

**Judgment : Giles JA; Santow JA; Tobias JA.** New South Wales Court of Appeal. 19<sup>th</sup> March 2007

1. **GILES JA:** Downer Construction (Australia) Pty Ltd ("Downer") contracted with Energy Australia ("EA") to design and construct a tunnel to carry electrical cables. It served on EA a payment claim under the Building and Construction Industry Security of Payment Act 1999 ("the Act") and, when EA provided a payment schedule indicating that it proposed to pay nothing, applied for an adjudication. The adjudicator determined that EA was to pay an amount to Downer.
- 2 EA obtained at trial a declaration that the adjudicator's determination was void. The central questions on appeal were whether the determination was void because -  
(a) the application was not for adjudication of the payment claim; alternatively  
(b) the determination was not of the payment claim.
- 3 The payment claim included a claim for extra costs arising from latent conditions. In brief, EA contended (and Downer contested) that with respect to this claim the adjudication application differed from the payment claim in the factual basis for the latent conditions, and that the adjudicator founded his determination on that different factual basis. It said that either of those matters was fatal to the determination.
- 4 The trial judge, Nicholas J, declined to hold that the adjudication application itself was vitiated by difference from the payment claim. He held, however, that the adjudicator had made a determination in respect of a substantially different claim from the payment claim, and that the determination was void for that reason; and that in doing so the adjudicator had failed to understand the basis for the claim and had not made the determination in the bona fide exercise of his power, and had denied natural justice to EA, so that the determination was void for those reasons also.
- 5 There were two appeals and a cross-appeal, in the following circumstances.
- 6 The adjudication amount was \$6,040,579.05, plus interest. On 11 October 2005 EA commenced proceedings 55080105 in the Equity Division, claiming a number of declarations adverse to the validity of the adjudication application and the adjudicator's determination. On 14 October 2005 Barrett J refused to grant an interlocutory injunction to restrain Downer from obtaining an adjudication certificate. Downer obtained an adjudication certificate on 17 October 2005, and on 18 October 2005 filed it as a judgment in the Supreme Court in what became proceedings 14803105 in the Common Law Division. The judgment was ordered on 20 October 2005.
- 7 EA paid into court in the Common Law Division proceedings the amount of the judgment plus interest, \$6,164,204.05. The Equity Division proceedings were amended to claim an order that the judgment in the Common Law Division proceedings be set aside and the money be paid out to EA.
- 8 The Equity Division proceedings were heard on 30 October and 1 November 2005. The trial judge gave judgment on 15 February 2006, and on 28 February 2006 made a declaration that the adjudicator's determination was not an adjudication determination within the meaning of s 22 of the Act and was void. On 2 March 2006 consequential orders were made in the Common Law Division proceedings, setting aside the judgment of 20 October 2005 and ordering that the \$6,164,204.05 and accrued interest be paid out to EA.
- 9 Downer appealed in proceedings 40154106 in the Court of Appeal from the orders made in the Common Law Division proceedings, and in proceedings 40155106 in the Court of Appeal from the declaration made in the Equity Division Proceedings. It was common ground that the outcome in proceedings 40154106 was consequential on that in proceedings 40155106. EA cross-appealed in proceedings 40155106 from the trial judge's decision that the adjudication application was valid, and by a notice of contention in those proceedings sought to uphold on other grounds the decision that the determination was void.
- 10 On 16 December 2005 Downer served on EA a further payment claim under the Act, similar to the earlier payment claim. In due course the payment claim was referred to adjudication, and on 30 March 2006 a different adjudicator made a determination in favour of Downer in the amount of \$4,488,588.84. The determination was not challenged, and the amount was paid.
- 11 For the reasons which follow, I agree that the adjudication application was not vitiated by difference from the payment claim, but respectfully differ from the trial judge in relation to the validity of the determination. The adjudicator expressly addressed whether the claim in the application was different from the claim in the payment claim, and considered that it was not; more to the point, he considered the ambit of the payment claim and that his determination was within it. In my opinion, in the circumstances of this case this was for the adjudicator to decide, even if erroneously, and I do not think the determination was void on any of the grounds which found favour with the trial judge. I would not accept the notice of contention grounds.
- 12 Accordingly, the appeals should be upheld and the cross appeal should be dismissed. The declaration should be set aside and the judgment of 18 October 2005 reinstated. It was also common ground, however, that the judgment should be taken to have been satisfied in part by payment of the amount of the later determination.

#### **The Contract**

- 13 The contract was entered into on 19 September 2001. The tunnel was to run from Haymarket to Surry Hills in Sydney. The contract price was \$'13,508,499, subject to variations and adjustments for provisional sums.
- 14 Clause 30.1 relevantly provided -  
"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.
- (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:
- (B) be paid by the Principal any extra costs (except delay costs dealt with under clause 34.9) reasonably 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."

- 15 The definitions in cl 1.1 included - "Latent conditions are, 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 who had reviewed the Pre-Contract Information and chosen appropriate machinery for use in the execution of the Work under the Deed."

**The latent conditions claim**

- 16 Excavation for the tunnel commenced in early 2002. In May 2002 Downer began to experience significant water ingress, at a time when the tunnel was on a downgrade so that the water flowed to the excavation face.
- 17 After some correspondence and discussions concerning the water ingress, in a letter dated 13 June 2002 to the Principal's Representative Downer wrote -

"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 selection 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 PreContract 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 possible."

- 18 The Principal's Representative relevantly replied by a letter stated 26 June 2002

"We have reviewed your notification, letter reference 101.C.6.01.366DB dated 13 June 2002 (which you state has been given in accordance with Sub clause 30.1(b)(i)) that the rate of groundwater inflow into the tunnel between Ch 572 and Ch 505 and continuing is the result of ground conditions (specifically, a horizontal feature in the bedrock) that constitute a Latent Condition.

Secondly, Latent Conditions are defined in Clause 1.1 of the General Conditions of Deed, and are any 'ground conditions ... which differ materially from those which should have been anticipated by a prudent, competent and experienced contractor who had reviewed the Pre-Contract Information and chosen appropriate machinery for use in the execution of the Work under the Deed.' Pre-Contract Information is further defined as being the Category 11 documentation listed at Specification Clause C.1.1.4(a). Such Category II documentation includes the various CHD-Longmac reports and memoranda. Item 2 on this list, GHD-LongMac, Geotechnical Report, Sydney CBD and Inner Suburbs -- 132kV Cable Project. Energy-Australia Revision 1 dated 1014101, has numerous references to the

anticipated presence of interconnecting joints within the rock mass. We refer particularly to pages 7, 8, 13 and 14 of the report.

