

Energy Australia v Downer Construction (Australia) P/L, The Institute of Arbitrators & Mediators Australia & William Timothy Sullivan

JUDGMENT : Nicholas J : Equity Div. T&C List. New South Wales Supreme Court. 15th February 2006

- 1 These proceedings concern the adjudication determination of the third defendant, William Timothy Sullivan (the adjudicator) dated 4 October 2005 (amended on 6 October 2005) under the *Building & Construction Industry Security of Payment Act 1999* (the Act) that the plaintiff, Energy Australia (Energy) was liable to the first defendant, Downer Construction (Australia) Pty Ltd (Downer) for the payment of the sum of \$6,040,579.05.
- 2 By its amended summons Energy challenges the validity of the adjudication application and the adjudication determination pursuant to which judgment in the sum of \$6,164,204.05 was entered against it on 18 October 2005 under s 25 of the Act.
- 3 In particular, Energy claims a declaration that the purported adjudication application by Downer of 9 August 2005 was not an adjudication application within s 17 of the Act and is null and void and of no effect. In support, it contends that as the purported adjudication application was for a claim substantially different from the payment claim it was not in accordance with the statute and therefore invalid, and that the subsequent adjudication determination was void as not being a determination of Downer's payment claim.
- 4 Alternatively, it claims a declaration that the purported adjudication determination of 4 October 2005 is not an adjudication determination within the meaning of s 22 of the Act and is null and void and of no effect. In support it contends that the adjudicator failed to determine the claim on the basis specified in the payment claim, but proceeded to determine a question which was included neither in the payment claim nor the adjudication application. It is contended that in so proceeding the adjudicator did not deal with the real dispute between the parties, acted arbitrarily, irrationally, or not bona fide, and denied Energy natural justice in that no opportunity was given to make submissions as to the basis upon which the matter was decided. Accordingly, it is contended that the adjudicator fell into jurisdictional error, and the purported adjudication determination is a nullity, and of no effect.

Background

- 5 On 19 September 2001 Energy and Downer entered into a design and construction contract (the deed) pursuant to which Downer undertook to design and construct a 132kV cable tunnel from a point in the south-western part of the city of Sydney near Campbell Street to Surry Hills for Energy for an amount of \$13,508,499.00.
- 6 On 3 June 2005 Energy, save as to an issue concerning water ingress into the tunnel, certified completion of the works. An amount of \$14,590,944.55 was paid to Downer pursuant to the deed.
- 7 On 12 July 2005 Downer submitted a payment claim under s 13 of the Act to Energy seeking payment of an amount of \$9,115,780.20. It included a claim for delay, disruption, and other costs incurred in relation to water ingress as a consequence of certain ground conditions which Downer alleged to be latent conditions within the meaning of cl 30.1 of the deed. It is this claim and the process by which it was determined by the adjudicator which have given rise to these proceedings. It is not disputed that the payment claim was in accordance with s 13.
- 8 On 26 July 2005 Energy responded to the payment claim by its payment schedule under s 14 of the Act which disputed that any amount was payable to Downer on certain grounds. Relevantly, Energy denied that the ground conditions described in the payment claim constituted a latent condition under the contract, and provided reasons for withholding payment of this claim.
- 9 On 9 August 2005 Downer served its adjudication application under s 17 of the Act on Energy.
- 10 On 15 September 2005 Energy served its adjudication response under s 20 of the Act.
- 11 On 4 October 2005 the adjudicator delivered the adjudication determination which found that Downer was entitled to be paid the sum of \$5,468,502.05 by Energy. On 6 October 2005 the adjudicator amended this amount to \$6,040,579.05 on the basis that it was affected by an accidental slip or omission.
- 12 On 14 October 2005 Barrett, J declined an interlocutory application by Energy for an order restraining Downer from obtaining an adjudication certificate to be filed as a judgment debt for the adjudicated amount under s 25 of the Act.
- 13 On 17 October 2005 an adjudication certificate was issued and, on 18 October 2005, Downer filed it as a judgment in this Court in proceedings No. 14803/05.

The Act

- 14 The relevant provisions are:

"13 Payment claims ...

(2) *A payment claim:*

- (a) *must identify the construction work (or related goods and services) to which the progress payment relates, and*
- (b) *must indicate the amount of the progress payment that the claimant claims to be due (the **claimed amount**), and*
- (c) *must state that it is made under this Act. ..."*

"14 Payment schedules

- (1) A person on whom a payment claim is served (the **respondent**) may reply to the claim by providing a payment schedule to the claimant.
- (2) A payment schedule:
 - (a) must identify the payment claim to which it relates, and
 - (b) must indicate the amount of the payment (if any) that the respondent proposes to make (the **scheduled amount**).
- (3) If the scheduled amount is less than the claimed amount, the schedule must indicate why the scheduled amount is less and (if it is less because the respondent is withholding payment for any reason) the respondent's reasons for withholding payment.
- (4) If:
 - (a) a claimant serves a payment claim on a respondent, and
 - (b) the respondent does not provide a payment schedule to the claimant:
 - (i) within the time required by the relevant construction contract, or
 - (ii) within 10 business days after the payment claim is served,whichever time expires earlier,the respondent becomes liable to pay the claimed amount to the claimant on the due date for the progress payment to which the payment claim relates".

"17 Adjudication applications

- (1) A claimant may apply for adjudication of a payment claim (an **adjudication application**) if:
 - (a) the respondent provides a payment schedule under Division 1 but:
 - (i) the scheduled amount indicated in the payment schedule is less than the claimed amount indicated in the payment claim, or ...
- (3) An adjudication application:
 - (a) must be in writing, and
 - (b) must be made to an authorised nominating authority chosen by the claimant,
 - (f) must identify the payment claim and the payment schedule (if any) to which it relates, and
 - (g) must be accompanied by such application fee (if any) as may be determined by the authorised nominating authority, and
 - (h) may contain such submissions relevant to the application as the claimant chooses to include. ..."

"20 Adjudication responses

- (1) Subject to subsection (2A), the respondent may lodge with the adjudicator a response to the claimant's adjudication application (the **adjudication response**) at any time within:
 - (a) 5 business days after receiving a copy of the application, or
 - (b) 2 business days after receiving notice of an adjudicator's acceptance of the application, whichever time expires later.
- (2) The adjudication response:
 - (a) must be in writing, and
 - (b) must identify the adjudication application to which it relates, and
 - (c) may contain such submissions relevant to the response as the respondent chooses to include.
- (2A) The respondent may lodge an adjudication response only if the respondent has provided a payment schedule to the claimant within the time specified in section 14 (4) or 17 (2) (b).
- (2B) The respondent cannot include in the adjudication response any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant.
- (3) A copy of the adjudication response must be served on the claimant".

"22 Adjudicator's determination

- (1) An adjudicator is to determine:
 - (a) the amount of the progress payment (if any) to be paid by the respondent to the claimant (the **adjudicated amount**), and
 - (b) the date on which any such amount became or becomes payable, and
 - (c) the rate of interest payable on any such amount.
- (2) In determining an adjudication application, the adjudicator is to consider the following matters only:
 - (a) the provisions of this Act,
 - (b) the provisions of the construction contract from which the application arose,
 - (c) the payment claim to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the claimant in support of the claim,
 - (d) the payment schedule (if any) to which the application relates, together with all submissions (including relevant documentation) that have been duly made by the respondent in support of the schedule,
 - (e) the results of any inspection carried out by the adjudicator of any matter to which the claim relates. ...".

15 Analysis of these provisions, which have been considered in many cases in the tsunami of litigation which has engulfed the court since the Act came into force, establishes the following propositions.

A payment claim

16 Section 13(2)(a) requires the payment claim to identify the construction work or related goods and services to which the progress payment relates. It must, on its face, identify the particular work. Although the court should not take an unduly strict approach to the construction of the claim, it ought not to cure defects in the claim document

by reference to extraneous circumstances or previous communications. A defect on the face of the document is not overcome by evidence that the recipient was not misled (*Jemzone Pty Ltd v Trytan Pty Ltd* (2002) 42 ACSR 42, paras 41-46).

