**JUDGMENT : Hodgson JA 1; Ipp JA ; McColl JA.** New South Wales Court of Appeal. 4th August 2005

1 **HODGSON JA**: I agree with Ipp JA.

2 **IPP JA:**

**The contract to construct levees**

3 Brewarrina is a small town (population 2,000) on the banks of the Barwon River in north-western New South Wales. At times the Barwon River floods. To protect itself against inundation, Brewarrina has had levee banks constructed in strategic positions around the town. The levees are constructed largely of compacted earth in which culverts have been inserted at intervals. The culverts serve to drain water from the township.

4 Levees were first constructed in 1976; these comprised what were referred to as the southern and northern levees. In 1991 the New South Wales Department of Public Works conducted an audit of the levees and recommended that further work be undertaken to upgrade them. In 2000 a flood occurred and the population of Brewarrina was heavily engaged in saving the existing levees. Brewarrina Shire Council (the "Council") commissioned a redesign of the levees with a view to upgrading them. The new works were designed and put out to tender. After the tender process had concluded, it was recommended to the Council that the tender of Beckhaus Civil Pty Ltd ("Beckhaus") be accepted. On 25 September 2001 the Council accepted this recommendation.

5 On 13 October 2001 the Council and Beckhaus entered into a contract (the "Contract") for the construction of the new levee works and work commenced the following day. The Contract incorporated general conditions of contract 2124 -1992 (the "General Conditions"). The General Conditions provided that the Contract be supervised by a superintendent. On 16 December 2002 Mr Komp, an employee of the Council, was appointed superintendent. The project was split up into two portions, Separable Portions A and B. Separable Portion A constituted the bulk of the works. The date for practical completion of separable Portion A was 10 February 2002 and, for separable Portion B, 27 December 2001.

6 The Contract included the upgrading of the northern levee and a small part of the southern levee. New levees were to be constructed on the site of Charlton Road and Tarrion Creek Road. These new levees led to part of the old southern levee becoming redundant. A new levee was also to be constructed around parts of North Brewarrina. As the levees were to be constructed on the site of existing roads, a new road had to be constructed.

**Litigation commences**

7 On 18 March 2002 Beckhaus wrote to the Council advising that the works had reached practical completion and requested certification of that fact. On 21 March 2002 the Council removed Mr Komp as superintendent and Mr Corven was appointed as superintendent. He immediately set about what Beckhaus described as employing a "contractual broom" against it.

8 Mr Corven obtained various test results that had been carried out on the levees. These test results led to Mr Corven sending a series of letters to Beckhaus asserting that it had not complied with the Contract. He refused to certify that the works had reached practical completion.

9 On 26 April 2002 Beckhaus lodged with the Council progress claim No 7, which was identified as a claim under the *Building and Construction Industry Security of Payment Act* 1999 (NSW) (the "Act"). The amount of this claim was $702,678.45. Instead of certifying that this amount was due to Beckhaus, Mr Corven – on 28 May 2002 – issued a certificate requiring payment by Beckhaus to the Council of $952,874.47.

10 On 4 June 2002 Beckhaus commenced proceedings against the Council. The claim was put on a number of alternative bases but, in essence, Beckhaus claimed a total of $838,969.10 (comprised of the claim of $702,678.45 represented by the amount of progress claim No 7 and amounts that Beckhaus asserted were owing to it in consequence of variations under the Contract).

11 The Council filed a cross-claim which underwent various amendments. In its final form, it alleged:

(a) In several respects Beckhaus had not executed and completed the work in accordance with the Contract; the Council in consequence had suffered loss and damage being the costs of rectification.

(b) The Contract was an entire contract and, by reason of Beckhaus' breaches thereof, the consideration for the payment of $1,654,747.40, being the sum paid by the Council to Beckhaus "in relation to the [Contract]", had wholly failed. The Council claimed repayment of that sum.

(c) Mr Beckhaus (a director of Beckhaus) had made representations to the Council, on behalf of Beckhaus, that were misleading and deceptive and contravened s 52 of the *Trade Practices Act* 1974 (Cth); in consequence of this conduct the Council had suffered loss and damage being, relevantly, the costs of rectification.

12 Mr Beckhaus was joined as a cross-defendant in relation to the cross-claim for misleading and deceptive conduct under the *Trade Practices Act*. The Council asserted that Mr Beckhaus "aided, abetted, counselled or procured" the contraventions of the Act and was knowingly concerned in or party to them. The Council alleged that Mr Beckhaus was liable, together with Beckhaus, for the damages the Council had allegedly suffered by reason of the contraventions of the Act.

13 Several interlocutory proceedings ensued. These included a claim for summary judgment by Beckhaus based on progress claim No 7. Master Macready (who presided over the trial) upheld the claim for summary judgment based on the provisions of the Contract and also on the Act. The Council appealed. Before this Court, the Council argued that the summary judgment should be set aside only on grounds relating to the contractual claim and assumed that, were the appeal to succeed on that basis, it would succeed, also, on the claim under the Act. Beckhaus did not

contend to the contrary and the appeal proceeded on that assumption. This Court, differently constituted (Mason P, Ipp JA and Young CJ in Eq), by a majority, upheld the appeal (***Brewarrina Shire Council v Beckhaus Civil Pty Ltd*** (2003) 56 NSWLR 576). The majority (Mason P and Ipp JA) held that, by cl 42.1 of the Contract, the superintendent's obligation to issue a payment certificate was subject to a condition precedent that Beckhaus support its claim with "such information as the superintendent might reasonably have required", and Beckhaus had not established that that information had been provided. Having regard to the way the appeal was argued, the Court set aside the summary judgment orders (both in respect of the cause of action based on the Contract and that based on the Act) and granted leave to defend.

**The judgment of 16 September 2004**

14 The trial took 19 days to be completed. On 16 September 2004 Master Macready delivered what was his first judgment in the case.

15 The Master commenced his judgment by considering whether Beckhaus had achieved practical completion of the work. He noted that, although the obligation to make payment of progress claim No 7 was "arguably not conditioned upon the issue of a certificate of practical completion", such a certificate was "important for other purposes under the [Contract]".

16 The Council contended at trial (and on appeal) that the failure by Beckhaus to achieve practical completion amounted to a breach that disentitled Beckhaus from any further payment under the Contract.

17 Practical completion was defined by the General Conditions as follows:

> "'*Practical completion' is that stage in the execution of the work under the Contract when –*
> *(a) the Works are complete except for minor omissions and minor defects –*
> *(i) which do not prevent the Works from being reasonably capable of being used for their intended purpose; and*
> *(ii) which the Superintendent determines the Contractor has reasonable grounds for not promptly rectifying; and*
> *(iii) rectification of which will not prejudice the convenient use of the Works; and*
> *(b) those tests which are required by the Contract to be carried out and passed before the Works reach Practical Completion have been carried out and passed; and*
> *(c) documents and other information required under the Contract which, in the opinion of the Superintendent, are essential for the use, operation and maintenance of the Works have been supplied.*"

18 Master Macready held that all the tests required by the Contract to be carried out at culvert locations had not been performed. On this ground, he held that Beckhaus had failed to comply with paragraph (b) of the definition of practical completion; hence, Beckhaus had not achieved practical completion.

19 The Master turned to the question whether the Contract was a "lump sum contract" and, hence, an entire contract. He referred to the fact that the Contract contained a schedule of prices for provisional quantities and noted that the provisional quantities in question were items where the quantities were unknown (payment for provisional items of that kind was to be made by multiplying the tendered rate by the measured quantity). He concluded: *"[A]lthough the [Contract] may be described as a lump sum contract, it does contain appropriate conditions for certain provisions quantities which are, under the terms of the [Contract], to be determined by measurement."*

20 The Master then addressed numerous claims for variations that Beckhaus had made. He rejected a number of them but allowed the claim for Variation 17, being a claim for $106,240.40 in respect of stabilising additional soil not included within the specification.

21 The Master discussed a claim, described as Variation 21, for the costs to Beckhaus of holding its machinery in Brewarrina after it had sought a certificate of practical completion. Beckhaus contended that, because the superintendent had failed to grant a certificate of practical completion and to provide a list of defects, it was obliged to keep its machinery and employees on standby for over a month. It contended that the cost of keeping its equipment and employees on standby was payable by the Council either as delay costs pursuant to cl 36 of the General Conditions, alternatively as damages for breach of contract (being the Council's failure to provide it with a list of defects after it had claimed practical completion). The Master did not decide this issue in his judgment of 16 September 2004 but left it over for further argument.

22 Master Macready proceeded to deal with progress claim No 7. The first issue in this connection was whether Beckhaus had complied with the condition precedent constituted by cl 42(1) of the General Conditions. The Master found that Beckhaus had complied with this condition.

23 The Master held, further, that, while Beckhaus had not achieved practical completion, it had achieved "substantial compliance with the [Contract]". On this basis, he upheld Beckhaus' claim for $702,678.45 in respect of progress claim No 7 (but subject to any damages that might be awarded to the Council under its cross-claims).

24 As regards the cross-claims, the Council contended that Beckhaus had breached the Contract by failing to achieve compaction of the levees, generally, to the contractual minimum, namely, "Hilf Density Ratio of 95% when tested in accordance with Test Method AS1289 – 5.7.1". The Master found against the Council in this respect.

25 The Council contended that Beckhaus had breached the Contract by failing to comply with the testing required in respect of the compaction at the culverts. The Master held that Beckhaus had not complied with the specification in this respect. He nevertheless concluded that the evidence "clearly demonstrates that there has been substantial compliance with the contractual requirements for compaction over the culverts".