Accordingly, we consider that the ground conditions actually encountered, and which Downer is claiming constitute a Latent Condition, are very similar to those foreshadowed in the Pre-Contract information. Therefore, the Contractor is deemed to have anticipated them and they cannot be considered to constitute a Latent Condition.

In conclusion, the claim for Latent Condition is rejected."

- 19 There was further correspondence, not only with respect to Downer's claim for extra costs but also with respect to the significance of the water ingress to the integrity of the tunnel and its fitness for carrying electrical cables. The rejection of the claim for extra costs was maintained.
- 20 Construction of the tunnel was completed in early June 2005. With variations and adjustments of provisional sums, the contract price became either \$14,590,944.55 or \$14,491,631.95. Whichever amount it was, it was paid by EA to Downer.

#### The payment claim

- 21 On 12 July 2005 Downer served on EA a payment claim under the Act, claiming \$9,115,780.02. It comprised principally "unapproved claims" totalling \$8,372,141.90. Three of the claims, given the labels WI 1.1, WI 1.2 and WI 2.1 respectively, were for "water ingress delay costs" of \$520,070, "water ingress direct and disruption costs" of \$1,072,236 and "collection and control of seepage extra costs" of \$211,988.
- 22 As to each of these three claims the payment claim referred to its Schedule 1. Relevantly, in Schedule 1 there was stated against "Basis of Claim/Entitlement" -
- "2 Downer encountered extensive, sub-horizontal, bedding plane shears that were linked to a rechargeable water source during excavation of the Tunnel.
- 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.
- 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;
  - (d) the water inflow could not be addressed effectively by grouting;
  - (e) Downer incurred additional costs and Completion was delayed; and
  - (f) in combination with the unforeseen water quality, a fundamental change to the tunnel draining system including the Water Treatment Plant was required.
- 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."
- 23 The documents in support of the three claims prominently included the Douglas Partners Report on Latent Conditions dated .12 July 2005 mentioned in para 3 set out above, prepared by Dr J C Braybrooke ("the Braybrooke Report").
- 24 In the introduction Dr Braybrooke noted that during excavation high groundwater inflow rates were encountered, and said that he had been asked to "prepare an opinion as to whether the conditions encountered constitute a 'Latent Condition' within the meaning of Clause 30 of the General Conditions of the Deed". He identified the documents on which he had relied in forming his opinion, saying that his "brief is to read the pre-contract information and provide an opinion as to what groundwater conditions that [sic] should have been reasonably anticipated by a prudent, competent and experienced contractor who had read the pre-contract information".

25 Dr Braybrooke discussed the pre-contract information and the "hydra-geological conditions" which should have been anticipated by a prudent et cetera contractor. He opined that such a contractor should have anticipated "low seepage inflows except where fractured areas or dykes are crossed" and, comparing "encountered hydra-geological conditions", said -

"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 chainages 575) to chainage 501 (construction chainages 644-546)."

25 Dr Braybrooke expressed the 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."

#### The payment schedule

27 EA served its payment schedule on 26 July 2005. It stated that EA proposed to pay nothing. The summary in the "Overview" included -

"1.8 EA's assessment of \$nil arises because:

- (a) The latent conditions Downer now alleges were not latent conditions.
- (b) Downer expressly anticipated substantial water ingress and took the contractual risk of dealing with those conditions by promising to adopt an "Observational Approach" to dealing with water ingress when it arose, by grouting.
- (c) When Downer encountered the water ingress it foresaw in its tender it refused to grout to exclude water until expressly directed to do so. It then claimed a Variation.
- (e) Downer's latent conditions claim is also obviously and fatally flawed on the facts. It asserts substantial ongoing water ingress at 3 locations which it says it did not anticipate. The site records show that there simply was not substantial ongoing water ingress at the 3 nominated locations.
- (f) At least one other tenderer expressly foresaw the very conditions encountered.
- (g) The 'latent conditions' referred to in Downer's liability expert report by Dr Braybrooke at tab 7 of the Payment Claim ('the Braybrooke Report') are not the same as the 'latent conditions' analysed in Downer's quantum expert report, the Tozer Report. Mr Tozer analyses water impact close to the Great Sydney Dyke at design chainages 573-228. Downer and Dr Braybrooke say the latent conditions were encountered at design chainages 575-501, 572-467 and 421-404.

28 The detailed response to Schedule 1 of the payment claim included -

"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. This is clear from the following documents which show Downer's expectations at the time of tender: [here a number of documents was listed]

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 Meynick ('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;

3.9 EA says that Downer should have anticipated the ground conditions based on the Pre-Contract Information."

29 The report of Pells Sullivan Meynick Pty Ltd mentioned in para 3.7 sets out above, which accompanied the payment schedule, was prepared by Dr P J N Pells ("the Pells Report"). It was said in its covering letter to deal "only with matters pertaining to groundwater quantity".