- 17 As the words used are in relation to events occurring in the construction industry they should be given their natural meaning and applied in a commonsense practical manner (*Hawkins Constructions (Aust) Pty Ltd v Mac's Industrial Pipework Pty Ltd* [2002] NSWCA 136, para 20).
- 18 The relevant work or goods and services must be identified sufficiently to enable the respondent to understand the basis of the claim. Generally it is enough that the claim and its basis (in the contract and/or as a matter of valuation) be set out with sufficient clarity. This may be achieved by reference to supporting documentation incorporated in the payment claim (*Co-ordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd & Ors* [2005] NSWCA 229, paras 25, 27, 42). The information provided should be sufficient to enable the respondent to provide a payment schedule under s 14 (*Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266, paras 65, 82).
- 19 It is essential that the document by which the payment claim is put forward includes, whether in shorthand or in longhand and whether by one means or another, sufficient information to identify what the claim is (*John Holland Pty Ltd v Cardno MBK (NSW) Pty Ltd & Ors* [2004] NSWSC 258, paras 18, 19). Clear definition of the claim is of crucial importance and the claimant will be bound by it for the purposes of any adjudication (*Multiplex Constructions Pty Ltd v Luikens & Ors* [2003] NSWSC 1140, para 67, *John Holland* para 11).
- 20 Although a payment claim and a payment schedule should not be required to be as precise and as particularised as a pleading in the Supreme Court, precision and particularity must be required to a degree reasonably sufficient to apprise the parties of the real issues in dispute (*Multiplex* para 76).
- 21 The extent of information sufficient to identify the work or goods and services will depend upon the circumstances of the particular case. However a claimant would be well advised to observe the fundamental principles relevant to particulars in ordinary litigation referred to, for example, in *Sims v Wran* (1984) 1 NSWLR 317, p 321. A party must be made aware of the case he is called upon to meet so that he may know what are the issues of fact to be investigated at the hearing. It is not a question of whether one party has adequate knowledge of the actual facts; it is a question of whether he has adequate knowledge of what the other party alleges are the facts, for that is the case which he must meet.

A payment schedule

- 22 Section 14(2) requires a payment schedule to identify the payment claim to which it relates, and to indicate the amount of the payment (if any) that the respondent proposes to make. Sub-section (3) requires that if the scheduled amount is less than the claimed amount, the schedule must indicate why, and the respondent's reasons for withholding payment. Its purpose was described in the Minister's Second Reading Speech (Hansard, Assembly, 8 September 1999, p 105): "*Under part 3, when a payment claim is made, and the other party, called the respondent, does not intend to pay the full amount of the payment claim, it must issue a payment schedule stating the amount, if any, of the payment claim which will be paid and the reasons for not paying the amount claimed. The time for issue of the payment schedule is 10 business days after receipt of the payment claim. The payment schedule alerts the claimant to the existence of a dispute over payment and allows the claimant to immediately commence the adjudication process available under the legislation. This is a critical component of the bill as it provides a statutory early warning to claimants that the respondent does not propose to pay their claim in full*".
- 23 The reasons for withholding payment of a claim must be expressed with sufficient particularity to enable the claimant to understand, at least in broad outline, what issue is sought to be raised so that it may make a decision whether or not to pursue the claim and to understand the nature of the case it will have to meet in an adjudication (*Multiplex* paras 70, 77-79). The relevant considerations are similar to those in respect of a payment claim.
- 24 The combined effect of s 14(3), s 20(2B), and s 22(2)(d) is to confine the respondent to the reasons indicated in the payment schedule in any adjudication (*Multiplex* paras 67, 68; *Climatech* paras 25, 26). Prudence requires the respondent to indicate reasons which are comprehensive and complete.

An adjudication application

- 25 Section 17(3)(f) requires that the adjudication application identify the payment claim and the payment schedule (if any) to which it relates. It may contain such submissions relevant to the application as the claimant chooses to include (s 17(3)(h)). Although these submissions should be supportive of the payment claim, they cannot constitute a payment claim or part of it (*John Holland* para 25).
- 26 As the Minister explained (Hansard p 106): "*The adjudication application is simply a notice in writing identifying the relevant payment claim and payment schedule and stating that the claimant requires adjudication under the Act. The claimant can include reasons why the full amount of the payment claim should be paid and why the respondent's reasons in the payment schedule for not paying are not justified*".
- 27 In my opinion it is evident from the Act and consistent with the Minister's statement that the application is the procedural step taken to commence the adjudication proceedings under Pt 3, Div 2 of the Act. Its contents, which may include the claimant's submissions, must be sufficient to identify the payment claim and payment schedule so as to avoid confusion and to enable the respondent to lodge a response with the adjudicator (s 20(1), (2)). As the

statutory language of s 17(3)(f) is similar to s 13(2)(a) and s 14(2)(a), the test for sufficiency is the same as for a payment claim and the payment schedule.

Adjudication responses

- 28 Section 20(2)(c) provides the adjudication response may contain such submissions relevant to the response as the respondent chooses to include. Section 20(2B) precludes the inclusion of any reasons for withholding payment unless those reasons have already been included in the payment schedule provided to the claimant. Thus the respondent is confined to submissions supportive of the payment schedule earlier made (*Multiplex* paras 67, 68; *John Holland* paras 25, 30).
- 29 The Minister stated (Hansard p 106): “The response must contain any submissions which the respondent wishes the adjudicator to consider when the adjudicator decides the claimant’s adjudication application ...
... the respondent’s submission must be confined to reasons, amounts and grounds for withholding payment which were stated in the payment schedule and any related issues raised in the claimant’s submission ...”.

An adjudicator’s determination

- 30 By s 22(2) the adjudicator is required to consider only the matters specified.
- 31 What is referred to an adjudicator for determination is a claimant’s payment claim, and what an adjudicator is to determine is the amount of the progress payment to be paid on the basis of that claim and on the basis of other considerations in s 22(2) (*Climatech* para 24; *Energetech v Sides Engineering & Anor* [2005] NSWSC 801, para 24). The Minister stated (Hansard p 106): “The ambit of the dispute to be decided is fixed by two documents, namely, the payment claim and the payment schedule”.
- 32 The issues so defined are the only issues which the parties are entitled to agitate in their dispute and they are the only issues which the adjudicator is entitled to determine under s 22. He is required to have regard only to those submissions which have been duly made in support of the claim and the schedule (s 22(2)(c), (d)) (*Multiplex* paras 67, 68; *Parist Holdings Pty Ltd v WT Partnership Australia Pty Ltd* [2003] NSWSC 365, para 33). Under s 22(2)(a) and (b) he is required to consider the provisions of the Act and the provisions of the construction contract and the submissions of a party relevant to those questions even if they cannot be considered under paras (c) and (d) (*The Minister for Commerce v Contrax Plumbing (NSW) Pty Ltd* [2005] NSWCA 142, paras 35, 36).
- 33 Requirements essential to an adjudicator’s determination were considered in *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 by Hodgson, JA in the following passage:
“52 However, it is plain in my opinion that for a document purporting to an adjudicator’s determination to have the strong legal effect provided by the Act, it must satisfy whatever are the conditions laid down by the Act as essential for there to be such a determination. If it does not, the purported determination will not in truth be an adjudicator’s determination within the meaning of the Act: it will be void and not merely voidable. A court of competent jurisdiction could in those circumstances grant relief by way of declaration or injunction, without the need to quash the determination by means of an order the nature of certiorari.
- 53 What then are the conditions laid down for the existence of an adjudicator’s determination? The basic and essential requirements appear to include the following:
1. The existence of a construction contract between the claimant and the respondent, to which the Act applies (ss.7 and 8).
2. The service by the claimant on the respondent of a payment claim (s.13).
3. The making of an adjudication application by the claimant to an authorised nominating authority (s.17).
4. The reference of the application to an eligible adjudicator, who accepts the application (ss.18 and 19).
5. The determination by the adjudicator of this application (ss.19(2) and 21(5)), by determining the amount of the progress payment, the date on which it becomes or became due and the rate of interest payable (ss.22(1)) and the issue of a determination in writing (ss.22(3)(a)).
- 54 The relevant sections contain more detailed requirements: for example, s.13(2) as to the content of payment claims; s.17 as to the time when an adjudication application can be made and as to its contents; s.21 as to the time when an adjudication application may be determined; and s.22 as to the matters to be considered by the adjudicator and the provision of reasons. A question arises whether any non-compliance with any of these requirements has the effect that a purported determination is void, that is, is not in truth an adjudicator’s determination. That question has been approached in the first instance decision by asking whether an error by the adjudicator in determining whether any of these requirements is satisfied is a jurisdictional or non-jurisdictional error. I think that approach has tended to cast the net too widely; and I think it is preferable to ask whether a requirement being considered was intended by the legislature to be an essential pre-condition for the existence of an adjudicator’s determination.
- 55 In my opinion, the reasons given above for excluding judicial review on the basis of non-jurisdictional error of law justify the conclusion that the legislature did not intend that exact compliance with all the more detailed requirements was essential to the existence of a determination: cf. *Project Blue Sky Inc. v. Australian Broadcasting Authority* (1998) 194 CLR 355 at 390-91. What was intended to be essential was compliance with the basic requirements (and those set out above may not be exhaustive), a bona fide attempt by the adjudicator to exercise the relevant power relating to the subject matter of the legislation and reasonably capable of reference to this power (cf. *R v. Hickman; Ex Parte Fox and Clinton* (1945) 70 CLR 598), and no substantial denial of the measure of natural justice that the Act requires to be given. If the basic requirements are not complied with, or if a