26 The Council contended that Beckhaus "did not comply with contractual requirements for stabilisation of the levee bank materials (Contract Technical Specification clause 8.10)". Clause 8.10 was in the following terms:
*"Gypsum Stabilisation*
*Gypsum shall be added to Zone A Clayfill at a minimum rate of 5% (by dry weight). Should this rate be insufficient to meet the required 12% linear shrinkage criteria, additional gypsum shall be added in 1% increments until the Contractor can verify that the criteria is satisfied. The cost of additional rates of Gypsum Stabilisation will be borne by the Superintendent and shall be calculated as per the rate given in the Schedule of Prices. …*
*Gypsum shall be evenly spread over the area to be stabilised and mixed thoroughly to produce a uniform material. Gypsum may be substituted with 3% Hydrated Lime by dry weight subject to the Superintendent's approval."*
*After the Contract had been entered into, the parties agreed that 3% lime should be substituted for "5% Gypsum" in cl 8.10.*

27 Master Macready observed, in regard to linear shrinkage and the addition of 3% lime: *"It is perfectly obvious from the evidence given in the case that the purpose of having achieved a particular linear shrinkage was to reduce the likelihood of deep and wide cracking in the embankment which might allow initiation of internal erosion and piping failure under flood conditions. In addition the adding of lime or Gypsum does inhibit dispersion if the soil is dispersive and makes it less likely to begin to erode or if erosion begins to slow the rate of erosion. It follows that the addition of lime reduces the shrinkage potential of the soil and thus reduces the depth of potential cracks.*

*The addition of 3% of meadow lime to all the materials may be a condition of the contract but a breach does not seem to have any consequence. This follows because the parties clearly contemplated that what is to be achieved is the placing of materials which had a maximum linear shrinkage of 12%. The whole testing regime in the contract is there merely to measure this requirement and there is no need for a demonstration of adding the particular 3% meadow lime."*

28 He noted: *"The addition of 3% lime required about 4,953 tons of lime which at $70.00 per ton would involve a cost of $346,710.00. Delivery dockets for the project indicated deliveries of 328.86 tons of lime which is a value of about $25,000.00. The daily reports showed somewhat less being received on site. As I have indicated earlier these are somewhat unreliable."*

29 The Master found that Beckhaus added sufficient lime to ensure that the material met the 12% maximum linear shrinkage specification. He held, however, that Beckhaus had not complied with the contractual requirement to add at least 3% lime to all the material. As mentioned, he concluded that the failure to add 3% lime had no relevant consequence.

30 The Master examined the testing that had been carried out in respect of linear shrinkage and concluded: *"It is perfectly plain that the results indicate a variety of failures and a variety of occasions when the specifications were met."*

He said, in regard to the 12% maximum linear shrinkage specification: *"Given the existence of these failures it is hard to conclude that there has not been some breach of the specifications."*

31 The Master, having found that there had been "some breach" of the Contract in regard to the 12% linear shrinkage requirement, proceeded to examine whether this breach sounded in damages. He concluded: *"Bearing in mind my conclusion that there has not been demonstrated a sufficient departure from the compaction requirement it seems to me that there has been substantial compliance with the contract in respect of linear shrinkage. This flows from the fact that such testing as there is, seems to indicate a compliance in the northern levee which is agreed to be sufficient. In respect of the other levees the evidence is of little weight because there is no basis expressed for the conclusions reached. In particular I am satisfied that in respect of linear shrinkage the levees are fit for their intended purpose."*

32 The Master rejected the Council's claim in restitution for total failure of consideration. He came to this conclusion on two bases. Firstly, there had been substantial performance of the Contract. Secondly, the Contract was not an entire contract.

33 The Master then turned to the allegations made by the Council in regard to the *Trade Practices Act*. The Council alleged that Beckhaus had been guilty of three misrepresentations that constituted misleading or deceptive conduct. These were:
(a) Beckhaus had assets worth $2,000,000,
(b) Beckhaus had an annual turnover of between $3,000,000 and $6,000,000, and
(c) Beckhaus operated a third party accredited quality system.

34 The Master found that these misrepresentations were made and the Council relied on them in entering into the Contract. He then addressed the question whether the Council had suffered any damage as a result. He pointed out that the next lower tenderer was Sudholz. The difference between Beckhaus' tender and that of Sudholz was approximately $1,000,000 and, having regard to the terms of Sudholz's tender, Sudholz's contract price would have increased by at least another $200,000. The Master observed: *"Having regard to my decision on the cross-claim it is clear that the damages will not anywhere near approach a sufficient sum to demonstrate that the Council has in fact suffered damage."*

In other words, the Master was of the view that the damages to which the Council might be entitled under its cross-claim would be substantially less than $1,200,000 (the difference between the price under the Sudholz contract and the Contract price). He therefore rejected the claim under the *Trade Practices Act*.

35 In the result, the Master dismissed the Council's cross-claim, save that he held that "the Council is entitled to damages for two small matters".

**The judgment of 7 December 2004**

36 The matter was then re-listed for further argument. At that stage, the Council orally sought leave to amend its pleadings to incorporate a claim for liquidated damages. In opposing this application, Beckhaus, submitted (as the Master observed): *"The [Contract] was discharged by implied agreement through the parties' mutual abandonment of the [Contract] in or about early 2002."*

37 On 7 December 2004 Master Macready handed down a further judgment.

38 He noted that the parties had agreed that the amount owing in respect of his findings on the cross-claim was $40,000.

39 In dealing with the application by the Council to amend so as to claim liquidated damages, the Master rejected Beckhaus' argument that the Contract had been abandoned or terminated. In doing so, he appears to have assumed that Beckhaus' contentions were based on the proposition that, by mutual agreement, the Contract had been rescinded *ab initio*. (Mr Rudge SC who, together with Mr Robertson, appeared for Beckhaus, disavowed to this Court having submitted at trial that the Contract had been so rescinded). The Master held that neither party had evinced such an intention.

40 It appears that the Council accepted before the Master that, by reason of extensions of time to which Beckhaus was probably entitled, the date for practical completion (in respect of both Separable Portions A and B of the Contract) should be taken to be 31 March 2002. That being so, under the Contract the claim for liquidated damages could run from no earlier date.

41 Master Macready upheld Beckhaus' submission that the Council was precluded from claiming liquidated damages after 27 May 2002. His reasoning was as follows. He held that the Council had failed to pay progress claim No 7 unconditionally. On the basis of that finding, Beckhaus, in terms of s 27(1) of the *Building and Construction Industry Security of Payment Act*, had lawfully suspended work on 27 May 2002. It followed, the Master held, that the superintendent, acting reasonably, would have extended time for practical completion until unconditional payment was made. Accordingly, work (and practical completion) remained lawfully suspended as at the judgment date. Under the Contract, there could be no claim for liquidated damages for the period during which the time for practical completion was so suspended (that is, during the period from 27 May 2002 to the date of judgment).

42 The Master noted that there had been "no identification of any determination" of the Contract (the Council was then contending that the Contract had not been terminated). He said: *"The parties have not identified any matter in the present evidence that would be an end date [for the period of liquidated damages] and the likelihood is that any entitlement to liquidated damages will only arise following upon some other facts which lead to a termination of the contract after the present time."*

43 For this reason, and the relatively small amount that, on the Master's reasons, the Council could claim (that is, based only on a "likely" period of about two months – from not earlier than 31 March 2002 to 27 May 2002) the Master declined to give leave to plead a claim for liquidated damages.

44 The Master turned to Variation 21. The gist of this claim was that, in breach of the Contract, the superintendent had failed to provide Beckhaus with a list of defects upon Beckhaus asserting that practical completion had been reached. Beckhaus contended that this failure caused it to keep its major earthmoving equipment at Brewarrina and entitled it to delay costs, alternatively to damages.

45 Master Macready appears, however, to have upheld this claim on a different basis, namely, because the Council had substantially failed in its cross-claim, there was no practical need for Beckhaus to have kept its equipment on site as the superintendent had required. The Master said: *"It is apparent from discussions, which took place on 3 April 2002 between the Council and [Beckhaus], that the Council was raising a large number of matters which might require further work by [Beckhaus]. The matter escalated into the service of notices of dispute on about 24 April 2002 and accordingly it was probably reasonable for [Beckhaus] to keep its equipment on site until the time claimed namely 27 April 2002. In my view [Beckhaus] is entitled to this variation."*

**The orders made by the Master**

46 Relevantly, Master Macready made orders:

(1) Granting a verdict and judgment in favour of Beckhaus in the sum of $809,236.54.
(2) Granting a verdict and judgment in favour of the Council on its cross-claim in the sum of $40,000.
(3) Otherwise dismissing the cross-claim.
(4) Ordering the Council to pay Beckhaus interest in the sum of $135,772.99.
(5) "In consolidation" of the orders referred to in (1), (2) and (3) above, granting a verdict and judgment in favour of Beckhaus in the sum of $905,009.53.
(6) Ordering the Council to pay Beckhaus' costs on various basis.
(7) Ordering the Council to pay Mr Beckhaus' costs of the cross-claim.

47 The sum of $905,009.53 (the "consolidated" verdict) appears to have been arrived at as follows. By adding interest in the sum of $135,772.99 (as ordered by the Master – see (4) above) to the verdict of $809,236.54 (see (1) above), the sum of $945,009.53 is arrived at. $945,009.53 less the amount of $40,000 awarded to the Council (see (2) above) is $905,009.53.

48 I assume that the judgment sum of $809,236.54 is the aggregate of progress claim No 7 and Variation 17. There is, however, no specific mention of Variation 21 in the orders that were made. According to the Council's notice of

appeal the amount awarded in respect of Variation 21 was $101,560. I can only assume that this sum formed part of the award of interest. The parties did not explain these matters to the Court.

**The notice of appeal and the notice of contention**

49 By its notice of appeal the Council, in summary, contended that Master Macready erred in the following respects:

(a) In holding that the Council was not entitled to damages for Beckhaus' breach of the Contract in failing to provide test results indicating that compaction around the culverts complied with the specification.

(b) In holding that the Council was not entitled to damages for Beckhaus' breach of the Contract in failing to add 3% lime to the material to be compacted.

(c) In holding that the Council was not entitled to damages for Beckhaus' breach of the Contract in failing to achieve linear shrinkage not exceeding 12%.

(d) In holding that the levees were compacted in accordance with the specification.

(e) In holding that the Contract was a divisible contract, that there had been substantial performance by Beckhaus and that the Council's claim for total failure of consideration was unsuccessful.

(f) In holding that the condition precedent to the issuing of a payment certificate by the superintendent (in respect of progress claim No 7) had been satisfied.

(g) In holding that, in accordance with the *Building and Construction Industry Security of Payment Act*, Beckhaus was entitled to payment of progress claim No 7.

(h) In holding that Beckhaus was entitled to payment of Variation 17.

(i) In holding that Beckhaus was entitled to payment of Variation 21.

(j) In ordering that the Council pay the costs of Beckhaus and Mr Beckhaus.

(k) In refusing the Council's application to amend so as to claim liquidated damages.