- 30 The Executive Summary in the Pells Report included -
1. The major sources of seepage into the tunnel were flows along near horizontal bedding plane shears which intersect the tunnel over much of the length between about chainage 250m and 590m and from fractures near the Great Sydney Dyke (GSD). These bedding plane shears are connected to fractured permeable rock in and immediately adjacent to the GSD. Flows also occurred from near vertical joints, typical of those found in the Hawkesbury Sandstone that were encountered about 100m to 150m either side of the GSD.
  6. The bedding plane shears observed in the tunnel are features of the type which have been observed over a wide area within the Hawkesbury Sandstone and have been documented previously as being encountered adjacent to the Great Sydney Dyke.
  7. The seepage inflows into the tunnel are consistent with seepage inflow calculations made at the time of tender by others using permeability data then available.
  8. The particular bedding plane shears intersected by the tunnel, and the connection of these shears with the Great Sydney Dyke were recognised and documented at the time of tender by independent geotechnical specialists, based only on data available in the tender documents.
  9. Arising out of the points summarised above there appears to be no technical basis for Latent Conditions in regard to the quantity of groundwater inflow."
- 31 Dr Pells set out in Section 5 of the report the "geology and hydrogeology germane to the matters of groundwater inflow". Under the heading "Assessment of the Claim" to Section 7 of the report he said
- "7.1 Basis of Assessment
- In assessing whether the physical conditions set out in Section 5 comprise Latent Conditions it is necessary to address the following questions:
- (i) Were Downer's expectations at the time of tender reasonable?
  - (ii) Was the groundwater inflow in excess of a reasonable assessment that could have been made Pre-Contract?
  - (iii) Did the actual groundwater inflows have a material impact on Downer's costs compared with the costs if flows had been as expected?
- The third of the above three questions only has to be addressed if the answers to the first two are 'yes'."
- 32 Dr Pells' assessment was -
- "10. CONCLUSIONS IN RESPECT TO DOWNERS SCHEDULE 1 CLAIMS
- The Latent Condition Claim as set out in Schedule 1 is based on the assertion of two physical occurrences namely:
1. that horizontal bedding plane shears were encountered between Ch 404m and 421 m, and between 467m to 575m, and
  2. these bedding plane shears were permeable and were linked hydraulically to a rechargeable water source.
- Facts summarised in Section 5 of the report indicate that,
- (a) there is no record of bedding plane shears between Ch 404m and Ch 421 m, and
  - (b) there were near horizontal bedding plane shears in the interval 467m to 575m, but these were not linked hydraulically to a rechargeable water source.
- Therefore on matters of fact, the claim is not sustainable.
- Furthermore, the information given in Section 7 of this report indicates that:
- The presence of horizontal extensive bedding plane shears that would intersect the tunnel was a reasonable expectation based on information made available at tender,
  - The presence of a rechargeable water source, namely the zone of the Great Sydney Dyke (GSD), was explicitly set out as a reasonable expectation in the tender documents (GHD Longmac report of April 2001), Connection of bedding plane shears to the GSD was a reasonable expectation,
  - Groundwater flows of greater than 1 lit/sec was a reasonable expectation based on permeability data provided pre-contract, and
  - Groundwater inflows would tend to collect at the face because the first 776m of tunnel was excavated downhill; to about Ch 375m.
- Hence, leaving aside the matters of fact, the Latent Conditions Claim fails every other test."

#### The adjudication application

- 33 Downer applied for an adjudication on 9 August 2005. The application included -

#### "PAYMENT CLAIM DETAILS

Claimant's business (eg. Electrical subcontractor, contractor, services consultant, plumbing supplier):  
constructionengineering contractor

Payment claim amount: \$9,131,998.31

Due date for payment (date when payment is due to be made): 2617105

#### PAYMENT SCHEDULE DETAILS

Date payment claim served on respondent: 1217105

Date payment schedule, if any, served on claimant: 2617105

Scheduled amount (amount that respondent proposes to pay): \$NIL"

- 34 The application stated that Downer's submissions and supporting documents were provided with and formed part of the application.
- 35 In the submissions expressed to be in support of Schedule 1 of the payment claim, the opening summary included -
- "114 During excavation of the Tunnel, Downer encountered ground conditions that were linked to a rechargeable water source. Those conditions comprised extensive, sub horizontal, bedding plane shears, as more fully described below.
- 115 Those ground conditions were a Latent Condition within the meaning of the Deed. They were not identified in the PreContract Information. In this regard, it is particularly notable that at the time of tender, neither EA's expert geotechnical consultants (GHD Longmac), nor their peer reviewer (PPK) identified the existence of those conditions.
- 116 As a result of those conditions, water ingress to the tunnel was greater than should have been anticipated at the time of tender and occurred in a manner and at locations different from those that should have been anticipated. By reason of GCOC clause 20, Downer is entitled to an adjustment to the Contract Price comprising its additional costs arising from the Latent Condition."
- 36 After reference to the contractual provisions, the submissions continued -
- "E.4 THE LATENT CONDITION WHICH DOWNER ENCOUNTERED
- 126 Downer commenced tunnelling from the Campbell St substation (approximately design chainage 1,000) and proceeded down grade in a westerly direction. Initially, site conditions proved to be as anticipated at the time of tender.
- 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:
- (1) were shears;
- (2) were permeable;
- (3) were extensive,
- (4) occurred in a sub-horizontal orientation; and
- (5) were linked hydraulically with a rechargeable water source.
- 129 Those features are more fully described in the Post Construction Groundwater inflow model and geological long section dated 25 June 2003, prepared by Coffey Geosciences.
- 130 At those features, Downer encountered significant water entry at the tunnel excavation face and, as tunnelling was proceeding downgrade, that water collected at (rather than draining away from) the excavation face.
- 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."
- 37 Then after reference to pre-contract information, the submissions said -
- "146 None of the expert analyses conducted at (or before) tender identified the relevant features as being extensive, sub-horizontal water bearing features, the conditions which were actually encountered. In these circumstances, Downer submits that a competent, prudent and experienced contractor is likely to regard the absence of any reference to an extensive, permeable layer connected to a rechargeable water source as indicating for tender purposes, that no such features is present.
- 147 The Pre-Contract Information contained information which suggested higher water inflows to the tunnel might be anticipated at certain clearly described locations such as the Great Sydney Dyke. It did not, however, contain information from which a prudent, competent and experienced contractor should have anticipated that the features at the Relevant Locations:
- (1) were shears;
- (2) were permeable;
- (3) were laterally extensive;
- (4) occurred in a sub-horizontal orientation; and
- (5) were linked hydraulically with a rechargeable water source.
- 160 The ground conditions encountered, as described above were materially different to the ground conditions which should reasonably have been anticipated by a prudent, competent and experienced contractor and that were in fact anticipated by Downer. The nature of the differences and their effect is set out below.
- (1) The relevant clayey seams were permeable shear planes.
- Permeable shear planes raise a greater possibility of water ingress.
- (2) The clayey seams were laterally extensive.

The laterally extensive nature of the relevant features increased the length of tunnel of which those features may have some effect. The laterally extensive nature of the relevant features also increased the possibility that they were connected (whether directly or indirectly) to a water source. The clayey seams occurred in a sub-horizontal orientation and were linked hydraulically with a rechargeable water source. The most significant water inflows were expected to be at the isolated locations where the tunnel route was known to cross identifiable sub-vertical features. Instead, Downer encountered significant water inflows over a sustained length of the tunnel excavation that was greater than the identifiable sub-vertical features.

The clayey seams were connected to a rechargeable water source with the result that sustained water inflows were encountered that did not diminish as expected.

