173 at 178-179.
51 [1999] 1 Qd R 173 at 176-178, citing *Mayfair Trading Co Pty Ltd v Dreyer* (1958) 101 CLR 428 at 449-450, per Dixon CJ and *Kiriri Cotton Co v Dewani* [1960] AC 192.
52 (1987) 162 CLR 221.
53 [2000] 2 Qd R 196 at [8]-[9] per McPherson JA; at [17]-[21] per Pincus JA.

in the expectation of payment. The purpose of the Bill for that Act was described in the Minister's second reading speech:

> "The Bill also remedies the potential for unfairness which emerged last year following a Court of Appeal decision in Zullo Enterprises and Others versus Sutton. The intention of the regulatory scheme has always been that building contractors be licensed. It is not the intention, therefore, that builders and developers have incentives to engage unlicensed contractors. The court found that, contrary to previous belief, the Act prevents an unlicensed building contractor from recovering any money at all under a contract. This opens the door for unjust enrichment of unscrupulous developers and builders, potentially encouraging them to engage unlicensed contractors.
>
> The Bill rectifies this situation by allowing unlicensed contractors to recover any moneys that they have reasonably spent while performing building work. But unlicensed contractors cannot recover any profit or receive any more than the contract price specified in the purported contract. They will also be penalised for the offence of operating without a licence. In addition, building contracts are required to include the licence number of the contracted party."

[120] A similar explanation emerges from the Explanatory Notes for the Bill for the amending Act:

> "Until the 1998 decision of the Court of Appeal in *Zullo Enterprises & Ors v Sutton* [1998] QCA 417 (15 December 1998), it was thought that s42, which makes the carrying out or undertaking to carry out of building work unlawful, did not prevent unlicensed contractors recovering their costs under the common law of contract.[54] The *Zullo* decision held that unlicensed contractors were prevented from recovering anything at all, and held the prospect that unlicensed contractors could be successfully sued for recovery of any moneys paid for prior performance. This potentially allows considerable injustice, such as deliberate recruiting of subcontractors from interstate and legally escaping from any obligation to pay for work performed. Unlicensed contracting will, of course, remain an offence committed by the contractor, but the principle that a builder or owner should not be able to enrich themselves through signing on unlicensed contractors is enshrined in this clause.
>
> This clause amends s42(3) and inserts a new subsection 42(4) to provide an unlicensed contractor with a limited statutory right to recover money which would otherwise be unavailable because of the *Zullo* decision. The new provisions will allow an unlicensed contractor to claim reasonable recovery of moneys actually expended for the supply of materials and labour, other than the contractor's own labour and profit. Existing subsections 42(4) to (6) are renumbered.

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[54] The expression "the common law of contract" was apparently intended as a reference to a restitutionary claim.

> The new provision in s42(4)(iii) also prevents an unlicensed contractor unreasonably incurring costs and claiming for recovery under this provision.
>
> S42(4)(c) prevents an unlicensed contractor recovering any more under this provision than the contract price.
>
> S42(4)(d) is designed to attack any scheme entered into by the unlicensed contractor, for example employing the contractor's child or the charging of a management fee by a company of which the contractor is a beneficial shareholder, to use this new provision to gain personal profit from unlicensed contracting."

[121] Those notes described s 42(4) as conferring a "limited statutory right", but that terminology appears not to have been a precise description of its legal effect. The immediately following words ("which would otherwise be unavailable because of the *Zullo* decision . . .") reveal, in conformity with the text of the amendments, that the intention was only to reverse the effect of that decision in so far as it prevented an unlicensed contractor from making the claim described in s 42(4).

[122] The extrinsic evidence is not entirely consistent or clear in this respect, but it is at least not inconsistent with what I think is the literal and natural meaning of s 42 in its amended form. Contrary to CCPL's thesis, the amendments did not create a statutory right in the unlicensed contractor as a qualification upon the payer's common law right to recover money paid to the contractor for "building work" in the mistaken belief that the contractor was contractually entitled to such payment. Rather, the amended section merely excepts a contractor's common law claim for reasonable remuneration, if it falls within the limits described in s 42(4), from the otherwise universal destruction wrought by s 42(3) upon any right in an unlicensed contractor to payment for "building work": "A person is not stopped under subsection (3) from claiming reasonable remuneration…".

