

BECKHAUS CIVIL PTY LTD V BREWARRINA SHIRE COUNCIL [2002] NSWSC 960

Supreme Court of New South Wales – 18 October 2002

FACTS

Brewarrina Shire Council ('the Council') and Beckhaus Civil Pty Ltd ('Beckhaus') entered into a contract for the construction of levee banks around the town of Brewarrina. The banks were to be constructed in strategic positions around the town of Brewarrina to protect it from the flooding of the Barwon River.

Beckhaus served a Payment Claim on Brewarrina Shire Council, which consisted of a letter and a claim form. Beckhaus wrote to the Council advising that the work had reached practical completion and requested certification of that fact. Beckhaus, in the letter to Brewarrina, also referred to a claim form containing a statement that it was made 'under the Building and Construction Industry Security of Payment Act 1999 (NSW)' ('the Act').

The Superintendent refused Beckhaus' request and advised that the failure to achieve practical completion amounted to a breach that disentitled Beckhaus from any further payment under the Contract. Accordingly, Beckhaus' claim was valued at \$Nil. The Superintendent's assessment of Beckhaus' claim was made out of time for the purposes of the Act.

Beckhaus then sought summary judgment in respect of the Payment Claim.

ISSUES

Whether the letter and claim form constituted a Payment Claim?

FINDING

The Court held that a Payment Claim can be made not only under the contract, but also the Act, as the act contemplates a dual system.

Further, a contractual right is not required to make a payment claim under the legislation.

The Court commented that looking at the letter and claim form together a reasonable recipient who must know the law and the provisions of the Act would conclude that the claim was 'one' under the contract and under the legislation.

Accordingly, a contractual progress claim and a Payment Claim under the Act can be made in the same document.

QUOTE

At paragraph 60 Justice Macready stated:

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”The Act obviously endeavours to cover a multitude of different contractual situations. It gives rights to progress claims when the contract is silent and gives remedies for non-payment. One thing the Act does not do is affect the parties’ existing contractual rights (see ss 3(1), 3(4)(a) and 32).

The parties cannot contract out of the Act (see s 34) and thus the Act contemplates a dual system. The framework of the Act is to create a statutory system alongside any contractual regime. It does not purport to create a statutory liability by altering the parties’ contractual regime. There is only a limited modification in s12 of some contractual provisions. Unfortunately, the Act uses language, when creating the statutory liabilities, which comes from the contractual sense. This causes confusion and hence the defendant’s submission that the words “person who is entitled to a progress payment under a construction contract” in s 13(1) refer to a contractual entitlement.”

IMPACT

The Act contemplates a dual system which does not impact upon the underlying rights of the contractual parties unless there is a “paid when paid” or “paid if paid” clause (the Act says such a clause will have no effect) or there is an attempt to contract out of the Act.

Further, a contractual progress claim and a Payment Claim under the Act can be made in the same document.

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