Supreme Court
New South Wales

Medium Neutral Citation:	**MP Water Pty Ltd v Veolia Water Australia Pty Ltd (No 3) [2021] NSWSC 1023**
Hearing dates:	26, 27, 28 and 29 July 2021
Date of orders:	13 August 2021
Decision date:	13 August 2021
Jurisdiction:	Equity - Commercial List
Before:	Williams J
Decision:	See paragraph [391]
Catchwords:	CONTRACTS – construction of contracts for the design and construction of a water treatment facility and the provision of services in relation to that facility – alleged breaches of contracts – prevention principle – scope of assistance required to be provided by services provider to principal exercising step-in right following "Major Service Failure" PRACTICE AND PROCEDURE – plaintiff purported to withdraw certain claims for relief after judgment reserved following four day hearing – defendant did not consent to withdrawal or discontinuance of those claims – leave required to discontinue claims – unfairness to defendant if claim discontinued
Legislation Cited:	*Uniform Civil Procedure Rules 2005* (NSW), r 12.1
Cases Cited:	*Bensons Property Group Pty Ltd v Key Infrastructure Australia Pty Ltd* [2021] VSCA 69 *Cherry v Steele Park* (2017) 96 NSWLR 548 *Lawrence v Ciantar* [2020] NSWCA 89 *Lan v Kaymet Corporation Pty Ltd* [2017] NSWCA 52 *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* [2017] NSWCA 151 *Re Mempoll Pty Ltd, Anankin Pty Ltd and Gold Kings Pty Ltd* [2013] NSWSC 301
Category:	Principal judgment
Parties:	MP Water Pty Ltd (ACN 621 777 320) in its capacity as trustee of the MP Water Trust (ABN 86 561 380 647) (Plaintiff) Veolia Water Australia Pty Ltd (Defendant

Representation:	Counsel: Mr J Giles SC with Mr J Hutton and Mr W Marshall Mr M Ashhurst SC with Ms J Wright and Mr F Anwar Solicitors: Gilbert + Tobin (Plaintiff) Norton Rose Fulbright Australia (Defendant)
File Number(s):	2021/138389
Publication restriction:	N/A

JUDGMENT

INTRODUCTION

1 The plaintiff (**MP Water**) seek orders requiring the defendant (**Veolia**) to comply with a Step-In Notice issued by MP Water on 13 May 2021 under clause 44 of a Services Provider Agreement dated 13 November 2017 between MP Water and Veolia (the **SPA**) pursuant to which MP Water engaged Veolia to provide specified services in relation to the treatment of water emanating from underground coal mines known as the Springvale Mine and the Angus Place Mine and the operation of a water treatment facility known as the Springvale Water Treatment Facility (the **Facility**). The water treated at the Facility is used in the cooling towers of the Mount Piper Power Station.

2 For a period of more than 48 hours commencing at about 7pm on 7 May 2021, the Facility failed to accept and process water emanating from the mines for processing and treatment. There is also a dispute about whether the failure of the Facility to accept and process water was a breach of the defendant's obligations under the SPA. If so, the quantum of damages associated with a claim against the plaintiff by its customers who operate the coal mines and the power station is to be determined separately.

3 These proceedings involve disputes between MP Water and Veolia about whether that failure constituted a Services Provider Default and, if it did, whether that default was caused by MP Water's own breaches of contract so that the prevention principle precluded MP Water from relying on the Services Provider Default. There are also disputes about whether MP Water was entitled to issue the Step-in Notice to Veolia on 13 May 2021 and whether clause 44 of the SPA entitles MP Water to require Veolia to perform the Services in accordance with MP Water's directions.

RELEVANT CONTRACTUAL PROVISIONS

4 A suite of contracts for the design, construction, maintenance and operation of the Facility was entered into on 13 November 2017, comprising:

(1) a Water Treatment Services Contract (**WTSC**) between MP Water (referred to as *"Project Co"*) and Springvale SK Kores Pty Ltd, Centennial Springvale Pty Ltd and EnergyAustralia NSW Pty Ltd (collectively, the **Customer**);

(2) a Design and Construct Contract between MP Water (referred to as *"the Principal"*) and Veolia (referred as *"the Contractor"*) (**D&C Contract**); and

(3)

the SPA referred to above between MP Water (referred to as *"Project Co"*) and Veolia (referred as the *"Services Provider"*).