**E.9 CONSEQUENCE OF THE LATENT CONDITION**

- 161 Downer anticipated that any significant water inflows would occur at isolated locations where the tunnel route was known to cross identifiable sub-vertical features and that those inflows would not be sustained in the longer term.
- 162 The resultant tunnelling methodology anticipated that the tunnel would cross those features with minor disruption and possible localized additional structural support as the excavation face passed through those features. It also anticipated that water inflows from those features would not be sustained over the long term.
- 163 As a result of the Latent Condition:
  - (1) significant water inflow occurred and continued to occur in a sustained fashion over a long length of the tunnel;
  - (2) a high proportion of the water inflow occurred at or near the face of the tunnel during construction;
  - (3) the water inflow disrupted and reduced productivity during the construction of the tunnel; and
  - (4) Downer incurred additional costs and completion of the tunnelling separable portions were delayed."
- 38 Downer relevantly claimed in the submissions the same amounts as had been claimed in the payment claim, that is, \$520,070 for claim WI 1.1, \$1,072,236 for claim WI 1.2 and \$211,988 for claim WI 2.1.
- 39 It will be noted that the "Relevant Locations" at which bedding planes were said to have been encountered varied from those identified in the payment claim. The adjudication application submissions included a further report by Dr Braybrooke responding to the Pells Report. Dr Braybrooke said that in the Braybrooke report he had incorrectly transcribed chainages for the bedding plane shears, that the correct transcriptions were 570-501, 498-467 and 421-313, and that he agreed with Dr Pells "where he identifies the three bps extend over a long distance".

**The adjudication response**

- 40 EA lodged an adjudication response dated 15 September 2005. The submissions contained in it relevantly began with a submission that the adjudication application included "a new Latent Condition claim which is different from the claim made in the Payment Claim", so that it was "not a proper adjudication application for the purpose of section 17(1) of the Act because it seeks adjudication of something other than the Payment Claim".
- 41 The adjudication response later said that the latent condition described in paras 126-131 of the adjudication application "is not the Latent Condition which was the subject of the Payment Claim" (para 6.1), and -
  - "6.2 In particular, the identification of the 'Relevant Locations' in which Downer claims it encountered bedding plans in paragraph 127, is different from the locations identified in Schedule 1 of the Payment Claim."
- 42 No other disconformity with the latent condition the subject of the payment claim was described, but the differences in chainages were identified and tabulated -

Payment Claim	Application	Difference
575 and 501	570 to 501	2 [sic: in fact 741 metres versus 69 metres
572 to 467	498 to 467	105 metres versus 31 metres
421 to 404	421 to 313	17 metres versus 108 metres

- 43 It was submitted that, as a result, the adjudication application "is not an application for adjudication of the Payment Claim" and that EA "will be denied natural justice if the adjudication proceeds on Downer's new claim".
- 44 The submissions in the adjudication response included as an answer to the claim that Downer "did foresee the risk of water ingress above" a particular rate of ingress, that a report part of the pre-contract information said that "it is possible that significant inflow of water into the tunnel could occur", and more generally that the pre-contract information indicated "that high inflow could be expected in some areas".

**The adjudicator's determination**

- 45 The adjudicator delivered his determination on 4 October 2005. With subsequent correction of a clerical mistake, it was for the \$6,040,579.05 earlier mentioned. Of that amount, \$1,473,704 represented the claims the subject of Schedule 1 in the payment claim, being \$520,070 for claim WI 1.1, \$868,013 for claim WI 1.2 and \$85,621 for claim WI 2.1.

- 46 The adjudicator addressed the three claims under the heading "Latent Conditions Claims for Water Ingress". He identified the claims WI 1.1, WI 1.2 and WI 2.1, and set out the definition of latent conditions and relevant parts of cl 30.1 of the contract. The adjudicator then said -
- "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 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."*
- 47 The adjudicator said that in the payment schedule EA "resists these Latent Conditions claims for the following reasons", setting out reasons in subparagraphs (a) to (p). The subparagraphs included
- "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 contractor;*
- e) there was no substantial ongoing water ingress at the three nominated locations;*
- f) at least one other tenderer expressly foresaw the conditions encountered.*
- 48 In subsequent paragraphs the adjudicator addressed whether Downer had in fact anticipated substantial water ingress and whether it should have anticipated the amount of water which it encountered, concluding in his para 84 - " ... that, although low levels of 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."
- 49 After reference to compliance with the notice requirements of the contract, the adjudicator said -
- "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 [sic: see below].*
- 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.*
- Ground Conditions Resulting from Inclement Weather**
- 89 One of the Respondent's reasons for resisting these claims is that the Respondent asserts that the conditions encountered were not Latent Conditions. The definition of Latent Conditions in the Contract is sufficiently wide to include water ingress into the tunnel during construction as ground conditions.*
- 90 One exclusion from 'any ground conditions' being Latent Conditions for the purpose of the Contract is where they are 'ground conditions resulting from inclement weather, wherever occurring'.*
- 91 The documents and submissions provided by the Respondent do not propound that the water resulted from inclement weather but that it emanates from other sources. Even if it was contended that the water entering the tunnel was from rain or some other weather related phenomena, the documents submitted in the adjudication indicate that the water was groundwater, some of which was possibly associated with the Great Sydney Dyke acting as an aquatard and some possibly from Darling Harbour. In other words, I have not accepted the inclement weather exception to the level of water ingress being considered to be a Latent Condition."*
- 50 The reference in the adjudicator's para 86 to notification on 11 May 2002 was agreed to be an erroneous reference to the letter of 13 June 2002.
- 51 The adjudicator later said

"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."