[123] Consistently with the statutory exclusion of the usual contractual entitlement to profit and the cost of the "person's own labour",[55] the reference in s 42(4) to "reasonable remuneration" suggests that the character of the permissible claim is non-contractual and that it is, or at least includes, the common money count for work done, or a *quantum meruit*.[56] The amended form of s 42 thus permits the unlicensed contractor to make a common law claim outside the contract and as an exception to the general preclusion of any claim in s 42(3), provided that the claim falls within the limits imposed by s 42(4). The section then leaves it to the common law to define the circumstances in which any such claim will succeed.

[124] Section 42 operates in that way whether or not the contractor has received any payment purportedly made pursuant to the contract. In either case the exception in s 42(4) applies only where the unlicensed contractor makes a claim of the character and for the amount permitted by that provision. That must be so because the presence or absence of payment is not expressed as a criterion upon which the destructive operation of s 42(3) depends. Thus, where the unlicensed contractor cannot invoke the exception it may be obliged to disgorge any payment it has received purportedly under the contract and contrary to the statute. There is no hint

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55 The trial judge found that this did not exclude a corporation claiming the cost of its employee's labour: *Cook's Construction P/L v Stork Food Systems Aust P/L* [2008] QSC 179 at [309](b).

56 *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 251, 253 per Deane J.

in the amendments or the extrinsic evidence that the legislative intention was to reverse that aspect of the decisions in *Marshall v Marshall* and *Sutton v Zullo Enterprises Pty Ltd*.

[125] The fact that the elements in paragraphs (a)-(d) of s 42(4) form part of the description of a claim for reasonable remuneration which may be made by an unlicensed contractor as an exception to the disentitling effect of s 42(3) suggests that the unlicensed contractor bears the burden of proving compliance with each of the paragraphs of s 42(4).[57] It must also be borne in mind that s 42 renders an unlicensed contractor who contravenes s 42(1) guilty of an offence but it does not stigmatise a person who, like Stork, pays the unlicensed contractor in ignorance of the sterilising effect of s 42(3) and in the mistaken belief that the contract requires the payment. It seems highly unlikely that the legislative intention was to throw the onus upon the innocent party to prove the absence of a valid counter claim by the guilty party, the unlicensed contractor, who had no entitlement to receive payments made on the mistaken footing that they were due to it under the contract. The unlikelihood of such a legislative intention is emphasised by the manifest difficulty the innocent party would face in framing and proving a claim that the contractor was entitled to no reasonable remuneration, or to a particular amount of reasonable remuneration calculated in accordance with s 42(4), a claim that ordinarily would require proof of matters exclusively within the contractor's knowledge.

[126] That construction of s 42 then informs the answer to the question whether Stork made its payments under such a mistaken belief as entitled it to recover the equivalent amount in its restitutionary claim.

[127] The question whether Stork paid under such a mistake must be answered at the time when it made the payments.[58] It seems very difficult to sustain the proposition that Stork was not mistaken when it made its progress payments, when CCPL had not by then purported to make any claim of the kind contemplated by s 42(4). CCPL was disposed to argue that its progress claims might be regarded as claims of the kind described in s 42(4), but this departs both from the reality of the situation and the manner in which the litigation was conducted. The progress claims did not purport to claim "reasonable remuneration" or otherwise conform to s 42(4). They were manifestly claims for payment made under and measured in accordance with the provisions of the subcontract. They thus differed markedly in their basis and measure from a claim described in s 42(4). Furthermore, CCPL did not plead or point to evidence that Mr Jewell was authorised by Stork to receive on its behalf any claim other than a progress claim under the subcontract. On the evidence, the first claim given to Stork that arguably was made in conformity with s 42(4) was made (or, perhaps more accurately, suggested) in CCPL's reply. That document was filed many years after the last of Stork's payments.

