

SECURITY OF PAYMENT

**DOWNER
CONSTRUCTION
(AUSTRALIA) PTY LTD V
ENERGY AUSTRALIA &
ORS [2007] NSWCA 49**

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SUMMARY

An adjudication application must identify the payment claim to which it relates.

Even if a submission accompanying an adjudication application is substantially different to a submission in support of a payment claim, it does not of itself invalidate the application so long as the basic and essential criteria for a determination are satisfied.

Downer Construction (Australia) Pty Ltd (Downer) v Energy Australia (EA) is another decision under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (Act) regarding the narrow grounds for challenging an adjudication determination.

FACTS

Downer and EA entered into a construction contract on 19 December 2001 (contract) to design and construct a tunnel. Clause 30.1 of contract provided that Downer 'bears the risk of all physical conditions and characteristics of the site ...' except for latent conditions which were defined as any ground conditions differing materially from those which should have been anticipated by a prudent,

competent and experienced contractor.

In June 2005 Downer completed the work and on 12 July 2005 served on EA a payment claim under the Act claiming \$9,115,780.02 (payment claim). The payment claim included three claims for unapproved extra costs arising from the water ingress which Downer attributed to various latent conditions including bedding plane shears at between chainages 404m and 421m.

On 26 July 2005 EA served on Downer a payment schedule stating EA would pay nil (payment schedule) and arguing the latent condition claim was not sustainable as there were no bedding plane shears between chainages 404m and 421m.

On 9 August 2005, Downer made an adjudication application (application) which conceded that the locations of some of the bedding plane shears in the payment claim were incorrect.

On or about 15 September 2005 EA lodged an adjudication response (response) stating that the latent condition described in the application was a different latent condition to that in the payment claim due to the different locations of the bedding plane shears and that the application included a new latent condition claim different to that made in the payment claim.

On 4 October 2005 the adjudicator made his determination (determination) concluding that the increased level of water ingress encountered was a latent condition and recognising that an error had been made in relation to the location of the bedding plane shears in the payment claim but determined that the payment claim, payment schedule, application and response all addressed the same latent condition claim.

EA appealed to the NSW Supreme Court seeking a declaration that the determination was void.

TRIAL JUDGE

Validity of the application

Nicholas J held that the validity of the application depends upon 'whether the adjudication application identified the payment claim' rather than whether the payment claim referred to in the application was different to the payment claim. The application was valid because when the 'adjudication application and the supporting documentation are taken as a whole, the payment claim and payment schedule are clearly identified' [65].

His Honour expressed the opinion that there is nothing in the words of section 17 of the Act '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' [64].

Validity of the determination

Basic and essential requirements

As to the validity of the determination Nicholas, J held that the adjudicator failed to determine the payment claim on the basis of the latent condition claimed in the payment claim, being the bedding plane shears. Instead, the adjudicator, Nicholas J held, made a determination in respect of a payment claim which regarded excess water ingress (not bedding plane shears) as the latent condition, i.e. a substantially different payment claim.

The trial judge held that at [112] 'it is an essential requirement that the adjudicator must consider and determine whether the specific basis of the payment claim has been established, and a

failure to do so is a failure to meet the mandate of s22(2)(c). As a result, the determination lacked a basic and essential requirement for its existence as it was not an adjudication of the payment claim, and the determination was void.

Bona fides

His Honour also held while the adjudicator addressed the parties' submissions regarding the existence of latent conditions, he failed to address those submissions regarding bedding plane shears at the core of the payment claim resulting in a failure to give due regard to EA's submissions. As a result, there was a crucial failure to attempt to grasp the basis of the payment claim and the determination was void.

Denial of natural justice

Finally, a denial of natural justice had occurred as the determination was made on a footing substantially different to that specified in the payment claim and responded to in the payment schedule. As EA could not reply to the approach taken by the adjudicator, the determination was void.

COURT OF APPEAL

Validity of the application

Giles JA (Santow and Tobias JJA agreeing) agreed with the trial judge and held:

1. if an adjudication application identifies a payment claim and payment schedule (if any) to which it relates, the application is a valid one. An adjudication application is not invalidated by the submissions supporting it;
2. if a submission accompanying an adjudication application is substantially different to a submission in support of a payment claim, that did not invalidate the application; and

3. that on no view did the application seek an adjudication of a payment claim unrelated to the payment claim.

Validity of the determination

Giles JA held it did not matter whether the adjudicator determined the payment claim on the basis that the latent condition claimed in the payment claim was for excess water ingress or bedding plane shears. Each of the bases was arguable and 'the entitlement to payment in relation to the work can be expounded at different levels of particularity' [78]. The key issue is payment rather than the description or identification of the construction work or related goods and services.

Giles JA further held it was for the adjudicator to determine whether, in the light of the definition of latent conditions, the ground conditions encountered constituted a latent condition. In the circumstances, the adjudicator determined that excessive water ingress was within the contractual latent condition. Indeed, the adjudicator could have made his determination on the basis that the bedding plane shears constituted a latent condition (or that some other ground condition constituted a latent condition). In any event, he made the determination and irrespective of whether he was correct in his construction of the contract, once he had so decided the court should not substitute its own view. The adjudicator's decision was not without foundation, and since the adjudicator addressed the matters and came to his decision, even if other decisions could be available on the facts, he did what the Act required, he determined the adjudicated amount.

His Honour then reviewed Co-ordinated *Construction Co Pty*

Ltd v Climatech (Canberra) Pty Ltd [2005] NSWCA 229 observing at [80] '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'.

On this basis, Giles JA disagreed with the trial judge's conclusion that the adjudicator failed to determine the payment claim.

Finally, Giles JA concluded that:

1. the adjudicator had not failed to exercise his power bona fide and to hold otherwise ignores the adjudicator's reasons and 'incorrectly imposes the court's opinion of the correct outcome as the determinant of bona fides' [90]; and
2. EA had opportunities to address water ingress as a latent condition in the payment schedule and the response and no denial of natural justice of justice had occurred.

BRODYN REAFFIRMED

EA also effectively sought a review of the merits of the adjudicator's decision-making for error in law or fact arguing that:

- under *Brodyn*, the requirements for validity were too low;
 - *Brodyn* was wrongly decided; and
 - seeking leave to reargue *Brodyn*.
- Giles JA refused to grant leave on the basis that the circumstances did not warrant a grant of leave and consistency in guidance from the courts is desirable until the High Court holds that *Brodyn* was wrongly decided.