**Relevant provisions of the Act**

- 52 The Act provides by s 8 for service of a payment claim by a person "who is or claims to be entitled to a progress payment". A progress payment is a payment in relation to work carried out or undertaken to be carried out under the construction contract, and the payment claim must "identify the construction work (or related goods and services) to which the progress payment relates" (s 13(2)(a)).
- 53 If a payment schedule is not served within 10 days, or earlier if the contract so provides, the claimed amount must be paid (s 14(4)). If in a payment schedule the amount of the payment proposed to be made is less than the amount claimed, the payment schedule must indicate why, and if it is less because payment is withheld for any reason the reasons for withholding payment (s 14(3)).
- 54 Section 17 provides  
"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  
(ii) the respondent fails to pay the whole or any part of the scheduled amount to the claimant by the due date for payment of the amount, or  
(b) the respondent fails to provide a payment schedule to the claimant under Division 1 and fails to pay the whole or any part of the claimed amount by the due date for payment of the amount.  
(2) An adjudication application to which subsection (1) (b) applies cannot be made unless:  
(a) the claimant has notified the respondent, within the period of 20 business days immediately following the due date for payment, of the claimant's intention to apply for adjudication of the payment claim, and  
(b) the respondent has been given an opportunity to provide a payment schedule to the claimant within 5 business days after receiving the claimant's notice.  
(3) An adjudication application:  
(a) must be in writing, and  
(b) must be made to an authorised nominating authority chosen by the claimant, and  
(c) in the case of an application under subsection (1) (a) (i) must be made within 10 business days after the claimant receives the payment schedule, and  
(d) in the case of an application under subsection (1) (a) (ii) must be made within 20 business days after the due date for payment, and  
(e) in the case of an application under subsection (1) (b) must be made within 10 business days after the end of the 5-day period referred to in subsection (2) (b), and  
(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.  
(4) The amount of any such application fee must not exceed the amount (if any) determined by the Minister.  
(5) A copy of an adjudication application must be served on the respondent concerned. ,  
(6) It is the duty of the authorised nominating authority to which an adjudication application is made to refer the application to an adjudicator (being a person who is eligible to be an adjudicator as referred to in section 18) as soon as practicable."
- 55 By s 20, a response to the adjudication application may be lodged with the adjudicator, which "may contain such submissions relevant to. the response as the respondent chooses to include" (s 20(2)(c)) but cannot include any reasons for withholding payment unless those reasons were included in the payment schedule (s 20(2B)).
- 56 Sections 21 and 22 provide  
"21 Adjudication procedures  
(1) An adjudicator is not to determine an adjudication application until after the end of the period within which the respondent may lodge an adjudication response.  
(2) An adjudicator is not to consider an adjudication response unless it was made before the end of the period within which the respondent may lodge such a response.  
(3) Subject to subsections (1) and (2), an adjudicator is to determine an adjudication application as expeditiously as possible and, in any case:  
(a) within 10 business days after the date on which the adjudicator notified the claimant and the respondent as to his or her acceptance of the application, or  
(b) within such further time as the claimant and the respondent may agree."

- (4) For the purposes of any proceedings conducted to determine an adjudication application, an adjudicator:
- (a) may request further written submissions from either party and must give the other party an opportunity to comment on those submissions, and
  - (b) may set deadlines for further submissions and comments by the parties, and
  - (c) may call a conference of the parties, and
  - (d) may carry out an inspection of any matter to which the claim relates.
- (4A) If any such conference is called, it is to be conducted informally and the parties are not entitled to any legal representation.
- (5) The adjudicator's power to determine an adjudication application is not affected by the failure of either or both of the parties to make a submission or comment within time or to comply with the adjudicator's call for a conference of the parties.

## 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.
- (3) The adjudicator's determination must:
- (a) be in writing, and
  - (b) include the reasons for the determination (unless the claimant and the respondent have both requested the adjudicator not to include those reasons in the determination).

## Validity of the adjudication application?

### (a) The trial judge's decision

57 The trial judge recorded EA's submission that the adjudication application differed from the payment claim in two respects, one as to the amount claimed and the other as to the locations of the bedding plane shears. Only that as to the location of the bedding plane shears was maintained on appeal. The submission to the trial judge was that 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; and further, that at chainage 313 the bedding plane shears were linked to the Great Sydney Dyke, which was a rechargeable water source. His Honour noted that EA did not rely on the other differences in locations identified and tabulated in the submissions. EA's submission was that the adjudication application was referable to a claim substantially different from that stated in the payment claim; 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; and that as it was essential to an adjudicator's jurisdiction that a valid application had been made, the determination was a nullity.

58 His Honour recorded Downer's submission, to the effect that the adjudication application and its accompanying submissions identified the payment claim and the payment schedule to which it related (s 17(3)(f)) and nothing more was required.

59 His Honour held that the adjudication application was valid, saying

*"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."

60 His Honour went on to say, however

"68. As to the matter referable to the location of the bedding plane shears, I accept Energy's submission 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."

**(b) On appeal**

61 EA submitted on appeal that an adjudication application as referred to in s 17(1) was an application for adjudication of a payment claim served under s 13, being a payment claim to which the respondent had had the opportunity to respond by providing a payment schedule under s 14. It said that this understanding of s 17(1) was reinforced by s 20(2)(3) and s 22(b), (d) and (e), confining what could be included in the adjudication response and what could be considered by the adjudicator. It submitted that it followed that a purported adjudication application was not an adjudication application within the meaning of s 17 of the Act if it sought the adjudication of a claim in substance different from the payment claim served under s 13, and that, having found the substantial difference to which he referred in his para 68, the trial judge should have held that the adjudication application was not an adjudication application within s 17 and was void.

62 In my opinion, this submission should not be accepted. The trial judge's finding of a substantial difference can for the present be assumed; I will return to it later in these reasons.

63 An adjudicator's task is to determine the amount of the progress payment (if any) to be paid. That means the progress payment in relation to the construction work (or related goods and services) identified in the payment claim. The adjudicator addresses the work and the entitlement to payment for the work. In making the determination the adjudicator will consider any submissions duly made in support of the payment claim and the payment schedule. But the submissions do not set the parameters of the application or its determination. It may be that there are no submissions or only partial submissions, and submissions in support of a progress payment in relation to the construction work (or related goods and services) other than that identified in the payment claim should be put aside.

64 Accordingly, if an adjudication application does what s 17(3)(f) requires, ie identifies the payment claim and the payment schedule (if any) to which it relates, it is a sufficient application and the adjudicator can carry out the statutory task. The application is not changed by the submissions accompanying it, and it remains an application for adjudication of the identified payment claim. To repeat, there may not be any submissions in support of the payment claim. The adjudicator must still make the determination, perhaps invoking the powers under s 21(4). If the submissions in whole or part address a progress payment in relation to construction work (or related goods and services) other than that identified in the payment claim, the adjudicator can invoke those powers in order to clarify matters; but even if the adjudicator does not do so, the adjudicator must make the determination addressing the work identified in the payment claim.

65 In the present case the adjudication application sufficiently identified the payment claim, and also the payment schedule; it was not submitted to the contrary. The "submissions relevant to the application" (s 17(3)(h)) which accompanied the payment claim, which must fall within "submissions ...that have been duly made by the claimant in support of the claim" in s 22(2)(c), may have had the substantial difference which for the present I assume, but that did not invalidate the application. On no view was this a case of an adjudication application which, from the submissions contained within it, sought adjudication of a payment claim unrelated to the payment claim served on 12 July 2005.