[128] What is left is CCPL's contention that it might have made a claim for reasonable remuneration before Stork made its payments. CCPL argued that it was plainly entitled to recover some amount of reasonable remuneration in accordance with s 42(4) so that, even if (as the trial judge found) it had failed to prove the amount to

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57 *Chugg v Pacific Dunlop Ltd* (1990) 170 CLR 249 at 257 per Dawson, Toohey and Gaudron JJ and *Vines v Djordjevitch* (1955) 91 CLR 512 at 519-520.

58 "From the point of view of the person making the payment, what happens after he or she has mistakenly paid over the money is irrelevant, for it is at that moment that the defendant is unjustly enriched": *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 385.

which it was entitled Stork had failed to prove that CCPL's receipt of the contractual payments was unjust.

[129] The proposition that CCPL possessed any entitlement conforming to s 42(4) is not self-evidently correct. To give one example of a possible obstacle, if it was an element of CCPL's claim for reasonable remuneration that Stork benefited as a result of CCPL having performed part of the work which Stork had contracted to perform for its principal, then Stork might deny the claim on the ground that CCPL failed to prove that Stork was itself paid for CCPL's work. (That was the trial judge's tentative conclusion when CCPL's "windfall" argument was advanced in opposition to Stork's claim for interest.[59]) I do not mean to express a view upon the merits in that respect: it would not be easy to do so in light of the fact, remarked upon by the trial judge,[60] that CCPL's pleading merely asserted an entitlement in accordance with s 42(4) and did not plead the material facts supporting that assertion. It does strike me, however, that there is a real difficulty in the way of accepting that CCPL was entitled to recover any amount as reasonable remuneration in circumstances in which it, the party most likely to be able to frame and prove the entitlement to and quantum of such a claim, comprehensively failed to do so. But even if it be assumed in CCPL's favour that it was entitled to some amount I would not accept its argument.

[130] CCPL invoked the following passage in the joint judgment of Mason CJ, Deane, Toohey, Gaudron, and McHugh JJ in *David Securities Pty Ltd v Commonwealth Bank of Australia*:

> "In the light of our view that the decision in *South Australian Cold Stores* [(1957) 98 CLR 65] can in this Court be justified on a narrower basis and that the traditional rule was not necessary to the decision, there is no other decision of this Court which constrains us to adopt the traditional rule. For the reasons stated above, the rule precluding recovery of moneys paid under a mistake of law should be held not to form part of the law in Australia. In referring to moneys paid under a mistake of law, we intend to refer to circumstances where the plaintiff pays moneys to a recipient who is not legally entitled to receive them. **It would not, for example, extend to a case where the moneys were paid under a mistaken belief that they were legally due and owing under a particular clause of a particular contract when in fact they were legally due and owing to the recipient under another clause or contract.** [*Barclays Bank Ltd. v W. J. Simms Son & Cooke (Southern) Ltd.*, [1980] Q.B. 677, at p. 695, per Robert Goff J: 'Of course, if the money was due under a contract between the payer and the payee, there can be no recovery on this ground.']." [61]

[131] CCPL argued that this passage requires the conclusion that a prima facie entitlement in Stork to recover moneys paid under mistake arose only if it proved that it was under no liability to CCPL to pay the same amount of money by way of restitution measured in accordance with s 42(4).

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59 *Cook's Construction P/L v Stork Food Systems Australia P/L* [2008] QSC 220 at [18] - [19].

60 *Cook's Construction P/L v Stork Food Systems Aust P/L* [2008] QSC 179 at [291].

61 (1992) 175 CLR 353 at 376. I have added the emphasis.

[132] Stork's mistake that CCPL held the necessary contractor's licence was a mistake of fact in respect of which that passage has no apparent application, but the passage does not assist CCPL for more fundamental reasons. It describes a situation in which it is proved that the money which the payer claims to recover was due and owing when it was paid. It does not answer the decisive question in this appeal, which concerns the onus of proof.