purported determination is not such a bona fide attempt, or if there is a substantial denial of this measure of natural justice, then in my opinion a purported determination will be void and not merely voidable, because there will then not, in my opinion, be satisfaction of requirements that the legislature has indicated as essential to the existence of a determination. If a question is raised before an adjudicator as to whether more detailed requirements have been exactly complied with, a failure to address that question could indicate that there was not a bona fide attempt to exercise the power; but if the question is addressed, then the determination will not be made void simply because of an erroneous decision that they were complied with or as to the consequences of non-compliance”.

34 In *The Minister for Commerce* Hodgson, JA said:

“49. In my opinion, an error of fact or law, including an error in interpretation of the Act or of the contract, or as to what are the valid and operative terms of the contract, does not prevent a determination from being an adjudicator’s determination within the meaning of the Act. Section 22(2) does require the adjudicator to consider the provisions of the Act and the provisions of the contract; but so long as the adjudicator does this, or at least bona fide addresses the requirements of s.22(2) as to what is to be considered, an error on these matters does not render the determination invalid”.

35 The requirement of good faith in the exercise of power referred to in *Brodyn* was considered by McDougall, J in *Timwin Construction v Facade Innovations* [2005] NSWSC 548. He took it to mean that the adjudicator must make an effort to understand and deal with the issues in the discharge of the statutory function to consider the matters in s 22(2) of the Act. As mentioned above, the ambit of those issues which he must address is fixed by the payment claim and the payment schedule.

36 Putting natural justice issues aside, and at the risk of over-simplification, I take these cases to be saying that if an adjudicator fails to determine the payment claim or determines the wrong payment claim he commits jurisdictional error; if he determines the payment claim wrongly, he does not.

37 I conclude from this analysis that in order to provide a speedy mechanism for the determination of claims and the resolution of disputes it was the legislature’s intention that issues for adjudication be confined to those limited by the payment claim and the payment schedule. The statutory scheme does not permit amendment to, or alteration of, the basis of the claim in the submissions in support of the payment claim (s 17(3)(h), s 22(2)(c)), or to the reasons for withholding payment in the submissions in support of the payment schedule (s 20(2)(c), (2B), s 22(2)(d)), or for an application for that purpose to be made to, or entertained by, the adjudicator. The purpose of the submissions is to support the case of the party indicated in the payment claim or payment schedule, but not to expand or vary it.

38 In my opinion it follows that where a claimant’s submissions contained in an application under s 17(3)(h) or in support under s 22(2)(c) include matter which is irrelevant to the payment claim, or in support of a claim not disclosed in the payment claim, it remains the adjudicator’s duty to determine only the payment claim. The proper exercise of his function under s 22(2) involves giving due consideration to submissions directly relevant to the payment claim and ignoring those which are not lest he be distracted from the true question and fall into error. Risk of error may be avoided if he takes the payment claim as his lodestar.

The adjudication application claim

39 Energy contends that there were differences between Downer’s payment claim and the claim the subject of its adjudication application made on 9 August 2005 which was so substantial as to render the adjudication application invalid upon the proper construction of s 17 of the Act.

40 Schedule I of the payment claim commences with a summary: “**Latent Condition Claims W1 1.1, 1.2, and W1 2.1 (in relation to water ingress)**”.

It then describes the costs to which the claim relates said to be “... incurred as a result of a Latent Condition” being project delay costs, direct and disruption costs, and costs for collection and control of seepage.

41 The relevant provisions of the deed are:

“30.1 Latent Conditions

(a) Subject to clause 30.1(b), the Contractor bears the risk of all physical conditions and characteristics of the Site and its surroundings (including hydrological, surface and sub-surface conditions and characteristics) encountered during the execution of the Work under the Deed and is not entitled to any additional payment or adjustment to the Contract Price, or any extension of time, arising out of the actual conditions encountered.

(b)

(i) If the Contractor considers that it has encountered a Latent Condition which will impair or delay the completion of the Work under the Deed, it must immediately give the Principal’s Representative written notice.

(ii) The Principal’s Representative must, within 21 days of receipt of the written notice, determine whether a Latent Condition has been encountered and whether it will impair or delay the completion of the Work under the Deed and notify the Principal and the Contractor of the Principal’s Representative’s determination.

(iii) If the Principal’s Representative determines that a Latent Condition has been encountered and it will impair or delay the completion of the Work under the Deed, the Contractor will be entitled to:

- (A) an extension of time to the Date for Substantial Completion the Date for Practical Completion and the Date for Completion as the case may be) where it is otherwise so entitled under clause 34; and
- (B) be paid by the Principal any extra costs (except delay costs dealt with under clause 34.9) reasonable incurred by the Contractor after a notice is given under clause 30.1(b)(ii) arising from the Latent Condition, which will be determined by the Principal's Representative and added to the Contract Price. The Contractor's entitlement under this clause and clause 34.9 will be its only right to make a claim arising out of, or in way in connection with, the Latent Condition".

42 Then follows a section headed "**Basis of Claim/Entitlement**" in which the ground conditions asserted to constitute the latent condition under cl 30.1 of the deed which led to the water ingress are described. The ground conditions encountered are described thus:

"2. Downer encountered extensive, sub-horizontal, bedding plane shears that were linked to a rechargeable water source during excavation of the Tunnel".

(Bedding plane shears are, in lay terms, fractures or fissures.)

43 It next stated:

"3. The ground conditions encountered, as described below, were materially different to the ground conditions which should reasonably have been anticipated by a prudent, competent and experienced contractor. They did not result from inclement weather. (Refer page 20 of the Douglas Partners Report on Latent Conditions Claim dated **12 July 2005**).

4. The ground conditions encountered, as described below, were a Latent Condition within the meaning of the Deed".

44 The reference to the Douglas Partners Report in para 3 was to the following paragraphs thereof:

"G. OPINION

91. In my opinion the water ingress was due to draining of groundwater, not due to inclement weather.

92. In my opinion the inflow rates encountered were far higher than and differed materially from those that should have been anticipated by a prudent, competent and experienced contractor who had reviewed the Pre Contract Information.

93. Further, the presence of an extensive horizontal sheared zone with significant groundwater inflows between ch 464 and ch 573 should not have been anticipated by a prudent, competent and experienced contractor who had reviewed the Pre Contract Information. Those features, as encountered, differed materially from the ground conditions that should have been anticipated by a prudent, competent and experienced contractor who had reviewed the Pre Contract Information".

45 Further particulars of the basis of the claim were provided in the following terms:

"5. During the construction of the tunnel Downer encountered bedding plane shears at the following locations:

- design chainages 575 and 501,
- design chainages 572 to 467, and
- design chainages 421 to 404.

6. It became apparent that the water was entering the tunnel through those features and that those features:

- (a) were shears;
- (b) were permeable;
- (c) were laterally extensive;
- (d) occurred in a sub-horizontal orientation; and
- (e) were linked hydraulically with a rechargeable water source

7. At those features, Downer encountered significant water entry at the tunnel excavation face and, as tunnelling was proceeding down grade, that water collected at (rather than draining away from) the excavation face.

8. The result of Downer encountering the Latent Condition was that

- (a) significant water inflow occurred and continued to occur in a sustained fashion over a long length of the tunnel;
- (b) a high proportion of the water inflow occurred at or near the face of the tunnel during construction;
- (c) the water inflow disrupted and reduced productivity during the construction of the tunnel.

9 By reason of clause 30.1 (b) of the GCOC, Downer is entitled to an adjustment to the Contract Price comprising its additional costs arising from the Latent Condition.