5 The Recitals to the WTSC recorded:

> "1. The Springvale Joint Venture has underground coal mining operations at Springvale and Angus Place, in the western coalfields of New South Wales (**Springvale Mine** and **Angus Place Mine** respectively).
>
> 2. The Springvale Mine is the primary coal supply for the Mt Piper Power Station (**MPPS**). Coal at the Springvale Mine is extracted using the longwall mining method and requires Mine Water to be removed for safe operations and treated to comply with Laws.
>
> 3. The MPPS is owned by Energy Australia. The MPPS requires, in addition to coal, Treated Water for its cooling circuits.
>
> 4. The Customer wishes to engage Project Co to perform:
>
> • the Works (including the design, engineering, procurement, supply, construction, testing and commissioning of the Facility); and
>
> • the Services (including the operation and maintenance of the Facility, treatment of the Mine Water, treatment of Blowdown Brine and the supply of Treated Water from the Facility and the delivery of Water Product to the relevant Water Product Delivery Points),
>
> in accordance with this Contract.
>
> 5. Project Co has agreed to perform the Works and Services in accordance with this Contract."

6 Mr Michael Clark, Executive General Manager, Strategy/Projects, at Centennial Coal gave evidence about the requirement for removal of water generated by the underground mining operations referred to in Recital 2 of the WTSC. Mr Clark deposed that, as part of normal underground mining operations at the Springvale Mine, approximately 25ML of water is generated each day. This occurs irrespective of the specific activities being conducted in the mine on any given day, and so the generation of water cannot be stopped or reduced. At the Angus Place Mine, approximately 7 to 8ML of water and up to a maximum 10ML of water is generated each day, even though coal mining is not currently taking place at that mine. The water generated in both the Springvale Mine and the Angus Place Mine needs to be removed to ensure that the strata are not saturated. Saturation of the strata risks compromising the effectiveness of the systems of bolts and mesh that are used to hold together the ribs and walls of the mines to ensure that the roof and walls do not fall in on tunnels in the underground mine. That is essential for the safe operation of the Springvale Mine. Although the Angus Place Mine is not currently being operated, the strata control are being maintained to facilitate potential recommencement of mining operations.[1]

7 Veolia was not a party to the WTSC. However, it is common ground between Veolia and MP Water in these proceedings that Veolia had knowledge of the terms of the WTSC at the time that MP Water and Veolia entered into the D&C Contract and the SPA.

8 Essentially, MP Water's obligations to perform *"the Works"* under the WTSC were sub-contracted to Veolia under the D&C Contract and MP Water's obligations to perform *"the Services"* under the WTSC were sub-contracted to Veolia under the SPA.

Relevant provisions of the WTSC

9

Subject to certain conditions precedent that are not presently relevant, clause 8.1 of the WTSC requires MP Water to *"perform and complete the Works, including design, engineer, procure, supply, construct, test and commission the Facility, in accordance with … the Scope of Works and Services"*. Clause 8.2 requires MP Water to *"operate and maintain the Facility and perform and complete the Services in accordance with … the Scope of Works and Services"*.

10 The *"Works"* are defined in clause 1.1 as *"all work which* [MP Water] *is or may be required to perform to comply with its obligations under this Contract, including the design, engineering, procurement, supply, construction, testing and commissioning of the Facility in accordance with this Contract"* but excluding the *"Services"*.

11 The *"Services"* are defined as *"the services in respect of the Facility to be provided by* [MP Water] *and includes all services described in the Scope of Works and Services…"*.

12 The *"Facility"* is defined in clause 1.1 and the Glossary to the Scope of works and Services as:

> "the whole of the facility to be designed, engineered, procured, supplied, constructed, tested, commissioned, operated, maintained and owned by Project Co on the Site in accordance with this Contract, and includes:
>
> 1 the Water Transfer System;
>
> 2 the Mine Water Buffer Pond;
>
> 3 the Water Treatment Facility;
>
> 4 the Mixed Brine Pond;
>
> 5 the OPUS Treatment Plant;
>
> 6 the Brine Cystalliser Plant;
>
> 7 the Brine Waste Ponds;
>
> 8 the Lime Salt Storage and Delivery System, and
>
> 9 the Mixed Salt Storage and Delivery System,
>
> as further described in the Scope of Works and Services."