50 In its notice of contention Beckhaus alleged that Master Macready had erred in failing to find that the Contract "had been abandoned *in futuro* or terminated by the implied agreement or mutual acquiescence of the parties, and that therefore [the Council's] claim for liquidated damages could not succeed, even if [the Council] were given leave to amend".

51 The notice of contention also asserted that the Council's application for leave to amend so as to claim liquidated damages should, in any event, have been refused "by reason of the numerous areas of factual inquiry requiring further evidence which would have been raised by the proposed amended cross-claim".

52 The notice of appeal and the notice of contention raised many other grounds that are encompassed in the grounds I have summarised above or which were not agitated on appeal or which have become irrelevant. I would add that there was a notice of cross-appeal filed by Beckhaus which, in effect, has been subsumed by the issues raised in the notice of appeal and the notice of contention.

**Claiming damages for defective performance while the Contract was on foot**

53 The notice of contention raises the question whether the Contract was terminated by mutual agreement. The Council long denied this proposition but, on the third day of the appeal, assented to it. Despite the Council's late acceptance of the proposition, the question remains relevant as it exposes a misconception by both parties in the way the issues were addressed at trial. The misconception was that the Council could claim damages from Beckhaus for defective and incomplete work while the work was still in Beckhaus' possession and while Beckhaus was still obliged (and entitled) to execute the work to practical completion. This misconception permeated the conduct of the case by all involved and complicated the identification of the true issues in the case.

54 The reason for the Council's stand is not hard to find. It lies in cl 35.6 of the General Conditions which provided: '*If [Beckhaus] fails to reach Practical Completion by the date for Practical Completion, [Beckhaus] shall be indebted to [the Council] for liquidated damages at the rate stated in the Annexure for every day after the Date for Practical Completion to and including the Date of Practical Completion or the date that the Contract is terminated under Clause 44, whichever first occurs.*"

The Council wished to assert that the Contract remained on foot so as to enable it to make a large claim for liquidated damages. Thus, the Council believed that it was in its interests to contend that the Contract had not been terminated but, at the same time, to claim damages for defective and incomplete work.

55 It is helpful to identify Beckhaus' obligations to perform the work under the Contract, Beckhaus' rights to be paid for its work, and the Council's rights in respect of breaches of the Contract by Beckhaus. Once those obligations and rights are identified, consideration must be given as to whether there was an agreed termination and, if so, how they were affected by the agreed termination.

56 By cl 3.1 of the General Conditions, Beckhaus undertook to execute and complete the work under the Contract and the Council undertook to pay Beckhaus:

"*(a) for work for which the [Council] accepted a lump sum, the lump sum;*

*(b) for work for which the [Council] accepted rates, the sum ascertained by multiplying the measured quantity of each section or item of work actually carried out under the contract by the rate accepted by the [council] for the section or item,*

*adjusted by any additions or deductions made pursuant to the contract.*"

Thus, by cl 3.1, the Council's obligation was to pay Beckhaus for the work executed and completed.

57 Clause 30.3 provided that, if the superintendent discovered material or work provided by Beckhaus that was not in accordance with the Contract, the superintendent might direct Beckhaus to remove the material from the site, to demolish the work, or to reconstruct, replace or correct the material or work. Thus, by cl 30.3, the Council was entitled to require Beckhaus to remedy defective work before the Council was obliged to pay for it.

58 Clause 35.2 provided that Beckhaus should execute the work under the Contract to the stage of practical completion by the date for practical completion. Beckhaus was obliged, on the date of practical completion, to give possession of the site and the work to the Council and, on that date, the Council was obliged to accept possession.

59 At least while the Contract endured, until practical completion was achieved Beckhaus had no obligation and no right to deliver the work to the Council and the Council had no right to take possession of the work.

60 The Contract provided that the date for practical completion of Separable Portion A was 20 weeks after *"Date of Acceptance of Tender"* and for Separable Portion B *"10 weeks after commencement date for Separable Portion B"*. Mr Christie, who together with Ms Culkoff, appeared for the Council, accepted that the superintendent probably would have allowed extensions of time to the dates for practical completion until about March 2002. This is not a matter on which any concession was forthcoming from Beckhaus, but it may be accepted that the dates for practical completion were not earlier than March 2002.

61 By cl 37, the defects liability period commenced on the date of practical completion. In terms of cl 37, Beckhaus was obliged to rectify any defects or omissions in the work existing at practical completion. Prior to the fourteenth day after the expiration of the defects liability period, the superintendent could direct Beckhaus to rectify any omission or defect in the work existing at the date of practical completion or which became apparent prior to the expiration of the defects liability period.

62 Clause 42.1 provided for the payment of progress claims; it stated: *"Payment of monies shall not be evidence of the value of work or an admission of liability or evidence that work has been executed satisfactorily but shall be a payment on account only …."*

Thus, a payment of a progress claim was a payment on account.

63 Clause 44.1 provided: *"If a party breaches or repudiates the Contract, nothing in Clause 44 shall prejudice the right of the other party to recover damages or exercise any other right."*

64 Clause 44.5 provided that, should the Council take the work out of Beckhaus' hands, the Council should complete the work. Clause 44.6 provided: *"When work taken out of the hands of [Beckhaus] under Clause 44.4(a) is completed the Superintendent shall ascertain the cost incurred by the [Council] in completing the work and shall issue a certificate to the [Council] and [Beckhaus] certifying the amount of that cost.*

*If the cost incurred by the [Council in completing the work] is greater than the amount which would have been paid to [Beckhaus] if the work had been completed by [Beckhaus], the difference shall be a debt due from [Beckhaus] to the [Council]. If the cost incurred by the [Council] is less than the amount that would have been paid to [Beckhaus] if the work had been completed by [Beckhaus], the difference shall be a debt due to [Beckhaus] from the [Council]."*

65 No provision of the Contract prevented the Council from suing Beckhaus for damages for breach of contract under common law; but that is not to say that, simply by reason of a failure, by the date for practical completion, to complete the work to the standard required, the Council would be entitled to damages for defective or incomplete work.

66 An important part of the Council's case at trial was that Beckhaus at no stage achieved practical completion of either Separable Portion A or B. Master Macready upheld this assertion and, for reasons that I later set out, I have come to the same conclusion.

67 Accordingly, as at the judgment date, the Council rightly denied that practical completion had been achieved. But, it continued - at that stage - to hold Beckhaus to its contractual obligations to perform the work. Thus, on the Council's contention, at the date of judgment, the work remained in Beckhaus' possession; the Council, in effect, having refused to accept possession.

68 While, on this assumption (the Contract still being on foot), the Council may have been entitled to claim damages for delay arising out of Beckhaus' failure to achieve practical completion by the date for practical completion, it could not sue Beckhaus for defective or incomplete work. As long as the Council maintained that the Contract was alive and had not been terminated, and held Beckhaus to its obligation to complete the work in accordance with the specification, on its contention the work remained lawfully in Beckhaus' possession. In other words, it was an inevitable incident of the Council's argument that the work had not been delivered to and accepted by the Council (Beckhaus – on the Council's argument – being in possession of and obliged to complete the work). While the work was in Beckhaus' possession, the Council suffered no loss by reason of defective or incomplete work; the work, not being in the Council's possession, did not at that stage form part of its patrimony.

69 This situation would have changed when the Contract was terminated. When that occurred, the work (in its defective and incomplete state) was handed over to the Council. At that stage, the Council suffered loss by being in possession of defective and incomplete work.

**The agreed termination of the Contract**

70 When Mr Christie eventually accepted that the Contract had been terminated by tacit agreement, the Council thereby, in effect, conceded the point made by Beckhaus' notice of contention (although the date of termination was

left open). Mr Christie's concession was rightly made; the conclusion that the parties agreed, by their conduct, to terminate the Contract was inevitable. I shall set out a brief summary of the facts relevant to this issue.

71 On 18 March 2002 Beckhaus claimed that it had achieved practical completion and requested the superintendent to issue a certificate to that effect. The superintendent failed to do so and requested Beckhaus to produce various test certificates. Beckhaus gave the superintendent certain test results (but not all that had been requested) and on 26 April 2002 submitted progress claim No 7. The superintendent did not issue a certificate of practical completion and, on 27 April 2002, Beckhaus removed its major plant from the site.

72 On 22 May 2002 Beckhaus served a notice of intention to suspend work pursuant to s 15(2)(b) of the Act. On 27 May 2002 Beckhaus suspended work in reliance on s 27 of the Act for failure to pay progress claim No 7. On 22 August 2003 Beckhaus wrote to the Council asserting that the Contract had not been terminated and was still in existence (this appears to have been an attempted forensic tactic, rather than a step connected to reality).

73 From the time that Beckhaus left the site, the attitudes of the parties began to harden and, in my opinion, by no later than 15 March 2004 – when the trial commenced - both parties tacitly accepted that the Contract was at an end. Beckhaus contended that it might have come to an end earlier but this issue depends on a factual inquiry that was not properly investigated at the trial and cannot be determined by this Court. The actual commencement of the hearing of lengthy and expensive litigation, directed to a final resolution of the parties' rights, was conduct by both parties manifesting an intention wholly inconsistent with any continuing obligation of performance on either side.

74 Master Macready considered the issue of termination on the assumption that the parties had agreed to rescind the contract *ab initio*. It is open, however, to parties to a contract to agree that the contract is to be terminated on the basis that there is a mutual release from future performance only and that rights accrued to the date of termination will remain of full force and effect. See, for example, ***CIC Insurance Ltd v Bankstown Football Club Ltd*** (1995) 8 ANZ Ins Cases 61-232 at 75-594 per Powell JA (and as to abandonment, generally, see ***Ryder v Frohlich*** [2004] NSWCA 472 per McColl JA).

75 In any event, the issue is now concluded by reason of the Council's late concession that the Contract was terminated by agreement on the latter basis.

**The effect of the agreed termination on Beckhaus' claim for unpaid work and the cross-claims**

76 I have observed that a progress claim is a claim for payment on account (see cl 42.1). As the Contract has been terminated, it is no longer appropriate for Beckhaus to be awarded any sum "on account". The financial position between the parties now has to be determined finally.

77 The Contract contains elaborate provisions as to the determination of amounts that, *on completion* of the Contract, the Council might owe to Beckhaus or Beckhaus might owe to the Council. The Contract, however, (by agreement) was not completed.