**Validity of the determination?**

**(a) The trial judge's decision**

66 Further to his view that there was a substantial difference between the assertions and particulars in the payment claim and those in the submissions with the adjudication application, the trial judge accepted at para 88 - "*...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.*"

67 His Honour referred in some detail to cl 30.1(b) of the contract and the definition of latent conditions, and to the material in and referred to in Schedule 1 of the payment claim. He said at [95] that from that material - "*... 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) [sic] of the deed, namely whether the bedding plane shears were latent conditions and, if so, whether the water ingress arose from them.*"

65 He considered that the adjudicator had failed to understand, and to determine, Downer's payment claim, because he had proceeded on the understanding that the latent conditions specified in the payment claim as the basis of entitlement to payment was excess water ingress, and had addressed whether the water ingress was or should

have been anticipated. He thought that the adjudicator's approach had erroneously been coloured by the notice of 13 June 2002 (which the adjudicator gave the incorrect date of 11 May 2002), and that the adjudicator might not have concluded that the claim related to water ingress as latent conditions had he limited his consideration to the payment claim and the payment schedule "for the purpose of identifying the basis of the claim and the true ambit of the dispute".

69 Thus his Honour concluded -

"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."

70 Referring to the principles expounded in judgments of Hodgson JA in *Brodyn Pty Ltd v Davenport* (2004) 61 NSWLR 421 and *The Minister for Commerce v Contrax Plumbing (NSM Pty Ltd)* [2005] NSWCA 142, his Honour said -

"111 His Honour provides guidance as to the application of these principles in *Climatech [Co-ordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd]* [2005] NSWCA 229] 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".

71 His Honour then said -

"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."

72 His Honour continued -

"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."

#### **(b) On appeal**

73 One matter for the adjudicator was whether, on the proper construction of the contract, the "ground conditions" for the definition of latent conditions were the features of the bedrock, the bedding plane shears, or also included the water ingress occasioned by the presence of those features when linked with a rechargeable water source. The adjudicator considered that groundwater ingress fell within the definition of latent conditions in the contract; see in particular his paras 89 and 97. The trial judge's decision did not involve a challenge to that view, although the contention grounds did.

- 74 The matter raised before the trial judge was whether the payment claim asserted as the latent conditions the bedding plane shears as distinct from water ingress, or vice versa, or a combination of the former resulting in the latter. The trial judge applied his own view of the payment claim, that it asserted the bedding plane shears which resulted in the water ingress, and then arrived at the substantial difference to which he referred on his para 68. Downer's principal submission was that, so far as that matter arose, it was a matter for the adjudicator and that he had plainly enough decided that the payment claim asserted the water ingress, see in particular his paras 63 and 86-89, and that the court should not substitute its own view. It submitted however, that the trial judge was incorrect in his view and it was open to the adjudicator to conclude as he did.
- 75 As will appear, I do not think that this categorisation of the payment claim was necessary. So far as it was for the adjudicator to address it, undoubtedly there were significant grounds in many references to bedding plane shears for the view to which the trial judge came. But even if the trial judge arrived at the preferable view, there were respectable grounds for the payment claim relying on the water ingress, caused by the bedding plane shears, as the latent conditions. Schedule 1 was far from precise in this respect. Paragraph 92 of the Braybrooke Report treated the "inflow rates" themselves as ground conditions, since Dr Braybrooke compared them with those which should have been anticipated by a prudent et cetera contractor, and the Braybrooke Report was plainly put forward as a substantial basis for the payment claim. It is not irrelevant that the submissions with the payment schedule referred to water ingress as conditions and to groundwater conditions, and that the Pells Report treated "the groundwater inflow" as the ground conditions, also referring to the bedding plane shears and their link to a rechargeable water source; see also the submission in the adjudication response earlier noted speaking of foreseen and anticipated inflows of water. There were many arguable indicators, of varying significance, of what the trial judge called the basis of Downer's claim, to which we were taken in detail on appeal. If the enquiry had to be made, they were far from all one way.
- 76 In arriving at his basis of Downer's payment claim, in my opinion the trial judge read too much into the reasons of Hodgson JA in *Co-ordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd* [2005] NSWCA 229. Hodgson JA said in his paras [25]-[27]:
- "25 I note also that s.13(2)(a) requires that a payment claim "identify" the construction work or related goods or services to which the payment relates. This requirement must be interpreted, in my opinion, having regard to the requirement in s.14(3) that the payment schedule indicate the respondents' reasons for withholding payment, the limitation on the adjudication response in s.20(2B) to those reasons, and the corresponding limitation in s.22(2)(c), as well as the circumstance that, for the reasons given above, payment claims may include amounts that are not (in a narrow sense) for construction work that has actually been carried out for related goods and services that have actually been supplied. In my opinion, the relevant construction work or related goods and services must be identified sufficiently to enable the respondent to understand the basis of the claim; and in the case of "delay damages" of the kind involved in this case, it is generally sufficient (assuming that the contract itself is sufficiently identified) that the basis of contractual entitlement be shown. In my opinion, that would generally be enough to ground identification, at least by way of inference, of the construction work or related goods or services to which the payment relates.*
- 26 In my opinion, failure adequately to set out in a payment claim the basis of the claim could be a ground on which an adjudicator could exclude a relevant amount from the determination. Further, even if in such a case a claimant adequately set out the basis of the claim in submissions put to the adjudicator, the adjudicator could take the view that, because the respondent was unable adequately to respond to this subsequent material (because of the provisions of s.20(2B) and s.22(2)(c) of the Act), he or she is not appropriately satisfied of the claimant's entitlement. Generally however, in my opinion, it is for the adjudicator to determine if the basis of the claim is adequately set out in the payment claim, and if not, whether on this ground a relevant amount claimed should be excluded from the amount of the progress payment determined under s.22(l).*
- 27 So far as this case is concerned, there is no suggestion that the contractual basis for the amounts claimed was not adequately indicated in the payment claim. The complaint is that the payment claim did not indicate that the claim was for related goods or services supplied. However, in my opinion, if a claim is in substance a claim for related goods or services supplied, it is not essential that it be explicitly identified as such in the payment 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."*
- 77 Hodgson JA was referring to sufficiency of identification of the construction work or related goods and services, and of the contractual basis for the amount claimed; indeed, he accepted that a payment claim which indicated on its face a contractual basis of delay damages could carry a claim for the supply of goods and services.
- 78 To return to adjudication of a payment claim by determining the amount of the progress payment (if any) to be made, the progress payment being in relation to the construction work (or related goods and services) identified in the payment claim, the issue is payment in relation to the work or the goods and services. Entitlement to payment in relation to the work can be expounded at different levels of particularity, but the claim to payment in relation to the work remains. It is the payment claim and the identified construction work (or related goods and services) that has the adjudicator's attention, and the parameters of the payment claim are not found in the level of particularity at which it is supported.
- 79 In the present case the payment claim was relevantly to a progress payment in relation to the work occasioned by the water ingress, with the three claims WI 1.1, WI 1.2 and WI 2.1 describing the direct and indirect costs

thereby occasioned. The payment claim was made in reliance on cl 30.1 of the contract. It was for the adjudicator to address whether, on the material properly before him, Downer was entitled to payment in relation to the work. In determining the application the adjudicator would be expected to give attention to the meaning and scope of "ground conditions" in the definition of latent conditions, and to what ground conditions were encountered and whether they should have been anticipated by a prudent et cetera contractor. But what he was to determine was the payment claim, and it does not seem to me that this task would fall away if he thought it asserted bedding plane shears as the ground conditions as distinct from water ingress resulting from the bedding plane shears; or because it referred to bedding plane shears at the precise chainages stated in the payment claim (which by the time of the adjudication were accepted on both sides to have been stated mistakenly). As the adjudicator said in his paras 87-8', the claims were for increased water ingress. He considered that excessive water ingress was within the contractual latent conditions. He may or may not have been correct in his construction of the contract, but once he so decided his determination was within the parameters of the payment claim.