13 The term *"Mine Water Buffer Pond"* is defined as:

> "the existing Blowdown Pond B owned by Energy Australia at MPPS after it has been repurposed by Project Co to function as the Mine Water Buffer Pond and which will be part of the Facility, with all modifications and additions necessary to be compliant with Schedule 20 of this Contract; where
>
> > 1 all modifications and additions are to be designed, engineered, procured, supplied, constructed, tested, and commissioned by Project Co, as further described in Attachment 1; and
> >
> > 2 which will be operated and maintained by Project Co in accordance with Schedule 20 of this Contract and the Mine Water Buffer Pond Operating Protocol."

14 The term *"Mine Water"* is defined in clause 1.1 of the WTSC as water discharged from either the Springvale Mine or the Angus Place Mine (or both) and delivered to a *"Mine Water Receipt Point"*. There are three Mine Water Receipt Points that are identified in clause 6.2 of the Scope of Works and Services in Attachment 1 to the WTSC and in the Facility Diagram there referred to. Clause 6.2(a) of the Scope of Works and services provides that the Facility must accept Mine Water at the three Mine Water Receipt Points.

15 The Facility Diagram depicts the interaction between the multitude of components comprising the Facility, which are not limited to those listed in the definition of *"Facility"* above. Indeed, the definitions of many of those listed components themselves include

many components. For example, the *"Water Treatment Facility"* is defined as *"the water treatment plant and associated equipment to be utilised for treating Mine Water and producing Treated Water, Mine Water Brine and Residuals …"*. The Facility Diagram shows the many different components of the Water Treatment Facility through which Mine Water passes after being accepted at one of the three Mine Water Receipt Points, including the *"WTF Pretreatment"*, *"WTF Desalination"* and *"WTF Brine Treatment Plant"*). The Facility Diagram also shows:

(1) the *"Mine Water Diversion"* via which Mine Water may be diverted after passing the Mine Water Receipt Points to the Mine Water Buffer Pond; and

(2) the *"Mine Water Buffer Return"* by which waters in the Mine Water Buffer Pond may be transferred back to the Water Treatment Facility.

16 Mr Benjamin Bowen, a chemical engineer who has acted as MP Water's representative under the SPA from the outset, gave evidence describing the purpose of the Mine Water Buffer Pond as:-[2]

> "to provide additional buffering capacity to store Mine Water in the event of restricted flow to the Facility or where water from the Mine cannot be treated in the Facility immediately. Should such a disruptive event occur, the Buffer Pond will enable the Facility to continue to receive Mine water and, in effect, will store it until the disruptive event is remedied. Water stored in the Buffer Pond can then be sent back into the Facility for treatment."

17 Mr Bowen also gave evidence that:-[3]

> "As the Mine Water Buffer Pond is intended to provide additional buffering capacity to store Mine Water during plant outages or process upsets, to blend 'out of envelope' Mine Water and to receive and blend additional flows from the Mt Piper Power Station referred to as MPPS Mixed Waters and Blowdown Waters prior to treatment at the Facility, the Mine Water Buffer Pond is critical to the proper functioning of the Facility."

18 Veolia embraced these aspects of Mr Bowen's evidence, which were consistent with evidence given by Ms Yvette Waterfall, Commercial Director of Veolia.-[4]

19 Mr Bowen also gave evidence that the pond required to be repurposed as the Mine Water Buffer Pond has a capacity of 104ML. That evidence was not the subject of any challenge or dispute.

20 It is convenient to set out in full the definition of *"Water Treatment Facility"* referred to above:

> "the water treatment plant and associated equipment to be utilised for treating Mine Water and producing Treated Water, Mine Water Brine and Residuals to be designed, engineered, procured, supplied, constructed, tested, commissioned and maintained and owned by Project Co on the Site in accordance with this Contract, as further described in the Scope of Works and Services and which forms part of (or, where the context requires, will form part of) the Facility"

21 The term *"Treated Water"* is defined as the treated water produced by the Water Treatment Facility, including treated water that is delivered to three specified delivery points referred to as TWDP1, TWDP2 and TWDP3.

22 The Scope of Works and Services is set out in Attachment 1 to the WTSC.

23 Clause 5.1 of the Scope of Works and Services provides that the Works include all work required to design, engineer, procure, supply, construct, test and commission the Facility, including each of the elements included in the definition set out at [12] above. Clause 5.1 also provides that the Services include all activities and services required to (*inter alia*) receive Mine Water at the three Mine Water Receipt Points, transfer Mine

Water to the Water Treatment Facility, treat Mine Water at the Water Treatment Facility and transfer Treated Water to TWDP1, TWDP2 and TWDP3 in accordance with the WTSC.