78 I have above referred to and set out cl 44.6 of the Contract. This clause regulates the settlement of accounts between the parties in the event of the work being taken out of the hands of Beckhaus and being completed by some other party (on the Council's behalf). Clause 44.6 provides, in effect, that, were Beckhaus to commit a material breach of the Contract and were the Council to take the work out of its hands and have it completed by another contractor (as provided in cl 44. 4(a)), a balance would be struck between:

(a) the cost to the Council of completing the work (including the amounts it paid to Beckhaus under the Contract), and
(b) the amount the Council would have paid to Beckhaus (including amounts due for variations affecting the cost of the work) if all the work had been duly completed by it in accordance with the Contract.

It makes no difference whether the amounts previously paid to Beckhaus are or are not included in both these amounts.

79 In my view, it was implicit in the termination agreement that neither party would be worse off by reason of that agreement than it would have been had the Contract been terminated in accordance with its terms. In my view, the parties impliedly agreed that their respective rights on termination would be governed, *mutatis mutandis*, by those provisions of the Contract that applied on completion. In my opinion, although the termination agreement did not trigger cl 44.6 (because the work was not taken out of the hands of Beckhaus under cl 44.4(a) and was not completed), it was implicit in the termination agreement that the formula provided by the clause would operate upon termination. That formula is commercially fair and appropriate and there was no reason for the parties to depart from it.

80 Thus, were Beckhaus to prove that the Council would incur less costs in having the work under the Contract rectified and completed in accordance with the Contract than the amount it would have paid to Beckhaus if the latter had duly completed all the work in accordance with the Contract, Beckhaus would be entitled to be paid the difference (that being the balance struck in accordance with the formula contained in cl 44.6). In the present circumstances, where the work has not been rectified and completed, the onus, in my opinion, lies on Beckhaus – in establishing its claim that there is a balance owing to it – to prove the elements of the formula resulting in that balance, including what rectification and completion would cost.

81 A claim on the basis of such an implied term is not a claim for a quantum meruit in the sense of being a restitutionary claim "outside the contract" (see ***Trimis v Mina*** (1999) 16 BCL 288 at 295 [52] per Mason P). Beckhaus' claim on this basis is a claim under the Contract as varied by the termination agreement.

82 Beckhaus' claim was not put in this way at the trial and, understandably, was not dealt with in this way by the Master. Beckhaus' claim, as represented by progress claim No 7, was simply a claim on account.

83 The reason why Beckhaus' claim was not so dealt with at the trial was that neither party appreciated the significance of the agreed termination of the Contract. From the material before the Court (including progress claim No 7), it appears that Beckhaus did a substantial amount of work in accordance with the Contract for which it was not paid; but it is not certain that Beckhaus has proved that the cost of completing the work would be less than the amount than the Council would have paid it had it duly completed the work. The matters necessary to complete the work are also the subject of cross-claims which were rejected by the Master and which should be re-assessed; but it is also not clear that the Council has established a balance owing to it. Although I later deal with these as cross-claims by Council, it is to be kept in mind that the same matters also concern the deficiencies in respect of which Beckhaus bears an onus of proof as far as its claim is concerned.

84 In my opinion, in the light of the mutual misconception by the parties, justice requires the issue of the amount that may be owing to Beckhaus or the Council under the Contract as varied by the termination agreement to be remitted to Master Macready (now Macready AsJ). This, essentially, requires a re-examination of the work, the subject of progress claim No 7, in the light of these reasons. Regard must be had to the implied term of the termination agreement governing the final financial position of the parties, and those aspects of the Council's appeal in respect of its cross-claims which I would uphold on the ground that work done by Beckhaus was not in accordance with the Contract and needs to be rectified and completed. This Court is not in a position to undertake this inquiry and the parties did not ask it to do so.

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. As regards the cross-claims, the onus lies on the Council to prove these matters.

88 I should add that, on all issues that are to be remitted to Macready AsJ, it will be entirely a matter for him whether fresh evidence should be allowed.

**Variation 17**

89 Variation 17 is a claim by Beckhaus based on the following item in the Schedule of Prices: *"Stabilise excavated borrow material with 5% gypsum (by dry weight) and condition (excavation included in other items)."*

The quantity of material that appeared in the Schedule of Prices for this item was 47,370 tons.

90 Beckhaus argued that additional soil had to be excavated over and above that allowed for in the Contract. As Master Macready put it, there was "no item for the stabilisation of the additional material". It was on this basis that the Master upheld this variation.

91 The Council contended, however, that Variation 17 should not have been allowed as the work done by Beckhaus in respect thereof was not in accordance with the Contract. This submission was based on Beckhaus' failure to add 3% meadow lime to all the material the subject of the item in question.

92 Beckhaus contended that its obligation under the Contract was to achieve a minimum of 12% linear shrinkage of the material and lime only had to be added to the extent necessary to achieve this percentage. It contended that it was not obliged, absolutely, to add 3% lime to all the material.

93 I do not accept Beckhaus' submission. Clause 8.10 is clear in its terms and imposes a separate and independent obligation on Beckhaus to add 3% lime to all the material. Mr Rudge acknowledged that the addition of lime to soil can affect its linear shrinkage, its dispersion characteristics and – to the extent that lime might affect its dispersion characteristics – the capacity of the soil to erode. These are all matters that concern the effectiveness of the levees. These were relevant reasons for the Contract to require the addition of 3% lime to all the material used and, in my view, this is what the Contract, in clear and unequivocal terms, provided.

94 Beckhaus did not add 3% lime to all the material. The addition of 3% lime required about 4,953 tons of lime to be added and Master Macready observed that delivery dockets for the project indicated deliveries of only 328.86 tons of lime. Although the delivery dockets do not establish precisely how much lime was added (more lime than reflected in the dockets may have been used), the quantity must have been substantially less than 4,953 tons.

95 As Beckhaus did not add 3% lime to all the material, it did not stabilise and condition the additional excavated borrow material as the Contract required. In other words, it did not establish that it did the work, the subject of Variation 17, in accordance with the Contract. Accordingly, in my view, it is not entitled to be paid, in accordance with the Contract, for the work it did in that connection. It follows, in my view, that the Master erred in upholding Beckhaus' claim for Variation 17.

96 My conclusion in this regard does not necessarily mean that Beckhaus will receive no value whatever for the work the subject of the claim for Variation 17. In assessing the elements necessary for both Beckhaus' claims and the Council's cross-claims, regard would have to be had to the degree to which the Variation 17 work advanced the due completion of the Contract. This will be a matter for Macready AsJ.

**Variation 21**

97 The parties made no oral submissions in relation to this variation but relied on their written submissions.

98 As mentioned, Variation 21 is a claim by Beckhaus for its costs in holding its machinery in Brewarrina after it had claimed practical completion.

99 As mentioned, on 18 March 2002, Beckhaus in writing requested the superintendent to issue a certificate of practical completion. In terms of cl 42.5 of the General Conditions, the superintendent was required, within 14 days of the receipt of Beckhaus' request, to provide a certificate of practical completion "*or give [Beckhaus] in writing the reasons for not issuing the certificate*".

100 Master Macready accepted that the superintendent refused to issue a list of defects in the work to which Beckhaus could have responded or made decisions to remove its major earthmoving equipment.

101 Beckhaus submitted to the Master that, under cl 42.5, the Council, within 14 days after receiving the request of 18 March 2004, should have given Beckhaus reasons advising it "*of outstanding items required to be completed to achieve practical completion*" *and, had this been done, Beckhaus "could have made appropriate decisions to retain or demobilise its major earthmoving equipment from the site of its works at Brewarrina*". Beckhaus submitted further that, as Master Macready had found, the only valid reason for the superintendent not granting a certificate of practical completion "was a lack of a sufficient number of test results for the installation of culverts". Beckhaus submitted that, accordingly, the Council "*has substantially failed in its cross-claim in these proceedings and hence there was no requirement for [Beckhaus] to have kept its major earthmoving equipment on site*".

102 The Master agreed with the submissions of Beckhaus and found that it was reasonable for Beckhaus to have kept its equipment on site until 27 April 2002 and that it was entitled to the costs of doing so. The reasons do not reveal from what date those costs were incurred and how they were made up.

103 For reasons that I set out below, I consider that the Master erred in finding that the only reason for not issuing a certificate of practical completion was the lack of a sufficient number of test results for the culverts. In my opinion, Beckhaus breached the Contract by failing to achieve the required degree of compaction over and in the immediate vicinity of the culverts and, also, by failing to achieve a uniform factor of 12% linear shrinkage in respect of the levees it constructed. These breaches may well give rise to rectification costs of a not insubstantial amount. Were that to be the case, it would not be correct that the Council substantially failed in its cross-claim. Accordingly, the foundation for the Master's decision in regard to Variation 21 would fall away.

104 The Council contended that the claim for Variation 21 should fail because it was premised on practical completion having been achieved, and the Master had held that it was not achieved. While I accept (albeit for different reasons, being the breaches of contract to which I have referred) that practical completion was not achieved, I do not think that fact is necessarily an answer to the claim for Variation 21.

105 From my reading of the written arguments, Beckhaus' claim is not based on the argument that practical completion was achieved; rather it is based on the asserted failure of the superintendent to provide adequate reasons for not issuing a certificate of practical completion in accordance with cl 42.5 of the General Conditions. Looked at in this way, the claim is a claim for damages for breach of contract, rather than a claim for a variation.

106 The parties' written arguments on this issue were premised on matters that, by reason of the finding that the Contract was terminated, have altered significantly. In the circumstances, I am reluctant to attempt to resolve the claim on the material before this Court. I would remit this claim to Macready AsJ for determination in the light of these reasons.

**The culverts**

107 I now turn to those aspects of Master Macready's judgment in regard to the cross-claim in respect of which the Council appeals.

108 The first finding of the Master that the Council challenged was that, despite the Master's conclusion that Beckhaus had not complied with the specification in regard to the frequency of testing in respect of the culverts, there had been substantial compliance with the contractual requirements for compaction over the culverts and in their immediate vicinity.

109 There were 13 culverts in the levees Beckhaus constructed. The levees were not of a uniform height but, in parts of the levee, for example, the height was to be 1650 millimetres made up of compacted 150 millimetre thick layers. The culverts themselves were 600 millimetres deep. The expert witnesses identified the culverts as parts of the levees that were particularly susceptible to erosion.

110 Unlike the rest of the levees, the soil in the immediate vicinity of the culverts and up to a certain level over the culverts could not be compacted by using heavy machinery. It was feared that the weight of heavy machinery might damage the culverts.