10. More particularly, Downer is entitled to an extension of time and its extra costs reasonably incurred if a Latent Condition is encountered. (Refer GCOC clause 30.1 (b)(iii)(A) and (B))". ...

12. Downer relies on the Deed as if it is set out in full".

46 The next section was headed "Notices" which contained the following:

"Notices

1 Downer notified EA of the above circumstances and the changes required to the Works, as follows.

- (a) On 11 May 2002 Downer notified EA that it had been delayed due to increased seepage inflow to the tunnel ...
- (b) On 13 June 2002 Downer notified EA that the seepage had stabilised at around 3L/s and that it was now in a position to identify it as a latent condition ..."

- 47 The letter of 11 May 2002 from Downer to Energy is expressed to be a notice of a possible delay which may affect the progress of the work due to water seepage into the tunnel at a rate above 1.5 litres per second.
- 48 The letter of 13 June 2002 from Downer to Energy is expressed to be a notice under cl 30.1(b)(i) of the deed that Downer has encountered a latent condition which will impair or delay the completion of the work and a request under cl 30.1(b)(ii) for Energy's determination of these matters. Relevantly, it says:

“Clause 30 - Latent Conditions and Selection Of Equipment

We refer you to the definition of Latent Conditions contained in Clause 1.1 of the Deed.

In our opinion, the rate of groundwater inflow into the tunnel between CH 572 to CH 505 (and continuing) is the result of ground conditions that could not have been anticipated during our review of the Pre-Contract Information for this section of the tunnel

These ground conditions consisting of a horizontal feature in the bedrock are responsible for the volume of ground water entering the tunnel excavation.

Neither the Pre Contract Information nor our post tender investigations anticipated the intersection of such a water bearing feature at this location.

The inflow of groundwater at a rate of 3 litres per second is far in excess of the 0.25 litres experienced, at the intersection of the Great Sydney Dyke, during construction of the Eastern Suburbs Railway tunnels.

Notwithstanding comments made in GHD's letter, the fact that the Deed recognises ground conditions encountered during construction can differ from those anticipated by review of Pre-Contract Information, is evidenced by the inclusion of a Latent Conditions clause.

Further to the issues notified in our previous correspondence and in accordance with Sub clause 30.1(b)(i) of the Deed, we hereby give further notice that we consider the ground conditions encountered constitute a Latent Condition under the terms of the Deed.

The Deed is quite specific in the procedure to be followed if and when Latent Conditions are encountered and therefore in accordance with Clause 30.1(b)(ii) of the Deed and in the interests of all parties concerned, we request your determination as soon as is possible”.

- 49 The schedule included a section headed **“Further Documents in Support”**. The only document mentioned therein to which the Court was taken was the Douglas Partners Report referred to earlier which, relevantly, included the following:

“82. What were not and I believe, could not and should not have been anticipated (based on a review of the Pre-Contract Information) were the three bedding plane shears identified by Coffey Geosciences in their as built and Post Construction reports (References 22 and 23). The first two were intersected in the ventilation chamber, one extending from design chainage 575-501 (construction ch 644-570) and the other extending from design chainage 572-467 construction ch 678 - 573) while the third was intersected between design chainages 404-421 (construction chainages 741-724). Although it is not overly clear from CG's logging, it seems to me that the first bedding plane shear extends from design chainages 599 (not chainage 575) to design chainage 501 (construction chainages 644-546)”.

- 50 It was, of course, open to Downer to incorporate the supporting documentation in the payment claim for the purpose of clearly identifying the basis upon which its claim was made. For the purpose of any adjudication it was bound by the claim it propounded in the payment claim (**Multiplex** para 67, **John Holland** para 11; **Climatech** para 24).

- 51 Energy's payment schedule under s 14 in response to Downer's payment claim indicated that it did not propose to pay any of the amount claimed. In the section headed **“Overview”** it denied the allegation of the latent condition, and referred specifically to the locations nominated in the payment claim, apparently accepting that the location described as **“575 and 501”** should have been **“575 to 501”**.

- 52 Under the heading **“3. Payment Claim Schedule 1”** was included the following:

“3.3 Downer claims that during the construction of the tunnel it encountered bedding plane shears as design chainages 575-501, 572-467 and 404-421 that were linked hydraulically with a rechargeable water source through which water made its way into the tunnel. Downer alleges that this amounts to a Latent Condition and Downer relies on the Braybrooke Report.

3.4 EA denies that the ground conditions encountered by Downer amount to a Latent Condition.

3.5 No question of whether the groundwater conditions “should have been anticipated by a prudent, competent and experienced contractor who had reviewed the Pre-Contract Information” arises. That is because the uncertain groundwater conditions were anticipated by Downer, and were allowed for in its bid

*3.7 Further, or in the alternative, the groundwater conditions encountered by Downer should have been anticipated by a prudent, competent and experienced contractor. It is the opinion of Dr Pells that Downer should have anticipated that it would encounter bedding plane shears based on both the tender documents, and on literature published at the time, including literature from Downer's experts John Braybrooke of Douglas Partners, and Coffey Geosciences (**“Coffey”**). Dr Pells' company, Pells Sullivan Meynink (**“PSM”**) assessed the conditions of the tunnel for one of the unsuccessful tenderers and that assessment indicated:*

(a) the presence of bedding plane shears;

(b) that inflows could be expected to be in the range 7 to 10 L/sec; and

(c) that such shears and other joints and bedding features would therefore require grouting”.

- 53 The payment schedule was supported by a report of an expert, Dr P J N Pells (July 2005, p 10), which identified the latent condition from the particulars in the payment claim as groundwater inflows, the physical features of which were:
- “(a) Bedding plane shears were permeable and were “linked to a rechargeable water source during excavation of the tunnel”, and
(b) These bedding plane shears were at design chainages:
(i) 404 to 421
(ii) 467 to 572, and
(iii) 501 to 575 (which is the same interval as in (ii) but with the addition of 3m of tunnel)”.
- 54 He proceeded to deal with the situation in respect of each location. He expressed the view that the assertion that these bedding plane shears were linked to a rechargeable water source was incorrect on grounds that none was recorded at the specified locations and/or they did not produce sustained water inflows.
- 55 Downer lodged its adjudication application on 9 August 2005. The document included details of the project name and contract title. It identified the payment claim by reference to an amount of \$9,131,998.31, and the due date for payment as “26/7/05”. It identified the payment schedule with reference to the dates of service of the payment claim (“12/7/05”), and of the payment schedule (“26/7/05”) and to the scheduled amount (\$nil). It incorporated by reference Downer’s submissions and supporting documents.
- 56 The submissions included a section headed “E. Water Ingress Latent Condition (W1, 1.1, 1.2)” in support of the claim in respect of the latent condition. The introductory paragraphs asserted that the latent condition was constituted by ground conditions comprised of extensive, sub-horizontal, bedding plane shears which were linked to a rechargeable water source, which resulted in water ingress to the tunnel greater than should have been anticipated (paras 114-116).
- 57 Further particulars were stated in the sub-section headed “E.4. The Latent Condition which Downer encountered” which, relevantly, stated:
- “127 During the construction of the tunnel, Downer encountered bedding planes at the following locations:
(1) design chainages 570 to 501;
(2) design chainages 498 to 467; and
(3) design chainages 421 to 313,
(hereafter referred to as the ‘**Relevant Locations**’).
128 It became apparent during construction that the water was entering the tunnel through those bedding planes, and that those features: ...
(5) were linked hydraulically with a rechargeable water source. ...
131 Those features (and the conditions which resulted from them) directly and immediately resulted in decreased productivity by reason of the need to dispose of the water and the increased repair and maintenance required on the excavation equipment due to the abrasive nature of the resultant slurry”.
- 58 It also referred to the supporting statutory declaration of Mr David Bamforth, Downer’s former project manager, in which (para 27ff) he asserted that there were water inflows between chainages 400 and 582.

