

BREWARRINA SHIRE COUNCIL v BECKHAUS CIVIL PTY LTD
[2005] NSWCA 248
Supreme Court of New South Wales – 4 August 2005

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 wrote to the Council advising that the work had reached practical completion and requested certification of that fact. The Superintendent under the Contract 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. Beckhaus commenced proceedings against the Council claiming an amount alleged owing for variations and a progress claim. The Council cross-claimed alleging that Beckhaus had not completed the work in accordance with the Contract and the Council, in consequence had suffered loss and damage being the costs of rectification. At first instance the Supreme Court ordered the Council pay Beckhaus \$905,009.53. The Council appealed.

ISSUE

Whether the Council was entitled to costs of rectification.

FINDING

The Court of Appeal found that the Council would only be entitled to judgment in respect of the rectification costs if the Council incurred greater costs in having the work rectified and completed in accordance with the Contract than the amount it would have paid to Beckhaus, if Beckhaus had duly completed the work. Further, the assessment of damages for rectification costs in relation to a construction contract is calculated according to the cost of the new work required to make the work already performed by the contract conform to the requirements of the contract, if it is reasonable. The Court of Appeal remitted the decision back to the Supreme Court for determination of the Council's entitlement.

QUOTE

His Honour, Ipp JA reasoned at paragraphs 85 to 87:

"[85] With respect to the cross-claims, the Council would only be entitled to judgment for an amount payable by Beckhaus to it were Macready AsJ to find, on re-assessment, that the Council would incur greater costs in having the work rectified and completed in accordance with the Contract than the amount it would have paid to Beckhaus if the latter had duly completed the work. The Council would then be entitled to be paid the difference between the two amounts.

[86] It may be helpful if some hypothetical amounts are taken to illustrate the position. Assume that, had Beckhaus completed the work in accordance with the Contract, the cost to the Council would have been \$2.5 mill. Assume that the Council has already paid Beckhaus \$1.8 mill and the cost to it of completing the work in accordance with the Contract is \$300,000. Beckhaus would then be entitled to be paid \$400,000 (being \$700,000 – the difference between \$2.5 mill and \$1.8 mill - less \$300,000). The deficiencies the subject of the Council's cross-claims would be taken into account in arriving at this result and no amount would be payable to it. If, however, the cost of completing the work in accordance with the Contract is \$800,000, the Council would then be entitled to be paid \$100,000 (being \$800,000 less \$700,000) and Beckhaus would receive nothing further.

[87] I reiterate that, as regards Beckhaus' claim, the onus is on Beckhaus to prove to prove what rectification and completion would cost and what the Council would have paid it if it had completed the work in accordance with the Contract."

IMPACT

Where the Contract works are defective, a Principal is only be entitled to the difference between the costs incurred in rectifying the defects and the amount it would have taken to complete the works under the Contract.

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NSW

Jim Doyle
P: 02 9283 5388

E: jdoyle@doylesconstructionlawyers.com

QLD

Frank Nardone
P: 07 3221 2970

E: fnardone@doylesconstructionlawyers.com

VIC

Vinodhini Krisnan
P: 03 9620 0322

E: vkrisnan@doylesconstructionlawyers.com