111 Clause 3.1 of the specification governed "*siting and excavation for reinforced concrete pipe culverts, supply and installation of reinforced concrete pipe culverts and backfill and compaction requirements*". Clause 3.7 provided: "*Unless directed otherwise by the superintendent, all material shall be compacted in layers not exceeding 150 mm compacted thickness.*"

Clause 3.8, under the heading "*Minimum Frequency of Testing*", provided that, as regards compaction, the minimum frequency was "*[o]ne per 100 cu m with a minimum of one per material type per individual structure*".

112 Clause 8.9.3 of the specification provided:
"*For the purposes of compaction control the following test frequencies shall be adopted as a minimum: -*
*(a)* …
*(b) For backfill of Discharge Pipes and Stormwater Drainage Pipes: 1 test per layer*."

Accordingly, under cl 8.9.3, one test per 150 millimetres had to be carried out (a "layer" being 150 millimetres thick).

113 Beckhaus submitted that there was a conflict between cl 3.8 and cl 8.9.3, and submitted that cl 3.8 was paramount as it was more specific. As Hodgson JA pointed out in the course of argument, however, there is no conflict; the Contract simply provided for two different minimum standards and both had to be complied with. That is to say, under cl 3.8 one test had to be undertaken per 100 cu m "with minimum of one per material type of individual structure" and, under cl 8.9.3, one test per 150 millimetres had to be undertaken.

114 In fact, no tests were undertaken in regard to five culverts; one or no tests were taken in respect of three culverts; two culverts were tested only once each; there was one culvert in respect of which two tests were undertaken; there were two culverts in respect of each of which seven to eight tests were undertaken.

115 In August 2003 two tests, known as the "Golder tests" were undertaken at two culverts. Master Macready said in regard to these tests: "*They indicated that at a depth of .15 that the field dry density was 95% and a depth of 1.2 was 90.5%*."

Thus, one passed and the other did not (but only at the depths indicated).

116 The Master described the relevant evidence being that set out in Beckhaus' submissions as follows: "*Komp, the Superintendent under the contract during construction, witnessed compaction occurring at culvert locations … He was not challenged on this evidence under cross examination;*
*The daily records of [Beckhaus] support that compaction occurred at culverts … ;*
*Macartney's evidence is that compaction was carried out at culverts … ;*
*Whilst Macartney under cross examination admitted that the specified number of compaction tests was not taken at culvert locations …, his evidence that compaction was actually performed at culverts was not seriously challenged …*
*Test results taken by CETS at culvert locations confirm that compaction was satisfactory ….*"

117 The Master then concluded: "*The fact that sufficient tests were not taken at the culverts as appears from Mr Macartney's evidence precludes me from coming to a conclusion that there has been compliance with the specification requirements for the frequency of testing in respect of the culverts. However, the evidence before me clearly demonstrates that there has been substantial compliance with the contractual requirements for compaction over the culverts.*"

118 In my opinion, however, the Master erred in the approach he adopted.

119 The integrity of the entire levee system is a matter of great importance to the town of Brewarrina. A whole levee bank might be breached by water penetration around a culvert and a levee might fail at any location where fill is sufficiently loose or cracks are sufficiently deep. Professor Fell, an expert witness for the Council, testified that only one layer of poorly compacted soil might give a path for seepage and initiation of erosion. This is common sense.

120 In the light of the potential vulnerability of the area above and around culverts and the importance of the impermeable quality of the system as a whole, the relevance of the contractual requirements for testing at the culverts is self-evident. The purpose of these testing requirements was to give an appropriate degree of satisfaction to the Council as to the quality of the work done and the integrity of the system.

121 I accept the submission made by Beckhaus that the failure to carry out some of the tests does not necessarily mean that the works, when complete, do not substantially comply with the contractual standard. But, once it is established that there has been a failure to comply with the testing requirements, the evidentiary onus passes to Beckhaus to provide – by other evidence – the same degree of assurance as to the integrity of the system as would have been forthcoming had satisfactory test results been obtained in accordance with the frequency of testing under the Contract. Whether that assurance is to be derived from tests carried out subsequently, or from some other source, would be a matter for Beckhaus to establish.

122 Furthermore, due regard has to be paid to two other matters. Firstly, the failure by Beckhaus to comply with the obligation to add 3% lime to all material. This must give rise to at least a prima facie doubt that the levees had the qualities that the addition of lime to that extent would achieve.

123 Secondly, the circumstances under which the compaction tests (known as the "CETS" tests) were performed while Beckhaus was carrying out work under the Contract cast some doubt on the conclusions that otherwise would be drawn from the results of those tests. Some 340 CETS tests were carried out, in accordance with the Contract, in random places relating to the compaction levels on the levee system. All these tests passed, and Beckhaus submitted that these results, alone, provided a high degree of assurance that contractual standards had been met generally. After all, the Contract provided for the kind and quantity of compaction tests that would show, to the extent required by the Council, that the compaction work had been done properly, and these tests had been performed and satisfactory results had been achieved.

124 But, some of those tests only passed after the persons testing had indicated to Beckhaus that, in their view, a test at the particular place was likely to fail; Beckhaus then added lime and reworked the area; the test was then carried out and passed successfully. Mr Rudge explained: *"There was contested evidence before [the Master], which he accepted, that the CETS testers did not issue failing certificates. They were sufficiently experienced to tell, when they were on site, doing the in situ tests, that something was not properly compacted because of some deleterious material within the area, and that it would fail. They would then tell the foreman that that area was not going to pass, and the foreman would then arrange for it to be reworked, and then an adjacent or nearby area would be retested. If it looked as if it was going to pass, that sample was then taken back to the laboratory and, generally speaking, it did."*

125 This practice detracts from the degree of assurance that the successful CETS testing would otherwise have provided.

126 These two matters emphasise the need for Beckhaus to rebut the inference that arises from its failure to provide satisfactory test results as required by cl 3.8 and cl 8.9.3 of the specification.

127 In my opinion, the mere fact that compaction was actually performed at culverts (a fact relied on by the Master) and that the compaction was carried out apparently in accordance with appropriate techniques (which, arguably, is a further matter relied on by the Master) do not provide the degree of assurance that would have been forthcoming had satisfactory tests been carried out at the frequency required by the Contract.

128 In my opinion, the Master erred in finding that the evidence demonstrated that there had been substantial compliance with the contractual requirements for compaction over the culverts.

129 In my view, the Council is entitled to damages flowing from the breach of contract arising from the failure to carry out the tests required in relation to compaction at the culverts. Those damages are the costs of rectifying the work at the culverts. This would involve removing the fill over and in the vicinity of the culverts sufficiently to enable the work to be done in accordance with the contract. I propose that the assessment of such damages should be remitted to Macready AsJ.

**The addition of 3% lime as an independent breach**

130 I have previously in these reasons concluded that, under the Contract, Beckhaus was obliged to add 3% lime to all material and it did not do so. Mr Christie submitted that the failure to add 3% lime amounted to a separate and independent breach of contract by Beckhaus for which the Council was entitled to claim damages.

131 By omitting to add lime to the extent that it did, Beckhaus achieved a saving under the Contract of an amount that was not determined finally but which seems to be in the vicinity of $300,000. The amount in question would be the difference between the cost of adding the lime required by the Contract (and processing the material with it) less the cost of the lime actually added (and processed). These factors were not determined at the trial (simply because, at the trial, the Council made no independent claim for damages for breach of the obligation regarding the addition of 3% lime).

132 The Council submitted that it was entitled to damages for the breach of contract constituted by the omission to add lime and those damages should not be less than the saving to Beckhaus in not adding lime to the extent required by the Contract.

133 Mr Rudge submitted that the Council should not be entitled to put a claim on this basis. He said that such a claim had not previously been advanced and the first time that Beckhaus knew that it faced such a claim was when it saw the Council's notice of appeal.

134 In the cross-claim the only possible reference to the claim as articulated by Mr Christie on appeal was the following allegation: *"[Beckhaus] did not comply with contractual requirements for stabilisation of the levee bank materials (Contract Technical Specification clause 8.10)."*

No particulars referred to 3% lime.

135 Although the experts' reports referred to the use of 3% lime, it was not in a context that would have alerted Beckhaus to an independent claim for damages by the Council for a failure to use 3% lime. The focus of the experts' reports, in regard to the addition of lime, concerned the effect of lime on linear shrinkage. This requires some further explanation.

136 Prior to Beckhaus commencing the work, it undertook tests on the borrow pits from which the fill was to be obtained. These tests revealed that the soil in the borrow pits had a relatively high lime content. Beckhaus formed the view that its contractual obligation was only to achieve 12% linear shrinkage in the levees it constructed and concluded that, by reason of the quality of the soil from the borrow pits, it was unnecessary to add 3% lime to all the material to achieve 12% linear shrinkage. Thus, from time to time, Beckhaus added lime to the fill and carried out further tests to

ascertain whether the 12% factor had been met. When the fill reached a point where the linear shrinkage was 12%, no further lime was added.

137 The reports of the experts dealt with whether the addition of 3% lime to all the material, and not merely in accordance with the procedure adopted by Beckhaus, would have provided additional benefits to the levee system and, if so, to what extent. The reports provided no inkling that the Council intended to make an independent claim.

138 When Mr Beckhaus gave evidence, he was cross-examined about the lime that was added and he was asked to produce dockets that would establish what loads of lime were used. He produced some dockets but explained that his records were not satisfactory.

139 At the conclusion of evidence at the trial, the Council did not apply to amend its cross-claim to incorporate a specific claim for the omission to add lime. Plainly, for this reason, the Master did not deal with such a claim in his reasons.

140 Mr Rudge said that had he known that a claim for damages for an independent breach of the obligation to add 3% lime was being made, he would have led evidence to support the conclusion that Mr Komp, the then superintendent, knew that less than 3% lime was being used and approved of this happening. He said that he would also have led evidence to establish that more lime was used than the quantity of 328.86 tons of lime represented by the delivery dockets produced by Mr Beckhaus.

141 In my opinion, on the basis of the well-known principles relating to the raising of a claim for the first time on appeal as laid down in cases such as ***Suttor v Gundowda Pty Ltd*** (1950) 81 CLR 418, the Council should not be allowed, now, to advance this claim.