Energy’s submissions

- 59 Energy submitted that the adjudication application differed from the payment claim in that:
- (i) the adjudication application stated the payment claim amount as \$9,131,998.31 whereas the amount claimed in the payment claim was \$9,115,780.02, a difference of \$16,218.29; and
(ii) the submissions which accompanied the adjudication application specified bedding plane shears located at chainages 421 to 313 whereas the location of those specified in the payment claim was at chainages 421 to 404, a difference of 91 metres. Furthermore, at chainage 313 the bedding plane shears were linked to the Great Sydney Dyke which was a rechargeable water source.
(Although the locations specified in para 127(1) and (2) of the submissions differed from corresponding locations specified in the payment claim, Energy did not rely upon these differences for the purpose of its argument.)
- 60 Energy referred to Dr Pells’ report of 12 August 2005 in which he expressed the view that the chainage changes were very substantial.
- 61 Energy submitted that the adjudication application was referable to a claim substantially different from that stated in the payment claim. It was put that under s 17(1) of the Act the adjudication application must be expressed to be an application in respect of the payment claim to which the payment schedule responded, and not for a different claim. It was put that, in the circumstances, the adjudication application was not one for the adjudication of Downer’s payment claim, was outside the requirement of s 17, and was thus invalid. It was put that as it is a condition essential to an adjudicator’s jurisdiction that a valid application has been made (**Brodyn** para 53) the inevitable consequence in this case was that the adjudication was a nullity.

Downer’s submissions

- 62 For the purpose of deciding this issue it is unnecessary to recite Downer’s submissions in any detail. In short, it was submitted that the adjudication application was valid and complied with the requirements of s 17(3) in that, relevantly, it identified the payment claim and the payment schedule to which it related (s 17(3)(f)). It was put that as the accompanying submissions envisaged by s 17(3)(h) were to be read with the application itself there was ample material for the purpose of identification which was all that the statute requires. Particular reference

was made to the contents of the Executive Summary and section B.1 which referred in terms to the payment claim included in volume 2 of the accompanying documents, and section E concerning the "Water Ingress Latent Condition" as satisfying entirely the requirements of s 17(3)(f).

Decision

- 63 In my opinion Energy's submissions must be rejected. I have earlier held (para 27) that an adjudication application is the procedural step taken for the commencement of adjudication proceedings, that its contents must be sufficient to identify the payment claim and the payment schedule (s 17(3)(f)), and that the test for sufficiency is the same as for a payment claim and a payment schedule. In other words, an adjudication application should sufficiently identify the payment claim and the payment schedule relied upon by the claimant so as to enable the respondent to understand which particular payment claim is for adjudication. The question in this case really depends upon the proper construction of the material provided to the respondent to which a commonsense and practical approach is to be taken. Its resolution turns on whether the adjudication application identified the payment claim, not on whether the claim addressed in the accompanying submissions was, in fact, different to the payment claim.
- 64 In my opinion, there is nothing in the language of s 17 which requires precise correspondence between the details in the adjudication application with its supporting documentation and the payment claim as essential to the validity of the application, and of the adjudication determination which follows. Had this been its intention no doubt the legislature would have included clear words to express it.
- 65 In my opinion when Downer's adjudication application and supporting documentation are taken as a whole, the payment claim and payment schedule are clearly identified irrespective of the differences upon which Energy relied. I accept Downer's submissions on this issue. Accordingly, I find that the adjudication application was properly made under s 17(1) and (3) of the Act, and that the challenge to its validity has failed.
- 66 Although it is unnecessary for me to do so, in deference to the parties I should express my views as to whether the evidence establishes the differences which Energy asserted.
- 67 The first matter complained of was a difference of \$16,218.29 between the amount in the adjudication application and the amount in the payment claim. In submissions Downer identified the explanation for the discrepancy which was included in the submissions with the adjudication application (Ex PTP5 p 1290), and also referred to the fact that the amounts claimed as costs in relation to water ingress in the payment claim and in the adjudication application were identical. Unsurprisingly, this evidence was uncontradicted. It enables me to find that whether the relevant issue is the total amount of the payment claim or the amount of the water ingress component, neither differed from that identified in the adjudication application.
- 68 As to the matter referable to the locations of the bedding plane shears, I accept Energy's submissions that the evidence establishes a substantial difference between the assertions and particulars in the payment claim and those in the submissions with the adjudication application. In my opinion, the particulars in the adjudication application of bedding plane shears at chainages 421 to 313 which link them to the Great Sydney Dyke, a rechargeable water source, described ground conditions which were substantially different from those described in the payment claim. Such difference is apparent from a reasonable reading of the documents.

The adjudication determination claim

- 69 Energy contends that the adjudicator failed to determine the claim on the basis specified in the payment claim, and proceeded to determine a question which was included neither in the payment claim nor the adjudication application, and thereby fell into jurisdictional error.
- 70 In its adjudication response, Energy pointed out that the adjudication application advanced a latent condition claim different from that relied upon in the payment claim, and submitted that it should be ignored. It identified the differences between the locations of the bedding plane shears specified in the payment claim and in the adjudication application, and complained that new material was included in support of the new claim. It contended that the application was not one for adjudication of the payment claim, and that as it had been denied the opportunity of meeting the new case in its payment schedule, it would be denied natural justice if the adjudication proceeded. Included was Dr Pells' report of 12 August 2005 in which the chainage changes were described as very substantial, and as extending the location to the Great Sydney Dyke which was a rechargeable water source.
- 71 Nevertheless the adjudicator proceeded to make a determination. He rejected Energy's submission that the claim was a new claim, and held that the claim had always been about excess water ingress. His view was that the material relied upon by the parties established that the dispute concerned the amount of water ingress.
- 72 The following passages from the adjudication determination relate to the latent condition claim:
"63 The claims are made in relation to water ingress allegedly being greater than anticipated. In the Payment Claim and in the Adjudication application the Claimant submitted that "**extensive, sub-horizontal, bedding plane shears that were linked to a rechargeable water source**" were encountered during excavation of the Tunnel. The Claimant's claimed that water was entering the tunnel through those features and that it encountered significant water entry at the excavation face.
64 The Claimant says that the ground conditions encountered were materially different to the ground conditions which should reasonably have been anticipated by a prudent, competent and experienced contractor and that the

conditions therefore were Latent Conditions for the purpose of the Contract. In the Payment Schedule the Respondent resists these Latent Conditions claims for the following reasons:

- a) the latent condition on which claims are based are not latent conditions;
- b) (i) The Claimant expressly anticipated substantial water ingress and took the contractual risk of dealing with those conditions by promising to adopt an "**Observational Approach**";
(ii) in the alternative the groundwater conditions encountered, based on the Pre-Contract information, should have been anticipated by a prudent, competent, and experienced contract; ...
- e) there was no substantial ongoing water ingress at the three nominated locations;
- f) the latent conditions in the "**Tozer Report**" are not the same latent conditions analysed in the "**Braybrooke Report**"; ...

Was Substantial Water Ingress Anticipated by The Claimant

68 The Respondent submitted that the Claimant expressly anticipated substantial water ingress and took the contractual risk of dealing with those conditions by promising to adopt an "Observational Approach". ...

70 This paragraph from the Claimant's tender suggests to me that the Claimant did not anticipate substantial water ingress generally.

72 There is no contemporaneous document in the parties' submissions which clearly states that the Claimant anticipated, at the time of tender, water ingress of the magnitude encountered.

73 Based on what is stated in the tender and on the documentation provided to me I cannot find any material which supports a conclusion that the Claimant did anticipate the rate of water ingress which was encountered. The essence of the "Observational Approach" was that the Claimant wanted to wait and see what conditions were actually encountered. There is no doubt that some water inflow was expected but not the levels actually encountered. This indicates to me that the conditions were not anticipated and that there was substantial ongoing water ingress which is acknowledged in part of the Pells Sullivan Meynink Report provided to EnergyAustralia on 20 May 2003 twelve months after the water ingress problem was first notified. That report in part says:

"About 3.5 litre/sec of groundwater is seeping into the Energy Australia tunnel which runs from Surry Hills to the Haymarket. The tunnel was designed as a drained structure and therefore groundwater infiltration was expected. However, the quantity is greater than was originally anticipated".

Should the Amount of Water Ingress Have Been Anticipated

74 Having decided that the Claimant did not anticipate the amount of water flow actually encountered it is necessary to decide whether the Claimant "should have" anticipated the amount of water which it encountered. ...

83 There is a large body of other documents which relate to the Latent Conditions Claims which I have considered carefully but which I have not seen necessary to set out in this determination. I have paid particular attention to the documents which were in existence prior to the contract. The few extracts above are sufficient in my view to support the conclusion that as at 20 May 2003, about 3.5 litre/sec of groundwater was seeping into the tunnel and that this quantity is greater than was originally anticipated and in the Pre-Contract period the total long term inflow, for the tunnel below the water table should have been anticipated as approximately less than 1 L/sec) although the short term inflow would likely be greater than the long term and that the maximum inflow would be approximately 1 L/sec.