[133] That question is discussed later in the same judgment in a way that is opposed to CCPL's contention. Mason CJ, Deane, Toohey, Gaudron, and McHugh JJ considered and rejected an argument that a plaintiff should be required to prove that the retention of the moneys by the recipient would be unjust in all the circumstances before recovery should be granted. Their Honours regarded a claim by a recipient that the moneys were due on a basis other than that which motivated the payment as a circumstance which the recipient might raise to seek to rebut the payer's prima facie entitlement to restitution:

> "The fact that the payment has been caused by a mistake is sufficient to give rise to a prima facie obligation on the part of the respondent to make restitution. Before that prima facie liability is displaced, the respondent must point to circumstances which the law recognizes would make an order for restitution unjust [*Westpac Banking Corporation* (1988) 164 CLR, at p 673]. There can be no restitution in such circumstances because the law will not provide for recovery except when the enrichment is *unjust*. **It follows that the recipient of a payment, which is sought to be recovered on the ground of unjust enrichment, is entitled to raise by way of answer any matter or circumstance which shows that his or her receipt (or retention) of the payment is not unjust.**
>
> The two 'defences' upon which the respondent relies in this Court are, first, that the payments by the appellants were made for good consideration and, secondly, that in reliance upon receipt of the payments the respondent, in good faith, changed its position to its detriment. In the context of a mistake case, these 'defences' were included in the well known formulation of Goff J in *Barclays Bank*. His Lordship stated [(1980) Q.B., at p 695]:
>
> > '(1) If a person pays money to another under a mistake of fact which causes him to make the payment, he is prima facie entitled to recover it as money paid under a mistake of fact. (2) His claim may however fail if (a) the payer intends that the payee shall have the money at all events, whether the fact be true or false, or is deemed in law so to intend; or **(b) the payment is made for good consideration, in particular if the money is paid to discharge, and does discharge, a debt owed to the payee (or a principal on whose behalf he is authorised to receive the payment) by the payer or by a third party by whom he is authorised to discharge the debt;** or (c) the payee has changed his position in good faith, or is deemed in law to have done so.'"[62]

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62 (1992) 175 CLR 353 at 379-380. I have added the emphasis.

[134] That view of the onus of proof was applied in subsequent passages in the joint judgment:

> "In this case, the Bank must prove that the appellants are not entitled to restitution because they have received consideration for the *payments which they seek to recover*."[63]
>
> "It might be said to order restitution in the present case would, in the absence of any other defences, confer something in the nature of a windfall upon the appellants at the expense of the respondent. This possible result flows from the fact that, having proved mistake, the appellants are prima facie entitled to recovery and the respondent bears the onus of proving why an order for restitution would be unjust." [64]

[135] Those statements echoed the earlier statement in the joint judgment in *Australia & New Zealand Banking Group Ltd v Westpac Banking Corporation* that "[b]efore that prima facie liability [to make restitution] will be displaced, there must be circumstances (eg, that the payment was made for good consideration such as the discharge of an existing debt. . .) which the law recognises would make an order for restitution unjust." [65] The same view of the onus of proof, similarly applying Robert Goff J's influential dictum in the *Barclays Bank* case, had earlier been adopted in *Bank of New South Wales v Murphett*.[66]

[136] More recently, the elements of a claim for restitution were described in a way that bears upon the present issue in *Ovidio Carrideo Nominees Pty Ltd v The Dog Depot Pty Ltd.* [67] The legal issues were similar to those here: the payee contended that a payer's claim for restitution of payments made in the belief that it was contractually obliged to do so should fail because the payee was entitled to "counter restitution"; and the payer's belief was mistaken because a statute precluded any contractual obligation or entitlement but it did not preclude "counter restitution" in favour of the payee.