**Linear shrinkage**

142 Clause 8.7.1 of the specification provided: *"The levee embankment and Key Trench shall be constructed of Zone A Clayfill material, being clayey material selectively won from the borrow area or existing northern or southern Levees and having a maximum linear shrinkage value of 12%."*

143 Linear shrinkage is a measure, by a theoretical test, of the amount that a soil "shrinks" when the moisture is removed from it. In the theoretical test, the soil sample is put in an oven and all the moisture is removed.

144 The Master said: *"It is perfectly obvious from the evidence given in the case that the purpose of having achieved a particular linear shrinkage was to reduce the likelihood of deep and wide cracking in the embankment which might allow initiation of internal erosion and piping failure under flood conditions."*

145 Erosion is a physical process whereby the action of wind or water washes or carries away the soil particles. Piping is a process that occurs when water passes through a levee bank by way of a crack or internal seepage; water erodes the soil and a "pipe" is formed through the levee.

146 The Contract required testing of linear shrinkage. These tests were carried out by CETS. I have referred to CETS' practice not to issue failing certificates and to alert Beckhaus if they believed the soil was such that a test might fail. Thus, each of the tests of linear shrinkage required by the Contract passed.

147 In addition to the CETS tests, some tests were conducted on 24 October 2001 by K & H Construction Services Pty Ltd. The Master said in regard to these tests: *"These tests were conducted only for linear shrinkage at the request of Mr Komp, the superintendent. The actual test results which were taken at six places showed results ranging from 14% to 18%. These results were conveyed to [Beckhaus] and as a result the areas were reworked with additional lime being added. It is clear from Mr Komp's evidence that this rework was in respect of the area which had been tested and found wanting. Mr Komp did not have any further check tests done and, accordingly, throughout the rest of the construction, the testing by CETS showed that the results achieved the required level of 12%."*

148 Later, after Beckhaus had left the site, further tests were carried out for linear shrinkage. On 2 and 3 April 2002 an organisation known as Barnson conducted 13 linear shrinkage tests, 12 of which failed with a range between 14% and 18.5%. The one test that passed was located in the northern levee. Three other tests at the northern levee, however, indicated linear shrinkage results of between 14% and 16%. The nine other failed tests carried out by Barnson were undertaken at the Tarrion Creek, Charlton Road, southern and North Brewarrina levees. In fact, during April to July 2003, Barnson carried out 36 linear shrinkage tests and 20 of these failed, including some in the northern levee.

149 In April 2002 Douglas Partners conducted 10 further linear shrinkage tests. Five failed, with a range of 14.5% to 18.5%. The failures were in regard to tests taken in the Charlton Road levee, the Tarrion Creek levee, the southern levee, the northern levee (where one failed and three passed) and one in the North Brewarrina levee.

150 In September 2003 Golder undertook 12 linear shrinkage tests, 6 of which failed with ranges from 12.5% to 18.%. One of the failures was in the northern levee.

151 Master Macready dealt with these tests as follows: *"It is perfectly plain that the results indicate a variety of failures and a variety of occasions when the specifications were met."*

He observed further: *"There was no suggestion that the linear shrinkage factor varied over time."*

And said: *"Given the existence of these failures [in testing] it is hard to conclude that there has not been some breach of the specifications."*

152 The Master then turned to the question whether the breaches would have any "important" effect. I think that what he meant by that was whether the breaches resulted in the Council sustaining damage. The Master expressed his

conclusion on this question as follows: *"Bearing in mind my conclusion that there has not been demonstrated a sufficient departure from the compaction requirement it seems to me that there has been substantial compliance with the contract in respect of linear shrinkage. This flows from the fact that such testing as there is, seems to indicate a compliance in the northern levee which is agreed to be sufficient. In respect of the other levees the evidence is of little weight because there is no basis expressed for the conclusions reached. In particular I am satisfied that in respect of linear shrinkage the levees are fit for their intended purpose."*

153 I would observe that it is not to the point that the levees might be fit for their intended purpose. The correct question is whether, in consequence of the breaches of contract, the Council has suffered damage.

154 The Master's reference to the tests seeming to *"indicate a compliance in the northern levee which is agreed to be sufficient"* was based on evidence given by Dr Truscott, an expert called on behalf of the Council, and Dr Burman, an expert called on behalf of Beckhaus. The Master noted that Dr Truscott, when shown the test results from Barnson in respect of the northern levee (on which there was substantial compliance), stated that he had *"no problem with the northern levee in terms of linear shrinkage"*. Dr Burman testified that there was probably *"substantial compliance to [sic – in] the northern levee"*.

155 Master Macready's observation that, in respect of the other levees, the evidence was of little weight was based on the following observation he made: *"In respect of the other levees such results as they are show a different picture [from the northern levee] indicative of 12% not having been achieved for the majority of cases. However, whether such results given their small number are sufficient to lead one to conclude that the whole of the levees do not meet the specification depends upon whether one can extrapolate such a result from a small number of tests. There is nothing in the [Council's] expert's material that deals with this and it would seem that this is a flaw in their evidence which would lead me to give it little weight."*

156 The Master, having found that there had been a variety of failures and a variety of occasions when the specified tests were not met, said that the question to be asked was "whether or not one can extrapolate any result across the whole levee in respect of these results". He found that the tests were insufficient in number to draw any inference as to shrinkage over an area greater than the specific areas where the failed tests were conducted.

157 In my opinion, however, the correct approach in regard to the linear shrinkage issue is as follows. The onus was on the Council, as cross-claimant, to prove that Beckhaus breached the Contract by failing to comply with its obligation to construct the levee system with clay material having a maximum linear shrinkage value of 12%. In attempting to discharge this onus the Council proved:

(a) Beckhaus did not comply with its obligation to add 3% lime to all the material (Mr Rudge accepted that the addition of lime to soil can have an effect on its linear shrinkage).

(b) Although the linear shrinkage tests carried out during the course of the Contract showed that the 12% limit was met, certain of those tests, initially, would have failed had lime not been added to the areas tested and those areas reworked. This practice indicated that some areas did not, without reworking, qualify and detracted, generally, from the inference of contractual compliance that might otherwise have been drawn from the fact that the linear shrinkage tests required by the Contract passed.

(c) After Beckhaus had left the site, 53 linear shrinkage tests were carried out and a little over half of them failed.

(d) Professor Fell and Dr Truscott expressed the opinion that material, the linear shrinkage of which exceeded 12%, was not as effective as material where the linear shrinkage was 12% or less (although they could not quantify the difference). While Professor Fell and Dr Truscott could not say that the risk of failure of the levees was significantly changed by reason of the linear shrinkage being higher than 12%, they also could not say that the risk was not significantly changed.

(e) While Dr Burman and Dr Truscott accepted that there had been substantial compliance with linear shrinkage requirements, as regards the northern levee, it is by no means clear that they were aware of the fact that some of the testing that passed was based on test areas where lime had been added and the area reworked.

158 By reason of the matters referred to in the previous paragraph, an evidentiary onus shifted to Beckhaus to prove that, despite them, the Council had sustained no damage. This was not the approach of the Master and, in my opinion, he erred in consequence thereof.

159 Accordingly, I would remit to Macready AsJ the issues involving the extent to which the levee system was constructed with material having a maximum linear shrinkage value of more than 12% and an assessment of the damages suffered by the Council in consequence of the levee system not being constructed with material that consistently complied with the 12% linear shrinkage requirement.

160 I reiterate that it will be entirely a matter for Macready AsJ as to whether any fresh evidence should be led on this issue, should any party wish to do so. There seems little doubt that the task of determining these questions will not be easy. There was no evidence that explained how and to what extent one could infer that a failed test in one particular place could be indicative of a failure in an area greater than that tested. In the end, Macready AsJ may simply have to do his best to determine these issues.

**Compaction generally**

161 The Council contended that Beckhaus had breached cl 8.9.2 of the specification which provided, in regard to the levee embankments: *"Materials shall be placed and compacted to achieve a minimum Hilf Density Ratio of 95% (Standard) when tested in accordance with test method AS1289-5.7.1."*

162 A substantial number of CETS tests, in the order of 342, were conducted in relation to compaction during the course of the work carried out by Beckhaus. These tests, as provided by the Contract, were conducted on a random basis and all passed. The inference to be drawn from this, prima facie, is that the entire levee system met the required compaction standards. Master Macready so held.

163 In August 2003, some 15 months after Beckhaus had left the site, Golder carried out 18 compaction tests and Barnson carried out 7 tests in parallel. Eleven of the Golder tests and four of the Barnson tests failed to meet the contractual standard.

164 Dr Burman testified that it was "unrealistic" to expect that the level of compaction of the fill placed in early 2002 might not have varied over the period to the time the Golder and Barnson tests were carried out. He said: *"Soils are not inert materials, they can and do change with time and changes in environmental conditions and in many instances the prediction of actual field behaviour is uncertain within the present state-of-the-art."*

Master Macready regarded Dr Burman as "*a careful and accurate witness with appropriate knowledge*".

165 Master Macready accepted that Dr Burman "*only postulated a partial explanation of the difference between the results and the specified requirements under the contract*". He pointed out, however, that the Golder and Barnson tests were spread over all the different levees and constituted *"a very small spread of results over each levee"*. He observed: *"[T]here is no evidence that has dealt with the significance of those results in a statistical sense."*

The Master pointed out that, although they were also subject to the same problem as the Golder tests, Douglas Partners had carried out tests all of which provided satisfactory results immediately after the conclusion of the works.

166 The Master took into account his finding that the works progressed under the daily supervision of Mr Komp and the levees were compacted in accordance with the manner required by the specification.

167 Mr Christie submitted that the Master had erred in failing to pay due weight to the visual observations of certain witnesses on behalf of the appellant. These witnesses expressed the opinion that, from visual observations, it appeared that the levees did not meet the compaction specification. The Master did not regard this evidence as reliable and there is nothing to suggest that he was mistaken in this respect.

168 In my opinion, the Master has not been shown to have erred in finding that the levees met the 95% compaction requirement and I would not uphold the Council's arguments in this regard.

**The assessment of damages for rectification costs**

169 I have expressed the opinion that two of the claims made by the Council in its cross-claim should be remitted to Macready AsJ for rehearing. These are the claims for breaches relating to the compaction at the culverts and the achieving of 12% linear shrinkage.