84 My conclusion is that, although low levels of water flow in the tunnel generally and higher flows in the vicinity of the Great Sydney Dyke should have been anticipated, it cannot be said that the Claimant should have anticipated the level of water ingress encountered. ...

New Claim and Notice

86 The Respondent made much of the different ways in which the Latent Condition was described at various times. Although the claim has always been in respect of the excess water ingress, the geological feature at the alleged causes was originally described simply as "a horizontal feature in the bedrock". Although the Payment Claim and the Adjudication Application identify the cause of the water ingress Latent Condition as "extensive, sub-horizontal, bedding plane shears that were linked to a rechargeable water source" it is the same claim for a Latent Condition for excess water ingress as was notified in accordance with Clause 30 on 11 May 2002.

87 There were errors in the Payment Claim regarding the chainages at which the excess water ingress is claimed to have occurred. Notwithstanding the Respondent's submission that this amounted to the claim in the Payment Claim being a different claim to that in the Adjudication Application, the many volumes of supporting material provided by both parties deal with only two latent conditions. These two latent conditions are:

- a) the present group of claims under consideration which relate to the amount of water ingress; and
- b) the claims relating to the composition of the groundwater.

88 The Payment Claim, Payment Schedule, Adjudication Application and Adjudication Response clearly address the same claim for the increased water ingress. The claim in this adjudication is not a new claim. The issues are extensively ventilated by the parties in the large body of supporting documents provided by each party.

97 My conclusion, as expressed above, is that the level of groundwater ingress encountered is a Latent Condition for the purpose of the Contract notwithstanding that the Principal's Representative determined under Clause 30.1(b)(ii) that it was not. Having regard to the Respondent's submissions and supporting documents I see no

acceptable reason why the Claimant should not be paid the amounts as determined by the parameters set out in Clause 30.1”.

Energy's submissions

- 73 Energy submitted that Downer's entitlement to claim under cl 30.1(b) of the deed for costs arising from latent conditions depends upon showing that they were ground conditions not resulting from inclement weather which would not have been anticipated by a prudent, competent, and experienced contractor, and which will impair or delay the completion of the work. It emphasized that upon the proper construction of cl 30.1 it is necessary to show that the costs claimed arose out of, or resulted from, the latent conditions encountered.
- 74 It was submitted that it is evident on its face that the payment claim was drafted with cl 30.1(b) in mind. It was put that Schedule I and the accompanying documents identified a claim for costs in relation to water ingress resulting from latent conditions being permeable bedding plane shears linked to a rechargeable water source at specified locations. It was put that the particulars of the basis of the claim asserted in terms that significant water entry was encountered at those bedding plane shears as a result of which, inter alia, the water inflow disrupted and reduced productivity during the construction of the tunnel, and Downer incurred additional costs, and completion was delayed. It was argued that the letter of 13 June 2002 from Downer to Energy (para 48 above) and the passage from Douglas Partners Report of 12 July 2005 (para 44 above) effectively particularized the claim that the latent condition relied upon was constituted by ground conditions consisting of three bedding plane shears at specified locations which allowed the inflow of groundwater and were unanticipated within the meaning of the definition. Further, it was put that, consistent with the terms of the definition, particulars (2), (3) and (4) of the basis of the claim should be understood as identifying only the bedding plane shears, and not the water inflow, as the unanticipated ground conditions relied upon, and particulars (5) and (6) as specifying the locations at which they were linked to a rechargeable water source relevant to the assertion in particular (3) that they did not result from inclement weather. It was said that neither in the letter of 13 June 2002, which was given as a notice under cl 30.1(b)(i) of the deed, nor in Schedule I, was it asserted that the ground conditions consisted of water.
- 75 Energy submitted that its payment schedule responded directly to the matters relied upon in support of the payment claim. It denied the existence of latent conditions at each of the nominated locations (paras 51, 52 above) and that there was ongoing water ingress at any of them. Its denial was supported with detailed reasons including Dr Pells' report of July 2005 (paras 53, 54 above). The payment schedule also contended that the ground water conditions had in fact been, or alternatively, should have been, anticipated by Downer.
- 76 Energy then submitted that the ambit of the issues for determination was limited by the payment claim and payment schedule. Accordingly, it put that the core dispute concerned the existence of a latent condition with the features, and situated at the locations, specified in the payment claim which resulted in water ingress in relation to which Downer incurred additional costs. It was put that no assertion was made in the claim documents that the level of water ingress was the, or part of a, latent condition relied upon.
- 77 It contended that the adjudicator failed to determine Downer's claim based upon bedding plane shears as the latent condition, but dealt with it as a claim based upon the unanticipated level of water ingress as the latent condition, an issue not included in the payment claim, or met in the payment schedule, or dealt with in submissions.
- 78 Energy accepted that at the commencement of his analysis of the Schedule I claim (determination (D) para 63) the adjudicator correctly saw the claim for water entry through bedding plane shears linked to a rechargeable water source encountered during excavation of the tunnel. It was put that, nevertheless, thereafter (D para 68ff) the questions posed and decided were whether substantial water ingress was anticipated by Downer, and whether the amount of water ingress should have been anticipated. As to the first, he found that Downer did not anticipate the amount of water actually encountered (D para 73). After reviewing the documentation he stated that it indicated to him "... that the conditions were not anticipated and that there was substantial ongoing water ingress ...". As to the second, he concluded (D para 84) that "... it cannot be said that the Claimant should have anticipated the level of water ingress encountered".
- 79 It was put that, in effect, the adjudicator erroneously proceeded to determine whether the water inflow was the latent condition upon which the claim was based whereas Downer had never claimed that it was. It was also submitted that his departure from the relevant question is apparent from his finding that the latent condition with which he was concerned was "the water ingress Latent Condition" (D para 86), and that this was the same claim addressed in the payment claim, payment schedule, adjudication application and adjudication response (D para 88).
- 80 Finally, Energy submitted that it was entitled to relief because the adjudicator did not determine the real dispute between the parties, and/or because it had been denied natural justice when the adjudicator failed to provide an opportunity to put submissions as to the basis upon which he in fact determined the claim. In essence it was put that, in the circumstances, the determination failed to comply with basic requirements for the existence of a determination, and/or the adjudicator failed to make a bona fide attempt to exercise his power, and/or there was a denial of natural justice with the consequence that the determination was void (*Brodyn* paras 53, 55).

Downer's submissions

- 81 The thrust of Downer's submission was that at all relevant times the issue for adjudication was whether or not the level of water encountered and unanticipated at the time of tender was a latent condition, or part of the ground conditions which constituted a latent condition within the meaning of cl 30.1 of the deed. It was put that it was

evident from Schedule I and its accompanying documents, and from the subsequent documentation under the Act that the entry of water was the critical component of the latent condition either of itself, or as part of the ground conditions which included the bedding plane shears.