[137] In that case a tenant paid rent in the belief that it was liable to pay it under its lease. The tenant was mistaken because the effect of the statute[68] was that the tenant was not liable to pay the rent when, as was the case, the landlord had neglected to give the tenant a specified disclosure statement. There were two limbs to the landlord's argument in the appeal. It argued first that the tenant's claim for restitution for an amount equal to the rent which it had paid under its mistake was defeated by a defence of good consideration (the tenant's exclusive use and occupation of the premises in return for its payments). Secondly, it argued that the landlord had an available counter-claim for restitution in respect of the tenant's use and occupation of the premises in an amount equal to the amount of the tenant's claim.

[138] The landlord's appeal succeeded. In relation to the second limb of the landlord's argument, Nettle JA concluded that the landlord's entitlement to sue for "counter restitution" was "pro tanto an answer to a claim for restitution", so that it followed that to that extent the landlord's retention of the monies paid as rent would not be

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63 (1992) 175 CLR 353 at 383.
64 (1992) 175 CLR 353 at 384.
65 (1988) 164 CLR 662 at 673 per by Mason CJ, Wilson, Deane, Toohey, and Gaudron JJ.
66 [1983] 1 VR 489, at 492 per Starke J and at 495-496 per Crockett J, King J concurring.
67 (2006) Vic ConvR 54-713; [2006] VSCA 6.
68 *Retail Tenancies Reform Act* 1998 (Vic), s 8(2)(b).

unjust.[69] More relevantly for present purposes, in the course of considering the landlord's first argument Nettle JA referred to a passage in *David Securities v Commonwealth Bank of Australia*[70] for the proposition that "a claim for money had and received lies only as upon a total failure of consideration", referred to Gummow J's explanation in *Roxborough v Rothmans of Pall Mall Australia Ltd*[71] that in this context "total failure of consideration" looked to the benefit bargained for by the payer rather than any benefit which might have been received in fact, and concluded:

> "[The tenant] claims that it paid rent under the lease in the mistaken belief that it was bound in law to pay it, and therefore, because of mistake, it is entitled now to recover it. But, as has been seen, in order to succeed in that claim the [tenant] must establish that it paid the rent as upon a total failure of consideration. And, in effect, that necessitates acceptance of the proposition that, whatever the benefit the respondent might have received from the use and occupation of the demised premises, the respondent did not receive the benefit which it bargained. In my view the respondent has not succeeded in establishing that it did not receive the benefit for which it bargained."

[139] The incidence of the onus of proof was not there in issue,[72] but that way of expressing the applicable principles arguably supports CCPL's first contention. In a separate judgment, Chernov JA discussed the decisions I have touched upon, *ANZ Banking Group Ltd v Westpac Banking Corporation*, *David Securities Pty Ltd v Commonwealth Bank of Australia*, and *Roxborough v Rothmans of Pall Mall Australia Ltd*, and concluded that "once a *prima facie* entitlement to restitution is made out by the payer, it is for the payee to show that it would not be unjust or unconscionable for it to retain the money if the payer is to be denied restitutionary relief."[73]

[140] It will be apparent from what I have already written that I would respectfully accept Chernov JA's analysis of the applicable principles, which throws the onus upon the payee to justify its receipt by proof of its own claim for "counter restitution" against the payer. The remarks in the joint judgment in *David Securities Pty Ltd v Commonwealth Bank of Australia* concerning total failure of consideration (or a total failure of a severable part of the consideration) did not concern the elements of a prima facie entitlement to recover payments made by mistake. They concerned instead the elements of a defence that the payee gave consideration for the mistaken payment. That flowed from the rejection earlier in the joint judgment of the payee's proposition that the payer must prove "unjustness" over and above the mistake.[74] CCPL's first contention is an attempt to revive that rejected view of the basis of a restitutionary claim founded on mistake.