170 The measure of damage under both these heads is the cost of the work reasonably required to make the levee embankments conform to the requirements of the Contract, subject to the qualification, expressed in ***Bellgrove v Eldridge*** (1954) 90 CLR 613 at 618 by Dixon CJ, Webb and Taylor JJ, namely: *"The qualification, however, to which this rule is subject is that, not only must the work undertaken be necessary to produce conformity, but that also, it must be a reasonable course to adopt."*

171 The work at the culverts, presumably, will have to be removed and re-done.

172 The extent of the rectification required to ensure that the 12% linear shrinkage requirement is met is presently unknown. In the light of the evidence that a substantial part of the levees comply with the 12% requirement, the costs of rectification may well include only the removal or demolition of a small part of the structure in rectifying the material and compaction in those particular areas.

173 There was an issue between the parties as to the relevance of the omission of the Council to lead any evidence showing that it intended to rectify the levees in accordance with the Contract.

174 In my opinion, in the present case, an intention to rebuild or to rectify is not relevant to the measure of damages: ***Bellgrove v Eldridge*** (at 620), ***De Cesare v Deluxe Motors Pty Ltd*** (1996) 67 SASR 28.

175 It is true that in ***Ruxley Electronics & Constructions Ltd v Forsyth*** [1996] 1 AC 344 there are several statements to the effect that intention to rebuild is relevant to reasonableness, in the context of what reinstatement works should be allowed, and hence the extent of the loss which has been sustained (see at 359D, 372, 373B to D). As Megarry VC explained in ***Tito v Waddell (No 2)*** [1977] Ch 106 at 332 (quoted with approval by Lord Lloyd in ***Ruxley Electronics*** at 372): *"Again, some contracts for alterations to buildings, or for their demolition, might not, if carried out, enhance the market value of the land, and sometimes would reduce it. The tastes and desires of the owner may be wholly out of step with the ideas of those who constitute the market; yet I cannot see why eccentricity of taste should debar him from obtaining substantial damages unless he sues for specific performance. Per contra, if the plaintiff has suffered little or no monetary loss in the reduction of value of his land, and he has no intention of applying any damages towards carrying out the work contracted for, or its equivalent, I cannot see why he should recover the cost of doing work which will never be done. It would be a mere pretence to say that this cost was a loss and so should be recoverable as damages."*

176 In the present case, however, there is no question of the Council suing for diminution in value and there is also no question of reinstatement being required by reason of factors such as eccentricity of taste. Here we have a situation where the integrity of the levees is a matter of public interest and, in particular, of significant relevance to the welfare of the citizens of Brewarrina. In my view, the Council, in these circumstances, is entitled to the costs of

rectification without having to prove that it intends to rectify the works. The general rule expressed in ***Bellgrove v Eldridge*** at 620 applies.

**Total failure of consideration**

177 The Council contended that the Master erred in holding that the Contract was not an entire contract. This was part of the Council's argument that it was entitled to restitution of the monies paid under the Contract on the ground of total failure of consideration.

178 As Mason CJ explained in ***Baltic Shipping Company v Dillon*** (1993) 176 CLR 344 at 350: *"The concept of an entire contract is material when a court is called upon to decide whether complete performance by one party is a condition precedent to the other's liability to pay the stipulated price …"*

The Chief Justice went on to say: *"When, however, an innocent party seeks to recover money paid in advance under a contract in expectation of the entire performance by the contract-breaker of its obligations under the contract and the contract-breaker renders an incomplete performance, in general, the innocent party cannot recover unless there has been a total failure of consideration. If the incomplete performance results in the innocent party receiving and retaining any substantial part of the benefit expected under the contract, there will not be a total failure of consideration."*

179 The Master held that there had not been a total failure of consideration in this case. In my view, he was entirely correct. The significant requirement of the levees being constructed in accordance with the compaction specifications laid down by the Contract has been complied with. On the evidence, the defects in relation to the culverts can be remedied at a cost of not more than about $100,000. The problems with linear shrinkage do not appear to range over more than a minor part of the levees (having regard to the CETS tests that passed without the areas having to be first re-worked). Moreover, the evidence establishes that a failure to comply with the linear shrinkage requirement has only a general effect on the quality of the levees as a whole and may well not lead to the levees being, to any significant extent, less stable or more permeable.

180 In any event, the agreed termination of the Contract, resulting in the implied term relating to payment by the Council to Beckhaus of the value of the work done by it in accordance with the Contract, is a complete answer to the claim for restitution on the ground of entire failure of consideration.

181 In my view this ground of appeal is without substance.

**Misleading and deceptive conduct**

182 As I have mentioned, the misrepresentations found to have been made by Mr Beckhaus related to the financial position of Beckhaus and the fact that it operated a third party accredited quality system. Master Macready found that these misrepresentations caused the Council to enter into the Contract.

183 Master Macready found that, as a result of the misleading conduct, "causation is established". I understand his finding to be that, as a result of the misleading conduct, the Council entered into the Contract. This fact does not, itself, establish that the misleading conduct caused loss.

184 The Master appears to have accepted that, but for the misleading conduct, the Council would have contracted with the next lower tenderer, Sudholz. The contract price with Sudholz would have been approximately $1,200,000 higher than the contract price under the Contract. The Master held that the damages which the Council was likely to recover on its cross-claim *"would be no greater than the cost of rectification less the unpaid portion of the contract sum including provisional costs items and also less the difference between the contract sum and the amount which would have been paid to Sudholz as the next most likely tenderer"*. The Master concluded: *"Having regard to my decision on the cross-claim it is clear that the damages will not anywhere near approach a sufficient sum to demonstrate that the Council has in fact suffered damage."*

185 Even though I consider that the damages the Council may recover on its cross-claim could be significantly higher than those taken into account by Master Macready, I still come to the same conclusion as he did.

186 In any event, in my opinion, the misleading conduct alleged did not cause the Council to suffer any damage whatever.

187 The damage suffered by the Council was caused by Beckhaus' failure to comply with the Contract. Apart from the fact that those damages will be met upon payment of the damages established by the cross-claim, the misleading conduct of which Mr Beckhaus and Beckhaus were guilty had no bearing whatever on the breaches of Contract that caused the Council to suffer loss.

188 The Council did not attempt to make out a case that, had Beckhaus' financial position been as represented, or had Beckhaus operated a quality system as represented, the breaches of contract would not have occurred. There was no evidence that supported a finding of any link between the misleading conduct and the damages suffered (apart from the mere fact that the Contract was entered into which, in my view, on its own, is far too remote to constitute causation at law).

189 It is self-evident that the fact that Beckhaus' financial position was not as represented had nothing whatever to do with the breaches of contract committed; there was no suggestion by the Council to the contrary. Mr Christie expressly stated that he was not submitting that the absence of the represented quality control had any causative bearing on the breaches of contract.

190 In the circumstances, there is no adequate causative link between the actual entering into of the Contract with Beckhaus (as opposed to some other party) and the damages sustained. The entering into of the Contract did not

cause the Council loss; its loss was caused by the fact that Beckhaus, for reasons entirely unrelated to its misrepresentations, committed breaches of the Contract.

**The Council's other arguments that Beckhaus is not entitled to payment for outstanding work**

191 In the light of the agreed termination of the Contract and the implied term relating to payment to Beckhaus for the work performed by it in accordance with the Contract, the Council's other arguments opposing Beckhaus' rights to payment for such work fall away. These arguments were based principally on the proposition that Beckhaus is not entitled to any further payment because practical completion was not achieved and "the amount claimed in progress claim No 7 did not become due and payable".

192 As I have pointed out, the appropriate basis of Beckhaus' claim is not a claim for a progress payment but a claim based on an implied term of the termination agreement. For reasons I have explained, I would remit the issue of the amount to which Beckhaus is thereby entitled to Macready AsJ for rehearing.

**Liquidated damages**

193 The Council appeals against the refusal by the Master to allow its application to amend its claim so that it incorporates a claim for liquidated damages.

194 By cl 35.6 of the General Conditions, the Council is entitled to liquidated damages *"for every day after the Date for Practical Completion to and including the Date of Practical Completion or the date that the Contract is terminated under cl 44, whichever first occurs"*. Thus, the first step in ascertaining whether a claim for liquidated damages is capable of being maintained is to determine the dates for practical completion and termination.

195 I have noted that Mr Christie accepted that the dates for practical completion should be assumed as having been extended to about March 2002. This is not a matter on which any concession was forthcoming from Beckhaus and the Master made no finding on this issue.

196 I have previously expressed the opinion that the date on which the Contract was terminated by agreement could be no later than the date on which the trial commenced, namely, 15 March 2004.

197 On the assumption that the date for practical completion was March 2002, the period over which a claim for liquidated damages, potentially, might be made is about two years.

198 In refusing the Council's application to amend, the Master was materially influenced by the fact that Beckhaus suspended work under the Contract in terms of the Act.

199 On 22 May 2002 Beckhaus served upon the Council a notice of intention to suspend work in terms of s 15(2)(b) of the Act. The Council failed to pay the monies claimed by progress claim No 7 and on 27 May 2002 Beckhaus suspended work under the Contract in terms of s 27(1) of the Act. In consequence, Beckhaus submitted that it was entitled to rely on s 27(3) of the Act which has the effect that Beckhaus is not liable to the Council for any loss or damage suffered by it following a lawful suspension of work under the Act. The Master upheld these contentions.

200 The Council submitted that the Master should have held that progress claim No 7 was subject to a condition precedent that had not been fulfilled, namely, the requirement under cl 42.1 of the General Conditions that Beckhaus should support its progress claims with such information as the superintendent might reasonably require.

201 The Council contended that a letter of 2 April 2002, written by the superintendent to Beckhaus, set out information that Beckhaus should have provided to satisfy the condition precedent.

202 The letter of 2 April 2002 referred to outstanding test certificates for compaction (under cl 8.9.3 of the technical specifications) and stated "the test certificates received are insufficient in number". The letter requested Beckhaus "to provide all remaining test certificates for compaction of embankment and pavement material". The Council submitted, further, that an affidavit dated 19 March 2004 by Mr Corven, the superintendent, assisted in providing Beckhaus with particulars of the information required to comply with the condition precedent.

203 Master Macready, in dealing with the condition precedent argument, did not address the request in the letter of 2 April 2002 and the affidavit evidence of the superintendent to which I have referred. The Council rested its case on this aspect of the appeal on his omission to deal with these matters.

204 The letter of 2 April 2002 referred to test certificates that had been issued and also to certificates that were never issued and did not exist. The issued certificates were supplied to the Council by 8 June 2002.