- 82 Downer submitted that Schedule I was to be read with the Douglas Partners Report and the other documents to which it referred. It would be understood that the opinion expressed in the report was that the high groundwater inflow rates encountered were latent conditions, being unanticipated conditions not due to inclement weather (report paras 2, 3, 91-93). Further, it was said that the letter of 11 May 2002 from Downer to Energy concerned delay from increased water ingress, and the effect of the letter of 13 June 2002 was to serve notice of a latent condition claim based on unanticipated inflow. Accordingly, it was put that when read as a whole the information in the payment claim made plain to Energy that the latent conditions relied upon were not bedding plane shears at specified locations, but the water ingress through them, and that the costs claimed were in relation to such water ingress. Further, it was submitted that particulars (6) and (7) identified the bedding plane shears at which the water ingress condition was encountered, and that references to them would not be reasonably understood to be an assertion that they themselves were the latent conditions relied upon.
- 83 Downer then turned to the payment schedule and contended that it evidences Energy's understanding from the outset that the latent condition was in respect of the water ingress. It put that statements in the "Overview" e.g. para 1.8, challenged the claim that the water ingress was unanticipated which, ultimately, was an issue determined by the adjudicator for which he was criticised. To like effect were the assertions in paras 3.3 – 3.5 of the Schedule in response to the payment claim which indicated Energy was not contesting the claim on the basis that the latent condition consisted of the bedding plane shears. It was said that Dr Pells' report supported the submission as it dealt only with matters pertaining to ground water quantity, and its executive summary refuted the claim that water inflow through the bedding plane shears was unanticipated. It was put that, in responding to the Douglas Partners Report, his assessment of the latent condition claim (section 7) indicated that he identified the latent condition as the groundwater inflow. As the report proceeded to analyse and disagree with Downer's expert, it was put that Energy had joined issue on the latent condition claim of which a critical component was recognised to be water ingress.
- 84 With reference to the adjudication application Downer submitted that no different claim was advanced by reason of the alteration in the chainages. It was argued that its contents made plain that the contractual basis and quantum of the claim, and the work for which payment was sought, were the same as stated in the payment claim.
- 85 Downer then submitted that by its adjudication response Energy addressed what it asserted to be a different claim based upon the different location of the bedding plane shears, and advanced reasons on the facts in support of its contention that the adjudicator was being asked to determine a claim different from that stated in the payment claim. Reference was made, for example, to Dr Pells' report of 12 August 2005 which responded to Douglas Partners Report of August 2005 from Mr John Braybrooke in which he noted "... In order to address Braybrooke's comments it must be remembered that the claimed latent conditions are for sustained flows from bedding plane shears because they are claimed to have been connected to a "rechargeable water source"". Alternatively, it was put that if there was a divergence between the payment claim and the adjudication application, and the adjudicator had proceeded to determine the claim raised in the adjudication application and was wrong to do so, such error was one of fact or law and would not amount to a failure to comply with the requirements essential to the validity of his determination i.e. such error would be non-jurisdictional as explained in *Brodyn* paras 55, 56.
- 86 The detail of Downer's careful analysis of the adjudication determination has been recorded in the transcript (T pp 86-90). In essence it was put that the adjudicator's reasons demonstrate that he made a bona fide effort to understand and consider the issues. It was put that paras D 63 and 64 demonstrate that the adjudicator correctly understood from the payment claim, payment schedule and the adjudication application that the issue was water entry to an unanticipated level, and paras D 86ff his due consideration to Energy's contention in the adjudication response that Downer was propounding a new claim, following which he properly rejected it. Alternatively, if he was wrong, his error was not sufficient to render the determination void (*Brodyn* paras 55, 56).
- 87 As to the issue of natural justice, it was put that from the outset the issue as to water ingress being the latent condition was fully addressed by each party's experts and, accordingly, even if the adjudicator determined the wrong question there was no procedural unfairness to Energy in the circumstances of this case.

Decision

- 88 The first step is to ascertain from the payment claim the basis upon which the claim for costs in relation to water ingress was made. For the following reasons I accept generally Energy's submissions that Downer asserted as the basis of its claim the existence of latent conditions consisting of bedding plane shears at specified locations which resulted in water entry.
- 89 Schedule I of the payment claim commences with the description that it relates to delay and other costs incurred as a result of a latent condition. It was common ground that the contractual basis of the claim was cl 30.1(b) of the deed.
- 90 Latent conditions are defined as any ground conditions, excluding ground conditions resulting from inclement weather, wherever occurring, which differ materially from those which should have been anticipated by a prudent, competent and experienced contractor. Clause 30.1(b)(i) requires the contractor to give notice to the

principal's representative if it considers that it has encountered a latent condition which will impair or delay completion of the work. Clause 30.1(b)(ii) requires the principal's representative, within 21 days of receipt of the notice, to determine whether a latent condition has been encountered and whether it will impair or delay completion of the work, and to notify the parties of its determination. Clause 30.1(b)(iii)(B) founds the entitlement of the contractor to be paid extra costs incurred after the notice is given arising from the latent condition if the principal's representative has determined that a latent condition has been encountered and it will impair or delay completion of the work. The effect is that a contractor which claims extra costs under these provisions needs to show that, in fact, it encountered latent conditions as defined, which impaired or delayed completion of the work, and that the costs arose or resulted from the latent conditions encountered.

- 91 It is apparent from the particulars included in the section of Schedule I headed "*Basis of Claim/Entitlement*" that Downer intended to specify the facts and matters relied upon to establish that the ground conditions it encountered were latent conditions as defined, which impaired or delayed completion of the work with the consequence that it incurred additional costs in relation to water ingress.
- 92 Particulars (2), (3) and (4) identified the ground conditions relied upon in terms of the latent condition definition, and particulars (5) and (6) provided the reader with a detailed description of location and features. Particulars (6) and (7) alleged water entered through, and was encountered at, those features. In my opinion it is clear from the context in which they appear that the terms "ground conditions", "those features", and "Latent Condition" refer to bedding plane shears that were asserted to be linked to a rechargeable water source at each of the locations specified in particular (5) with the characteristics specified in particular (6). Mindful that an element of the definition of latent conditions is the exclusion of the ground conditions resulting from inclement weather, the reader of Schedule I would understand that in describing the bedding plane shears as linked to a rechargeable water source (particulars (2), (6)(e)) Downer was stating the fact relied upon to bring these features within the definition. By these particulars Downer clearly identified the bedding plane shears as the latent conditions relied upon.
- 93 Particular (8) includes particulars of what was claimed to be "... *the result of Downer encountering the Latent Condition ...*", being water inflow in respect of which it incurred additional costs and completion was delayed. Particulars (9) and (10) identified clause 30.1(b) as the basis of its entitlement to payment.
- 94 In the section headed "Notices" reference was made to the letter of 11 May 2002 and to the cl 30.1(b)(i) notice of 13 June 2002 in further identification of the basis of the claim. The relevant text of the notice is at para 48 above. The letter drew attention to water entry which might cause delay. The notice, in terms, described the latent condition which Downer asserted it had encountered as consisting of a horizontal feature in the bedrock located between chainages 572 and 505. Its purpose, under the contract, was to require Energy to undertake the twofold task under cl 30(1)(b)(ii) namely, to determine whether the alleged condition had been encountered and, if so, whether it would impair or delay completion of the work. Accordingly, in the notice (and in the Schedule I particulars) Downer identified the respects in which the latent conditions resulted in impairment or delay by asserting they were responsible for the volume of groundwater entering at the specified locations. It is relevant that neither in the notice nor the Schedule I particulars was it alleged, expressly or by implication, that the latent condition relied upon was the unanticipated volume of water ingress.
- 95 Consideration of the whole of Schedule I (including, as part of it, the documents referred to) with regard to the principles stated in the cases leads to the conclusion that the basis of the claim specified by Downer to be answered by Energy, and to be determined by the adjudicator, was substantially the same which Downer required Energy to determine under cl 30(1)(b)(ii) of the deed, namely whether the bedding plane shears were latent conditions and, if so, whether the water ingress arose from them.
- 96 I have not overlooked the passages from the Douglas Partners Report referred to in Schedule I upon which Downer relied on this issue. In my opinion, read in the context of the other matter in Schedule I, the report does not justify the conclusion that the latent conditions identified were water ingress and not bedding plane shears. The cl 30.1(b)(i) notice distinguished between groundwater inflow and ground conditions. It claimed that the groundwater inflow was the result of the ground conditions consisting of bedding plane shears which constituted a latent condition. The Schedule I particulars were consistent with the claim, and the distinction between "ground condition" and "groundwater inflow" made in the notice.
- 97 For the purpose of the Douglas Partners Report, the brief was to provide an opinion "... *as to what groundwater conditions that (sic) should have been reasonably anticipated by a prudent ... contractor ...*" (report p 4). As I understood it, the report dealt with that question. To the extent that the relevant ground conditions were considered the view was expressed that the three bedding plane shears could not, and should not, have been anticipated (report paras 82, 93). A similar view was expressed about the water ingress and groundwater conditions (report paras 91, 92). In my opinion it is improbable that reference to these opinions would cause the reader to conclude that the groundwater conditions, and not the bedding plane shears, constituted the latent conditions relied upon as the basis of the claim.
- 98 The relevant matter from Energy's payment schedule is set out in paras 51-54 above. In my opinion it is plain from the face of the payment schedule (including Dr Pells' report) that the reasons provided pursuant to s 14(3) of the Act show that Energy understood from Schedule I that Downer's claim was based on the allegation that the bedding plane shears constituted latent conditions which attracted the application of cl 30.1(b) of the deed. In para 3.4 of its schedule Energy expressly denies that the ground conditions, the bedding plane shears, amount to a latent condition. In paras 3.5 and 3.7 it joins issue with the view expressed in the Douglas Partners Report that

the groundwater conditions should not have been anticipated. In my opinion simply because Energy challenged, with Dr Pells' support, the claims about groundwater expressed in the Douglas Partners Report does not support Downer's submission that Energy understood from the payment claim that the water inflow was the latent condition.