[141] I conclude that, as is reflected in the terms of s 42, the onus lay upon CCPL to rebut Stork's prima facie entitlement to recover money "which in justice and equity

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69 [2006] VSCA 6 at [47].
70 (1992) 175 CLR 353 at 382.
71 (2001) 208 CLR 516. at 555.
72 [2006] VSCA 6 at [4], [8] and [47].
73 [2006] VSCA 6 at [20].
74 (1992) 175 CLR 353 at 378-380.

belongs to [Stork]"[75] by proving the fact and amount of any entitlement in CCPL to reasonable remuneration in conformity with s 42(4). CCPL did not prove any such entitlement. It follows that CCPL failed to displace the prima facie presumption that CCPL's enrichment by the amount of the payments should be regarded as unjust.[76]

[142] Stork filed a notice of contention under which it advanced an alternative argument. It argued that it was entitled to succeed irrespective of whether it had established that it made its payments by mistake, so that CCPL's first contention was irrelevant. This argument invoked the cause of action for moneys had and received which McPherson JA decided in *Marshall v Marshall* was available in these circumstances: s 42 prohibited an unlicensed contractor from carrying out and from undertaking to carry out building work, such an unlicensed contractor was not entitled to any monetary or other consideration for carrying out that building work, and s 42 was designed to protect a class of persons of whom the payer was one. This argument has real substance, but I would not base my decision upon it because that way of putting Stork's counterclaim was not litigated at the trial and I have in any event rejected CCPL's first contention for other reasons.

CCPL's second contention: it was fatal to Stork's claim that it neither made "counter-restitution" for the value to it of CCPL's building work nor negated the need to do so by proving that CCPL's work had no value.

[143] CCPL's argues that the facts that, as it contends, *restitutio in integrum* for the benefit Stork received was impossible and that Stork neither made "counter-restitution" nor negated the need to do so, were fatal to Stork's restitutionary claim.

[144] The legal propositions underlying this argument are that an obligation upon a claimant to make "counter-restitution" to a recipient, where that is possible, is a condition or limiting principle applicable to a claim for moneys paid by mistake and that where such "counter-restitution" is impossible the original restitutionary claim must fail. CCPL put the argument in another way, which seems to amount to the same thing, namely that any prima facie obligation to make restitution which Stork established was displaced when CCPL pointed to the existence of a valuable, albeit unquantified, right conforming with s 42(4) which the law recognises would make unjust the order for restitution sought by the claimant.

[145] As authority for those propositions CCPL relied upon *Clarke v Dickson*,[77] in which Crompton J stated the principle under consideration in the following terms:

> "When once it is settled that a contract induced by fraud is not void, but voidable at the option of the party to the fraud, it seems to me to follow that, when that party exercises his option to rescind the contract, he must be in a state to rescind; that is, he must be in such a situation as to be able to put the parties into their original state before the contract."

[146] *Clarke v Dickson* and the other authorities cited by CCPL for the same proposition[78] all concerned the rescission of executed contracts. No authority was cited which

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75 Bullen and Leake's *Precedents of Pleadings*, 3rd Ed (1886), p 44, quoted by Gummow J in *Roxburgh v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516; [2001] HCA 68 at [88].

76 *Australia & New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662, at 673; *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 at 379.

77 (1858) 120 ER 463.

78 *Alati v Kruger* (1955) 94 CLR 216; *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 184 CLR 102.

supports the application of that principle to claims for the recovery of money paid by mistake. The absence of authority is not necessarily fatal to the argument, but this is not an appropriate occasion for an examination of the extensive academic comment on this issue. A requirement that Stork must offer "counter restitution" in favour of CCPL as a condition of the validity of Stork's claim where CCPL has not proved its claim would conflict with the policy reflected in s 42: an unlicensed contractor is not to be remunerated for "building work" except by way of reasonable remuneration measured in conformity with s 42(4) pursuant to a claim made and proved by the unlicensed contractor. That the principle propounded by CCPL would conflict with the statutory policy is sufficient reason to reject its application in this case.[79]

CCPL's third contention: the trial judge erred by failing to regard the progress certificates as sufficient evidence that the certified amounts were reasonable remuneration in terms of s 42(4).

[147] Whilst, as I have mentioned, CCPL does not challenge the trial judge's rejection of the expert evidence bearing upon its claim under s 42(4), CCPL does contend that the trial judge erred by failing to regard the certificates by Mr Jewell as constituting evidence that the certified amounts were reasonable remuneration for the work concerned.

