

JENNINGS CONSTRUCTION LTD v Q H & M BIRT PTY LTD
[1986] 8 NSWLR 18
Supreme Court of New South Wales – 6 November 1986

FACTS

Jennings Construction Ltd ('Jennings') entered into a subcontract with Q H & M Birt Pty Ltd ('Birt') earthworks relating to the construction of State Highway No. 3 near Goulburn. Birt performed earthworks and made a claim against Jennings for reasonable remuneration. Jennings rejected the claim on the basis that clause 47 of the subcontract operated to bar the claim. Clause 47 of the subcontract stated:

"47. The Contractor shall not be liable upon any claim by the Sub-Contractor in respect of any matter arising out of this Contract unless the claim, together with full particulars thereof, is lodged in writing with the Contractor not later than fourteen (14) days after the date of the occurrence of events or circumstances on which the claim is based or written notice of intention to make a claim specifying the nature of the claim is lodged with the Contractor within that time and the claim together with full particulars thereof, is lodged in writing with the Contractor not later than fourteen (14) days before the issue of the Final Certificate under the Head Contract."

ISSUE

Does clause 47 operate as a precondition to payment?

FINDING

The Court held that properly construed, clause 47 is in the nature of a residual clause which requires a sub-contractor to give written notice of any claim in circumstances where the work performed, having become necessary due to events or circumstances, is over and above the minimum required by the contract if optimum conditions prevail, and which applies where there is no other clause specifically dealing with the procedures to be followed in relation to the particular matter. The requirement of notice under cl 47 must be met if payment is to be obtained for the extra work done as a result of the occurrence of events or circumstances.

QUOTE

Smart J at page 24 stated:

The purpose of cl 47 is to ensure that notice is given at an early stage so that the contractor can inspect and investigate promptly the events or circumstances and consider his position. He may wish to issue a variation. In cases involving excavations he needs to inspect to satisfy himself as to the conditions and quality of the material alleged.

Clause 47 is a troublesome clause whose meaning, operation and relationship to some of the other clauses is not clear. It is in the nature of a residual clause which imposes the obligation to give notice where money is claimed for work over and above the minimum work if optimum conditions exist and there is no other clause specifically dealing with the procedures to be followed in relation to the particular matter in question.

Unless notice is given the contractor may not be alerted to the proposed claim and given the opportunity to investigate and check. The requirement of written notice, which is so common in construction contracts, puts the matter on a formal and readily identifiable basis.

IMPACT

This case stands for the proposition that clause 47 imposes a condition precedent to liability in respect of claims to which it applies and timely detailed notification should be given for all claims.

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