205 The Council submitted that Beckhaus should have advised the superintendent that the tests relating to non-existent certificates had not been undertaken and, hence, no certificates were issued in respect thereof.

206 The non-existent certificates were not referred to in the Council's pleadings or identified at the trial in any way save for the Council producing the letter from the superintendent of 2 April 2002 and relying on his affidavit dated 19 March 2004.

207 On 1 June 2004, during argument before the Master (after the close of evidence), the Master said to Mr Christie that he wished to identify "precisely what it is said you say the request was for the information [the subject of the condition precedent]". The Master observed that the submissions made on the Council's part did not "make it clear precisely what it is you say is the information".

208 A week thereafter, on 8 June 2004, Mr Christie handed to Master Macready a document that he said responded to the questions the Master had asked about the identity of the information that, according to the Council, had not been provided to the superintendent. The document in question referred, amongst other things, to the superintendent's

request of 2 April 2002 to provide all remaining test certificates for compaction of the embankment and pavement material as well as to the statement in the letter of that date that the test certificates provided were insufficient in number. The document handed to the Master did not squarely assert that information about the non-existent certificates should have been supplied to the superintendent so as to comply with the condition precedent.

209 In my opinion, the Council did not in adequately clear terms inform Beckhaus and the Master that its argument that the condition precedent had not been fulfilled was based, in part, on the failure to advise that certain the tests had not been performed. It is plain that Master Macready did not understand that the Council put its case in this way. Although he dealt fully with the Council's arguments as to other information that the Council contended had not been supplied to it, he did not deal with the non-existent certificates. In my opinion, the Master was entirely justified in assuming that the matters with which he did deal constituted all the matters relied on by the Council on this issue. In my view, it is now too late for the Council to advance this contention. Beckhaus has not had a proper opportunity of dealing with the point – had it known, for example, that this case was being made against it, it might have sought to cross-examine the superintendent as to whether he knew in any event that the tests had not been carried out, or to lead evidence which went to the issue.

210 Accordingly, in my opinion, Master Macready correctly held that, as at 27 May 2002, the condition precedent had been met and Beckhaus was entitled to suspend work.

211 The Master held that, as a consequence of the delay caused by the suspension, the superintendent should have exercised the discretion available to him under cl 35.5 of the General Conditions to extend the time for practical completion notwithstanding that Beckhaus had not applied for such an extension of time. I agree with the Master's view on this issue (cf ***Peninsula Balmain Pty Ltd v Abigroup Contractors Pty Ltd*** (2002) 18 BCL 322 at 343 [78] - 343 [81]). Mr Christie, in his oral submissions, did not contend that the Master had erred in this respect. He said that he "would not cavil" with the proposition that the superintendent, acting fairly, would have given an extension to the date for practical completion corresponding to the suspension period.

212 The Council contended that Master Macready should have held that on 18 November 2002 it paid progress claim No 7 and, accordingly, on that date the suspension of work under the Act ceased.

213 Sections 27(1) and (2) of the Act provide:

> *"(1) A claimant may suspend the carrying out of construction work … under a construction contract if at least 2 business days have passed since the claimant has caused notice of intention to do so to be given to the respondent under s 15, 16 or 25.*
>
> *(2) The right conferred by sub-section (1) exists only for so long as the respondent fails to comply with the requirements referred to in s 15(1), 16(1) or 25(1), as the case may be."*

214 Of *"the requirements referred to in s 15(1), 16(1) or 25(1)"*, those in s 15(1)(b) are presently relevant. Those requirements comprise the obligation of a *"respondent"* to *"pay the whole or any part of the claimed amount on or before the due date for the progress payment to which the payment claim relates"*.

215 The payment made by the Council to Beckhaus on 18 November 2002 was subject to the condition that it be secured by a bank guarantee provided at the instance of Beckhaus. Mr Christie accepted that, without the bank guarantee, the Council would not have paid the amount of progress claim No 7.

216 By reason of the requirement to provide a bank guarantee, Beckhaus did not have access to the funds represented by the payment for use in its day to day operations.

217 Master Macready held that a payment that was conditional on the provision of a bank guarantee did not remove the suspension under s 27 of the Act. In coming to this conclusion he relied on *"the imperative of giving effect to the purpose of the statutory right of suspension"*. He said: *"[T]he remedy provided by s 27 of the Act is capable of achieving its full intended function only if the payment which terminates the claimant's right of suspension can be applied to defray expenses and liabilities incurred in carrying out the work to which the progress payment relates."*

218 I agree with the view so expressed. In ***Brodyn Pty Ltd v Davenport*** (2004) 61 NSWLR 421 Hodgson JA (with whom Mason P and Giles JA agreed) said: *"The Act discloses a legislative intention to give an entitlement to progress payments, and to provide a mechanism to ensure that disputes concerning the amount of such payments are resolved with the minimum of delay. The payments themselves are only payments on account of a liability that will be finally determined otherwise: ss 3(4), 32. The procedure contemplates a minimum of opportunity for court involvement: ss 3(3), 25(4)."*

219 The purpose of the Act was to ensure that contractors and sub-contractors, in the circumstances stipulated, could obtain a prompt interim progress payment on account, pending final determination of all disputes (***Brodyn Pty Ltd v Davenport*** [2003] NSWSC 1019 per Einstein J; see also ***Multiplex Constructions Pty Ltd v Luikens*** [2003] NSWSC 1140 at [96] per Palmer J). If the requirements of the Act concerning such interim progress payments could be satisfied by payments made conditionally against the provision of bank guarantees, the purpose of the Act would be defeated. In the circumstances, I agree that the payment of 18 November 2002 did not cause the suspension to cease; the suspension continued until the Contract was terminated.

220 In the circumstances, the claim for liquidated damages is capable of running from, the latest, March 2002 (the date for practical completion accepted by the Council – but not by Beckhaus) to 27 May 2002 when Beckhaus suspended work. This is a relatively short period.

221 In refusing leave to the Council to amend so as to claim liquidated damages, the Master, amongst other things, balanced the cost and inconvenience of the further hearing that would be required to establish the date for practical

completion against the relatively small amount to which the Council might be entitled in respect of liquidated damages (having regard to his findings relating to the suspension of work under the Act).

222 In the light of the orders that I propose, Macready AsJ might be disposed to allow further evidence on one or more of the several issues remitted to him. I make no comment on the prospects of this occurring, this being (as I have said) a matter entirely within his discretion. The prospect, however, of further evidence being led on the other issues does, however, constitute a change of circumstances relative to the Master's decision not to allow the claim for liquidated damages.

223 In my opinion, fairness requires the Master's decision to refuse to allow the claim for liquidated damages to be set aside so as to allow the Council, if it wishes, to renew the application before his Honour when the matter is remitted. If Macready AsJ determines the other issues remitted to him without allowing any further evidence, I would have thought it unlikely that he would allow the claim for liquidated damages to proceed (as his reasoning, as previously expressed, would remain the same). On the other hand, were evidence to be allowed, Macready AsJ might consider that it would be fair to allow evidence to be led in support of the dates necessary to establish a right on the part of the Council to liquidated damages. For this reason I propose that orders be made setting aside the Master's decision to refuse leave to amend so as to claim liquidated damages and remitting the issue to him for decision when determining all the issues that I propose be returned to Macready AsJ for decision afresh.

**The costs relating to Mr Beckhaus**

224 Before the Master counsel submitted that there should be no costs orders in favour of Beckhaus and Mr Beckhaus because of the finding that they had engaged in misleading or deceptive conduct in contravention of the *Trade Practices Act*.

225 The Master rejected the submission that the misleading conduct was the "prime reason" for starting the litigation. He said: *"The litigation was started because of concerns the Council felt about the work that had been performed by [Beckhaus] under the contract."*

He refused to deprive Beckhaus and Mr Beckhaus of their costs against the Council.

226 It has not been shown that the Master was wrong and I would not uphold this argument.

227 By reason, however, of the orders that I propose (remitting a number of the issues to Macready AsJ), I would set aside the costs orders he made, generally, on the basis that those orders should be reconsidered by him in the light of the findings he makes upon remission of all the issues in question. The purpose in setting aside those orders is to allow Macready AsJ full discretion to make whatever costs orders he thinks appropriate in the light of his overall decision in the case as remitted.

**Conclusion**

228 On the conclusions to which I have come, the Council has been more successful than Beckhaus. For the purposes of considering the appropriate order to be made in respect of the costs of the appeal, however, I would note that Beckhaus has been successful on some issues that took some time to argue and were not insignificant. Moreover, much time was spent on canvassing questions that became irrelevant once the Council accepted that the Contract had been terminated by mutual agreement. On balance, I think it would be fair if Beckhaus be ordered to pay 70% of the Council's costs of the appeal and cross-appeal.

229 I propose the following orders:

(1) The appeal be allowed.

(2) The orders made by Master Macready following his judgments of 16 September 2004 and 7 December 2004 be set aside.

(3) Beckhaus pay 70% of the Council's costs of the appeal and cross-appeal, and to have a certificate under the *Suitors' Fund Act*, if otherwise eligible.

(4) The following issues be remitted to Macready AsJ to determine in the light of these reasons:

(i) The costs of rectifying the work at the culverts.

(ii) The extent to which the levees constructed by Beckhaus did not comply with the requirement of 12% maximum linear shrinkage, and the costs of rectifying the work that was defective in this respect.

(iii) The amount the Council would have paid to Beckhaus (including amounts due for variations affecting the cost of the work) if all the work had been duly completed by it in accordance with the Contract.

(iv) The amount, if any, owing to Beckhaus by the Council for work that advanced the completion of the Contract (as assessed in accordance with these reasons).

(v) The amount, if any, owing to Beckhaus by the Council in respect of the amount claimed under Variation 21.

(vi) The amount, if any, owing to the Council by Beckhaus in respect of its cross-claims (as assessed in accordance with these reasons).

(vii) Whether the Council should be given leave to amend its claim so as to be able to claim liquidated damages, and the resolution of such a claim (if it be allowed).

(viii) Interest, if any.

(ix) The costs of the trial and the remitted hearing.

230 **McCOLL JA**: I agree with Ipp JA.

M Christie/V Culkoff (Appellant) instructed by Paul Ward-Harvey & Co (
M G Rudge SC/ D A C Robertson (First & Second Respondents) instructed by Dutton Lawyers