[148] A flaw in CCPL's argument is that the progress certificates did not distinguish "building work" from other work included within particular certificates. The certificates could, at best, provide evidence only that the gross amounts in each of them were prima facie reasonable valuations under the terms of the subcontract; they could not provide evidence that the amounts attributable to "building work", which amounts were not separately identified, were reasonable. Furthermore, the application of the subcontract rates to the anticipated quantities of work was presumably expected to produce a profit in CCPL's hands, which is of course not recoverable under s 42(4). Whether, in the events which occurred, the progress payments did include profit was not proved, but there is no basis for assuming that they did not. That being so it does not avail CCPL to point to authority[80] that the progress certificates might constitute some evidence of a claim for restitution under the common law unaffected by the limitations imposed by s 42(4).

Are CCPL's first three contentions open to it in this appeal?

[149] I return to Stork's argument that CCPL should not be permitted to maintain its first three contentions because none of them were litigated at the trial. Stork invoked the principle that in an appeal of this character a party ordinarily should not be permitted to raise a new point if, had the point been raised at trial, it might possibly have been met by additional evidence at the trial or the opponent might have conducted its case differently.[81]

[150] CCPL's pleading contained no hint of the contentions which it now advances. It may be, as CCPL argued in the appeal, that its pleaded denial of Stork's allegation

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79 *Mayfair Trading Co Pty Ltd v Dreyer* (1958) 101 CLR 428 per Dixon CJ at 449-450 and 456; *Lejo Holdings Pty Ltd v Deutche Bank (Asia) AG* [1988] 2 Qd R 30 at 34, per Macrossan J.

80 See *Flett v Deniliquin Publishing Co Ltd* [1964-5] NSWR 383; *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221 at 252, 257; *Gino D'Alessandro Constructions Pty Ltd v Powis* [1987] 2 Qd R 40 at 58-59; *Iezzi Constructions Pty Ltd v Watkins Pacific (Qld) Pty Ltd* [1995] 2 Qd R 350 at 355.

81 *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418 at 438; *Coulton v Holcombe* (1986) 162 CLR 1 at 7-9.

that it paid CCPL by mistake was sufficiently broad to have permitted CCPL to argue the first contention at trial, but that denial was hardly sufficient to encompass the second contention.[82] Despite the deficiencies in CCPL's pleading of a claim for reasonable remuneration, CCPL's third contention, which is merely an evidentiary point, was available to CCPL once it was permitted to litigate a claim in accordance with s 42(4), at least unless it was permitted to litigate that claim only on the footing that it confined the evidence upon which it relied to its expert evidence.

[151] What is important here though are not merely the pleadings but the parameters of the contest as they were defined by the parties' conduct of the trial.[83] Stork pointed to various statements made on behalf of CCPL before and during the trial which were inconsistent with its first three contentions. The effect of those statements was that CCPL proposed to meet the counterclaim by reliance upon its denial that the relevant work constituted "building work" and by proving an alternative claim, by expert evidence, for reasonable remuneration in conformity with s 42(4). That accords with the description of what was litigated by CCPL's own senior counsel at trial, which I quoted in the first section of these reasons.

[152] Those were the issues litigated and lost at trial by CCPL. The three contentions advanced for CCPL in the appeal were not litigated.

[153] Stork's affidavit evidence established that had any of CCPL's first three contentions been pleaded or raised at trial Stork would have taken various interlocutory steps, including seeking disclosure and non-party disclosure from others, and it would have adduced evidence bearing upon those contentions. CCPL argued in response that Stork counter claimed only the full amount of what it had paid and that the further evidence Stork identified would not have supported that counter claim, but might only have supported a different claim for a smaller amount, namely the amount of its counterclaim reduced by the amount of any entitlement in CCPL to reasonable remuneration measured in accordance with s 42(4).