- 99 The issues for determination were those disclosed in the payment claim and the payment schedule (**Multiplex** paras 67, 68; **Climatech** paras 24, 25; **Energetech** para 24). Submissions in support of an adjudication application or an adjudication response are to be taken as supportive of, but not part of, a payment claim or a payment schedule as the case may be (**John Holland** paras 25, 30). Thus it is necessary to ascertain the issues in dispute uninfluenced by accompanying submissions.
- 100 For the reasons given, I accept Energy's submission that the core dispute concerned the existence of latent conditions consisting of bedding plane shears with the features, and situated at the locations, specified in the Schedule I particulars, and whether such conditions resulted in water ingress for which Downer incurred additional costs.
- 101 I turn now to consider the adjudication determination, the relevant passages of which are at para 72 above.
- 102 The adjudicator (D para 92) found that the level of groundwater encountered was a latent condition for the purpose of the contract notwithstanding that the principal's representative determined under cl 30.1(b)(ii) that it was not. As pointed out in Energy's submissions, the adjudicator's reasons (D para 68ff) disclose that he proceeded on the understanding that the latent condition specified in the payment claim as the basis of entitlement to payment under the deed was excess water ingress. Accordingly, and mindful of the definition of latent conditions, his analysis of the documents before him was directed to the questions whether the water ingress was, or should have been, anticipated. He found that the conditions, being the levels of water ingress actually encountered, were not anticipated (D para 73), and that it cannot be said that they should have been (D para 84).
- 103 The reasons show that the adjudicator was alive to Energy's submission in support of its adjudication response protesting that in the adjudication application Downer advanced a latent condition claim different from that relied upon in the payment claim in that the chainages at which the bedding plane shears were located were different. Notwithstanding, he went on to say:
- "86. ... Although the Payment Claim and the Adjudication Application identify the cause of the water ingress Latent Condition as **"extensive, sub-horizontal, bedding plane shears that were linked to a rechargeable water source"** it is the same claim for a Latent Condition for excess water ingress as was notified in accordance with Clause 30 on 11 May 2002.
- 87 There were errors in the Payment Claim regarding the chainages at which the excess water ingress is claimed to have occurred. Notwithstanding the Respondent's submission that this amounted to the claim in the Payment Claim being a different claim to that in the Adjudication Application, the many volumes of supporting material provided by both parties deal with only two latent conditions. These two latent conditions are:
- a) the present group of claims under consideration which relate to the amount of water ingress; and
b) the claims relating to the composition of the groundwater.
- 88 The Payment Claim, Payment Schedule, Adjudication Application and Adjudication Response clearly address the same claim for the increased water ingress. The claim in this adjudication is not a new claim. The issues are extensively ventilated by the parties in the large body of supporting documents provided by each party".
- 104 In my opinion these statements demonstrate, and I find, that the adjudicator failed to understand, and to determine, Downer's payment claim.
- 105 The adjudicator's reasons indicate that his approach was coloured by his understanding of the cl 30(1)(b)(i) notice to Energy. (In D para 86 he stated the date of the notice as 11 May 2002. I accept that he intended to refer to the notice of 13 June 2002 as the quotation in the immediately preceding paragraph (D 85) was taken from it.) It appears that he understood it to be notice of a claim by Downer that excess water ingress was a latent condition under the deed. For reasons earlier given, in my view he was wrong to do so.
- 106 In addition, it appears that his understanding was also the product of consideration of the payment claim, payment schedule, adjudication application, adjudication response and supporting material including submissions. He says that these documents demonstrate that the parties addressed only two latent conditions, one being that which related to the amount of water ingress. He might have concluded otherwise had his consideration been limited to the payment claim and to the payment schedule for the purpose of identifying the basis of the claim and the true ambit of the dispute.
- 107 It follows that, in my opinion, the adjudicator failed to determine the payment claim the basis of which was bedding plane shears as the latent conditions, but instead determined a claim that was substantially different from it based on what he found was a latent condition consisting of excessive water ingress.
- 108 The remaining issue is whether the failure to determine the payment claim has the effect that the determination is void.
- 109 In **Brodyn** (para 53) Hodgson, JA identified some basic and essential requirements for the existence of an adjudicator's determination. He concluded that the legislature did not intend that exact compliance with all the more detailed requirements of the Act was essential to the existence of a determination (**Brodyn** para 55). His

view is that compliance with the requirements of s 22(2) is not a pre-condition of the existence of any authority to make a decision and that "... it is sufficient to avoid invalidity if an adjudicator either does consider only the matters referred to in s 22(2), or bona fide addresses the requirements of s 22(2) as to what is to be considered" (**Brodyn** para 56).

- 110 In **The Minister for Commerce**, His Honour said (para 49) that s 22(2) requires the adjudicator to consider the provisions of the Act and the provisions of the contract and so long as he does this, or at least bona fide addresses the requirements of s 22(2) as to what is to be considered, an error of fact or law does not render the determination invalid.
- 111 His Honour provides guidance as to the application of these principles in **Climatech** in which he said:
"24. However, I accept that what is referred to an adjudicator for determination is a claimant's payment claim, and what an adjudicator is to determine is the amount of the progress payment to be paid on the basis of that claim and on the basis of other considerations in s.22(2) of the Act. Accordingly, the task of the adjudicator is to make a determination within the parameters of the payment claim, although that is not to say that, if an adjudicator were to make an error which can later be seen as taking the determination outside those parameters, it necessarily invalidates the determination".
- 112 His Honour proceeded (**Climatech** paras 25–27) to emphasize the importance of the identification of the basis of a claim which I take to be the core issue for consideration and determination under s 22(2). It follows, in my opinion, that it is an essential requirement that the adjudicator must consider and determine whether the specified basis of the payment claim has been established, and a failure to do so is a failure to meet the mandate of s 22(2)(c). Support for this view is derived from the scheme of Divs 1 and 2, Pt 3 of the Act by which the ambit of the issues for determination is confined by the payment claim and the payment schedule.
- 113 The discharge of the statutory duty requires the adjudicator to direct his mind to the terms of the payment claim itself to ascertain the basis upon which the claim is made and, having done so, to determine the payment claim with regard to other matters in s 22(2). As held in **John Holland** (para 25) supporting submissions cannot constitute a payment claim or part of it.

Conclusion

- 114 In the present case the adjudicator failed to determine Downer's payment claim the basis of which was the latent conditions consisting of the bedding plane shears which resulted in excessive water ingress. He made a determination in respect of a substantially different claim. As a result, the determination lacked a basic and essential requirement for its existence as it was not the adjudication of the payment claim. There has not been an adjudication of the payment claim within the meaning of the Act and, accordingly, the determination is void.
- 115 In addition, the outcome of his determination indicates a failure to consider the matters to which s 22(2) refers. The requirement to make a bona fide attempt to exercise the statutory power obliges the adjudicator to attempt to understand and deal with the real issues as disclosed in the payment claim and the payment schedule, assisted by the submissions (**Brodyn** para 55; **Timwin** para 38). Although it is apparent that the adjudicator addressed the parties' submissions as to the existence of latent conditions, his failure to deal with those directed to bedding plane shears, which went to the core of the claim, supports the finding that he did not give due regard to Energy's submissions on that issue. In the circumstances my conclusion is that his reasons indicate a fundamental failure on his part to attempt to understand the basis of the claim in the exercise of his statutory power. The consequence is that the determination is void on the additional ground that it was not the product of a bona fide exercise of power.
- 116 In my opinion Energy has also established that it was denied natural justice in the sense explained in **Brodyn** (para 55). The adjudicator made his determination of a claim the basis of which was markedly different from that specified in the payment claim and addressed in the payment schedule. Energy was afforded no opportunity to put its case in response to the approach taken by the adjudicator in the course of the determination process. I find that, in all the circumstances, there was a substantial denial of the measure of natural justice that the Act requires to be given, with the consequence that the determination is void on this ground.
- 117 I find that Energy has established its entitlement to a declaration that the determination of the adjudicator dated 4 October 2005 purportedly made pursuant to s 22 of the Act is void, and to appropriate consequential orders.
- 118 In the circumstances it is appropriate that I direct Energy to bring in short minutes, and to afford the parties the opportunity to address me concerning what further orders are appropriate and, failing agreement, in relation to costs. Arrangements should be made with my associate by 24 February 2006 for the re-listing of the matter.