

SPUNWILL PTY LTD V BAB PTY LTD (1994) AUST CONTRACTS REPORTS 90-053

Supreme Court of New South Wales – 29 November 1994

FACTS

This case concerned a dispute over the meaning and interpretation of a restraint of trade clause contained in a deed to purchase a hardware store.

Spunwill had owned the three stores and sold one to BAB which was formed by two former directors of Spunwill. BAB began to sell gas appliances which Spunwill claimed was a breach of the restraint of trade clause.

ISSUES

The court had to decide whether surrounding circumstances could be used to interpret any ambiguity in the restraint of trade clause and whether the post-contractual conduct of the parties could be considered as part of the surrounding circumstances.

FINDING

Australian law supports the proposition that extrinsic evidence of post-contractual conduct is excluded only by the parol evidence rule. Thus, evidence of post-contractual conduct may in some circumstances be considered under the recognised exception to the parol evidence rule, and in particular the surrounding circumstances exception.

Though the relevance of subsequent conduct as an aid to construction is evidence of a party's subjective belief as to what the contract meant when it was made, use of such conduct will be legitimate under the objective theory of the contract in the limited circumstances where conduct evidences a clear and mutual subjective intention as to what the contract originally meant.

There appears to be no justification in principle for excluding such evidence of a mutual subjective intention at the time of contracting merely because the evidence itself arises subsequently to the making of the contract.

QUOTE

Santow J said

“Thus, evidence of post-contractual conduct may in some circumstances be considered under the recognised exceptions to that general rule, and in particular the surrounding circumstances exception.

Though the relevance of subsequent conduct as an aid to construction is evidence of a party's subjective belief as to what the contract meant when it was made, use of such conduct will be legitimate under the objective theory of the contract in the limited circumstances where conduct evidences a clear and mutual subjective intention as to what the contract originally meant.

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There appears to be no justification in principle for excluding such evidence of a mutual subjective intention at the time of contracting merely because the evidence itself arises subsequently to the making of the contract.” – page 90,264 of (1995) Aust Contract Reports 90-053

IMPACT

Parties to contracts should be aware that courts may consider post-contractual conduct where that conduct evidences a clear and mutual subjective intention as to what a clause of the contract originally meant.

However, it is preferable for the parties to prepare a clear contract so as to avoid the situation where a Court has to interpret a contract clause for the parties.

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