- 80 More fundamentally, as Hodgson JA observed in **Co-ordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd** at [24], if the adjudicator makes an error which can be seen as taking a determination outside the parameters of the payment claim, that does not necessarily invalidate the determination.
- 81 In **Brodyn Pty Ltd v Davenport** at [55] Hodgson JA, with whom Mason P and I agreed, noted as essentials to the existence of a determination compliance with the basic requirements laid down by the Act and "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". An adjudicator's determination may be incorrect, but it can still be a valid determination. Many cases have recognized that a determination under the Act is of an interim nature, often made in "pressure cooker" circumstances; that the purpose of the Act is to enable speedy resolution of claims to progress payments without excessive formality or intervention by the courts; and that the scope for invalidity for non jurisdictional error is limited: for example: **Brodyn Pty Ltd v Davenport** at [51]; **Co-ordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd** at [45]; **Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)** (2005) 64 NSWLR 462 at [44].
- 82 An adjudicator's exercise of the statutory power includes addressing the parameters of the payment claim. Basten JA in **Co-ordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd** observed at [44] that a determination will not necessarily be set aside if the determination "goes beyond the parameters of the claim, properly understood", and that
- "Intervention on that basis will only be justified if the legislature has imposed an objective requirement, rather than one which the adjudicator has power to determine. It is well established that the mere fact that a requirement is objectively expressed, rather than by reference to the satisfaction of the officer or tribunal concerned, is not decisive of the construction issue. Indeed, in relation to inferior courts, it has been said that there is a strong presumption against any jurisdictional qualification being interpreted as contingent upon the actual existence of a state of facts, as opposed to the decision-maker's opinion in that regard: see Parisienne Basket Shoes Pty Ltd v Whyte (1938) 59 CLR 369 at 391 (Dixon J). A factor favouring that approach is "the inconvenience that may arise from classifying a factual reference in a statutory formulation as a jurisdictional fact": Timbarra Protection Coalition Inc v Ross Mining NL (1999) 46 NSWLR 55 at 72 (Spigelman CJ)."*
- 83 His Honour said at [51 ] that, for the reasons earlier set out – "... it was for the adjudicator to determine the scope and nature of the payment claim. Furthermore, if the adjudicator had been inclined to determine the claim on the basis of a contractual entitlement other than that asserted by the claimant, he would have been required to make the relevant findings of fact and law to support his conclusion. If, in accordance with **Brodyn** and as suggested above, those matters are entrusted to the adjudicator by the Act, it is not open to the Court to form a view on those matters and act upon the view so formed, even to demonstrate that the adjudicated amount may be upheld on a different basis. The circumstances in which a court exercising a power of judicial review can reach a conclusion different from that reached by the repository of the power will be extremely rare: see **Minister for Immigration and Ethnic Affairs v Guo Wei Rong** (9997) 191 CLR 559 at 579."
- 84 See also Hodgson JA at [26], stating that generally it is for the adjudicator to determine if the basis of the claim is adequately set out in the payment claim and if not whether an amount should be excluded from the determined amount.
- 85 Ipp JA in **Nepean Engineering Pty Ltd v Total Process Services Pty Ltd (in liq)** at [76] stated that whether a claim complies with s 13(2) of the Act is "a matter for determination under s 17". In **Bitannia Pty Ltd v Parkline Constructions Pty Ltd** [2006] NSWCA 238 Basten JA referred to the cases concerning compliance with s 13 and said, at [71], that the existence of essential preconditions to a valid claim "are matters for the adjudicator, not for objective determination by a Court". It is not easy to see why determination of the parameters of the payment claim should be in a different position.
- 86 It may be added that in **John Holland Pty Ltd v Roads & Traffic Authority of New South Wales** (2007) NSWCA 19, decided after the hearing of the present appeals and cross appeal, whether a submission had been "duly made" (s 22(2)) was said to be a matter for the adjudicator, whose error in that respect would not invalidate his determination. It was not a matter for objective determination by the Court, see per Hodgson JA, with whom Beazley JA agreed, at [57] and Basten JA at [71]-[721]- the latter referred to what he had said in **Co-ordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd**.

- 87 In my opinion, determination of the parameters of the payment claim is a matter for the adjudicator, and a reasonable but erroneous decision by the adjudicator does not invalidate the determination. In the present case, in determining the amount of the progress payment (if any) to be made it was for the adjudicator to decide whether the water ingress fell within latent conditions for the purpose of the contract, and the parameters of the payment claim in that respect. He did so. As to both, it could not be said that the adjudicator's decision was without foundation, and if the adjudicator addressed the matters and came to his decisions, even if other decisions could have been come to, he did what the Act required - he determined the adjudicated amount. As was stated in *Minister for Commerce v Contrax Plumbing (NSVV) Pty Ltd* [2005] NSWCA 142 at [49] "..., 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."
- 88 There is good reason for leaving determination of the scope and nature of the payment claim to the adjudicator, apart from the purpose of the Act earlier mentioned. The scope and nature of the payment claim will often be, and in the present case was, open to be elucidated and evaluated with the benefit of the adjudicator's specialised knowledge.
- 89 Accordingly, I am unable to agree with the trial judge's conclusion that the adjudicator failed to determine Downer's payment claim, but instead determined a different claim. The adjudicator determined the payment claim, and the court should not by judicial review engage with the questions decided by him in doing so.
- 90 Nor do I consider that the determination was void because the adjudicator failed to attempt to understand the basis of the claim or failed bona fide to exercise his power. With respect to the trial judge, to say that "the outcome of [the adjudicator's] determination" indicates failure to consider the matters to which s 22(2) refers does not pay heed to the exposure of the adjudicator's reasons, and incorrectly imposes the Court's opinion of the correct outcome as the determinant of bona fides. I have not shared the trial judge's understanding of enquiry into the basis of a payment claim, and in my view there is no occasion to doubt that the adjudicator bona fide attempted to exercise his statutory power in, amongst other things, deciding whether the water ingress fell within latent conditions for the purposes of the contract and deciding that the payment claim was a claim for the increased water ingress and the claim he determined was within it.
- 91 As to natural justice, EA contended in its adjudication response that the claim put through the submissions contained in the adjudication application was a new claim, specifically but non-exclusively because of the differences in the chainages of the Relevant Locations. But EA made extensive submissions on water ingress and whether it was and should have been anticipated by a prudent et cetera contractor, at times specifically treating water ingress as the ground conditions. In my opinion, ground conditions by way of excessive water ingress from the bedding plane shears, was raised by the payment claim for the adjudicator's consideration and EA responded to it in the payment schedule in terms of the groundwater conditions. EA had appropriate opportunity to address water ingress as the ground conditions in the payment schedule and in the submissions contained in the adjudication response. It may not have used the opportunity well, with the focus it now sees as desirable, but that does not make out a denial of natural justice. I do not think the determination was void on that ground.