[154] That is not to deny, however, that had CCPL raised these points at trial Stork might have adduced evidence to avoid being exposed to the result for which CCPL contends in this appeal, namely the complete failure of Stork's counterclaim. Such a result would be manifestly unjust to Stork. CCPL's argument that (if it be assumed that there is substance in its new arguments) the result at trial was unjust to it carries much less weight. That result is a consequence of its own failure to establish the case it determined to litigate at the trial. As was pointed out in *Coulton v Holcombe*,[84] it is "fundamental to the due administration of justice that the substantial issues between the parties are ordinarily settled at trial."

[155] Had I thought that there was merit in CCPL's new points, I would have concluded that the injustice caused to Stork by allowing the points to be raised for the first time in this appeal could be met only by ordering a new trial. That is itself a reason for refusing to allow the new points to be litigated for the first time in the appeal.[85]

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82 CCPL was obliged to specifically plead in its answer to Stork's counterclaim any matter which CCPL alleged made Stork's counterclaim not maintainable or which if not specifically pleaded might take Stork by surprise: UCPR r 150(4).

83 *Whisprun Pty Ltd v Dixon* (2003) 200 ALR 447 at 461, *Water Board v Moustakas* (1988) 180 CLR 491 at 497.

84 (1986) 162 CLR 1 at 7, per Gibbs CJ, Wilson J, Brennan J and Dawson J.

85 *Whisprun Pty Ltd v Dixon* (2003) 200 ALR 447 at 461.

CCPL's fourth contention: interest

[156] The trial judge exercised the discretion conferred by s 47 of the *Supreme Court Act* 1995 (Qld) to award interest of $5,526,148.20. No question is raised by CCPL concerning the rate or period adopted by the trial judge in awarding interest. Rather, CCPL repeats the submission rejected by the trial judge[86] that Stork should be denied interest because Stork had not sustained a loss but had received a windfall.

[157] CCPL relies upon the principle referred to by Gibbs CJ in *Batchelor v Burke* that "… interest should not be awarded… [where] the respondent has not suffered any financial detriment from a practical point of view".[87] In *Batchelor v Burke* it was held that interest should not be awarded under s 30C(1) of the *Supreme Court Act* 1935 (SA) in respect of the portion of an award of damages in favour of a worker representing earnings lost before trial which were replaced by the payment of compensation. That is not analogous with this case, in which Stork has been held entitled both to retain whatever (unproved) value it may have derived from CCPL's building work whilst at the same time being entitled to judgment for the amount it paid for that work. In those circumstances it cannot be said that, in the period between when Stork's cause of action arose and judgment, Stork received anything by way of replacement for the amount withheld from it. That same feature dictates the view that the interest awarded by the trial judge conforms with the fundamental principle that interest is awarded to restore rather than to improve a plaintiff's position.[88]

[158] CCPL has not established that the trial judge's discretion to award interest miscarried.

Disposition and orders

[159] I would dismiss the appeal with costs.

[160] **DAUBNEY J:** It is clear, for the reasons given by Keane JA and Fraser JA, with each of whom I respectfully agree, that this appeal must fail.

[161] Without unnecessarily rehearsing the matters so comprehensively dealt with in each of their Honours' judgments, I would only re-affirm my view that the argument sought to be advanced by the appellant to the effect that, in the circumstances of this case, the onus lay at trial not on the appellant to prove its claim but on the respondent to disprove that the appellant had a valid claim in reliance on s 42(4) of the *Queensland Building Services Authority Act* 1991 (Qld) is not only counter-intuitive but, as has been demonstrated in their Honours' judgments, is neither consistent with a proper construction of the legislation nor with the public policy considerations underpinning it.

[162] I would also expressly associate myself with the observations made by Keane JA in paragraph [7] of his judgment.

[163] The appeal must be dismissed with costs.

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86 *Cook's Construction P/L v Stork Food Systems Aust P/L* [2008] QSC 220 at [42].

87 (1981) 148 CLR 448.

88 *Haines v Bendall* (1991) 172 CLR 60, at 72 per Mason CJ, Dawson, Toohey and Gaudron JJ.