#### The notice of contention grounds

- 92 EA wished to contend as its second contention ground that, on the findings of fact made by the trial judge, the determination was void because the adjudicator
- "(a) reached a conclusion that was not reasonably open;
  - (b) reached a conclusion by an illogical or legally erroneous process of reasoning;
  - (c) misunderstood the fundamental basis of the - Payment Claim; and
  - (d) failed to consider the matters referred to in 22(2)(c) and (d) of [the Act]"
- 93 The submissions in support of these grounds were tantamount to reviewing the merits of the adjudicator's decision-making for error in law or fact, and included that *Brodyn Pty Ltd v Davenport* "set the requirements for validity too low". One submission, for example, was that groundwater ingress did not on the proper construction of the contract fall within the definition of latent conditions, and that error in this respect vitiated the determination. It was recognised that the submissions were contrary to *Brodyn Pty Ltd v Davenport*, and the first contention ground was that *Brodyn Pty Ltd v Davenport* was wrongly decided.
- 94 EA accordingly sought leave to reargue *Brodyn Pty Ltd v Davenport*. In my opinion, leave should not be granted.
- 95 *Brodyn Pty Ltd v Davenport* has not gone unquestioned. In *Coordinated Construction Co Pty Ltd v J M Hargreaves (NSVV) Pty Ltd* (2005) 63 NSWLR 385 Basten JA suggested that there were "aspects of the reasoning ... which may bear elucidation" (at 69)), and indicated some matters of which there could be further consideration (at [72]-[79]). An application for leave to reargue *Brodyn Pty Ltd v Davenport* was made in that case. It was not necessary to decide the application and the Court did not do so, but Hodgson JA at [47]-[49] did not favour the grant of leave.
- 96 The principles on which an application to reargue a decision of this Court is decided are considered in cases such as *Bridges v Bridges* (1944) 45 SR 164, *Thomson v Hill* (1995) 38 NSWLR 714, *Fobco Pty Ltd v Harvey* (1996) 40 NSWLR 454, *Roberts v White* (1999) 29 MVR 331 and *Tzaidas v Child* (2004) 61 NSWLR 18. They are not definitive in their application, and the circumstances of the particular case will govern.

- 97 *Brodyn Pty Ltd v Davenport* is a relatively recent decision, but has already guided many decisions at first instance, and sometimes on appeal, in the frequent challenges to determinations under the Act. Certainty in the approach to such challenges will only come with a decision of the High Court. The desirability of consistency in guidance until that occurs, even if doubt has been expressed, adds to the caution with which this Court should respond to an invitation to overrule an earlier decision, and in this instance is in my view a consideration of considerable weight.
- 98 While *Brodyn Pty Ltd v Davenport* might bear elucidation, as has occurred in, for example *Coordinated Construction Co Pty Ltd v J M Hargreaves (NSW) Pty Ltd and Co-ordinated Construction Co Pty Ltd v Climatech (Canberra) Pty Ltd*, I am not moved by EA's submissions, or otherwise, to regard it as wrong in substance, and I am not persuaded that reconsideration would expand availability of judicial review to the review for error of law or fact for which EA wished to contend. The Act's oft-recognised objective of speedy but interim resolution of claims, attendant with the possibility of error and confined curial intervention, in my view weighs heavily against substantive change in the current approach to challenges to determinations under the Act.
- 99 The amounts often at stake in the challenges which come before the court make an application for special leave to appeal to the High Court likely, whatever be the approach to the challenges determined in this Court. For the reasons stated above, I consider that the circumstances of this case do not warrant the grant of leave to reargue *Brodyn v Davenport*; and more widely, I favour maintaining *Brodyn Pty Ltd v Davenport* until the High Court says otherwise.

#### Orders

- 100 The parties agreed upon the appropriate orders if Downer succeeded on appeal. The agreed orders were rather convoluted, and unnecessarily ordered payment of the balance of the judgment sum in the Common Law Division proceedings. Allowing the appeal will reinstate the judgment, and it was common ground that there had been partial satisfaction of the judgment.
- 101 In my opinion the following orders, which I propose, meet the case, but there should be liberty to apply if there be real occasion for their modification to carry out the parties' agreement.
- Proceedings 40155/06
- (i) Appeal allowed.
  - (ii) Cross-appeal dismissed.
  - (iii) Orders 1, 2 and 3 made on 28 February 2006 set aside, and in lieu thereof order that the summons be dismissed and the plaintiff pay the defendants' costs.
  - (iv) First respondent pay the costs of the appellant and the second and third respondents.
- Proceedings 40154/06
- (i) Appeal allowed.
  - (ii) Order 1 made on 2 March 2006 set aside to the intent that the judgment ordered on 20 October 2005 have and be taken always to have had effect.
  - (iii) Order 3 made on 2 March 2006 set aside and in lieu thereof order that the defendant pay the plaintiff's costs.
  - (iv) First respondent pay the costs of the appellant.
- 102 In both proceedings, liberty to apply for modification to the orders within 14 days of the date of those orders, any application to be made in the first instance by contacting the Associate to Santow JA.
- 103 SANTOW JA: I agree with Giles JA.
- 104 TOBIAS JA: I agree with Giles JA.

A: G Inately SCI B McManus instructed by Corrs Chambers Westgarth, Sydney  
R: S Gageler SC / S A Kerr instructed by Mallesons Stephen Jaques