24 Clause 5.3 of the Scope of Works and Services requires MP Water to design the Works so that the Facility is capable of achieving, and will be operated by MP Water to achieve, specified *"Guaranteed Flow and Process Capacity"*. I will refer to this as **Guaranteed Capacity**. Relevantly, the Guaranteed Capacity for the Water Treatment Facility is the capacity for continuous and uninterrupted acceptance of Mine Water at the rate of not less than 36ML per day (without using standby or backup equipment) and capacity for occasional acceptance of Mine Water at a rate of not less than 42ML per day for up to 60 days in respect of any one event (using standby or backup equipment).

25 Clause 5.5(g)(3) of the Scope of Works and Services permits MP Water to give the Customer a written request on 24 hours' notice to stop or reduce the flow of Mine Water as soon as MP Water becomes aware of specified events, including *"an actual or expected overflow of the Mine Water Buffer Pond"*. The Customer must promptly comply with any such request. The request does not relieve MP Water of any obligation or liability under the WTSC.

26 Clause 5.5(h) of the Scope of Works and Services requires the Mine Water Buffer Pond to have minimum reserve storage volume of 42ML provided as *"Customer Freeboard"*. Any temporary storage capacity set aside by MP Water to allow for scheduled maintenance or intermittent storage of fluids does not count towards the Customer Freeboard. Clause 5.6(a) provides that the Water Treatment Facility must be able to continuously accept Mine Water up to the Guaranteed Capacity whilst accommodating regular maintenance activities at the Water Treatment Facility, and requires MP Water to maintain not less than that 42ML capacity in the Mine Water Buffer Pond *"for the sole purpose of receiving Mine Water inflow from the Customers on an unfettered basis"*.

27 Clause 5.9(a) of the Scope of Works and Services provides:

> "Project Co is wholly responsible for all Works necessary to repurpose the existing Blowdown Pond B as the Mine Water Buffer Pond, including isolation of the pond from Blowdown Pond A, and all diversion work required; except as otherwise provided in Schedule 20 of the Contract."

28 Clauses 5.9(b)-(e) describe the other sources of water to be received by the Mine Water Buffer Pond in addition to Mine Water. Those other sources of water and the provisions of clauses 5.9(b)-(e) are not relevant to these proceedings.

29 Schedule 20 of the WTSC requires the Customer to obtain and provide to MP Water a report prepared by an experienced and competent contractor in relation to (relevantly) *"the condition and integrity of the liner in each Pond"* (the **Pond Baseline Condition Report**). The ponds in relation to which that report is required include *"Blowdown Pond B which will become the Mine Water Buffer Pond"*.

30 Clause 2(c) of Schedule 20 relevantly provides that, if the Pond Baseline Condition Report *"identifies that … the integrity of the liner in any Pond will, or is reasonably expected to, materially adversely affect the performance of the Services"* then the Customer must request MP Water to provide, and MP Water will provide, a quotation to

(relevantly) *"remediate or replace any relevant liner to the extent necessary to ensure the integrity of the liner will not materially adversely affect the performance of the Services"*. I will refer to this as **Liner Remediation Work**.

31 Clauses 2(d) and (e) of Schedule 20 relevantly provide for the Customer to direct MP Water to undertake the quoted Liner Remediation Work (at the Customer's cost) if the Customer and MP Water agree on the work required, the preferred manner in which to perform the work and the estimated cost of the work. In the absence of such agreement, the Customer must undertake or procure the Liner Remediation Work. Clause 6 of Schedule 20 requires the Customer to ensure that any Liner Remediation Work it undertakes or procures is performed in a sound and workmanlike manner, with due care and skill, using materials of merchantable quality that are fit for the intended purpose, to the standard expected of a competent contractor and in accordance with all applicable Laws.

32 Those provisions of clause 2 of Schedule 20 also apply to any work identified by the Pond Baseline Condition Report as necessary to ensure that the settled solids or chemistry of settled solids do not materially affect the operating volume of any Pond or the performance of the Services. Any such work, together with Liner Remediation Work, is defined as *"Settled Solid and Liner Remediation"*.

33 Thus, pursuant to clause 5.9(a) of the Scope of Works and Services, MP Water is *"wholly responsible for all Works necessary to repurpose the existing Blowdown Pond B as the Mine Water Buffer Pond"* except to the extent that the Customer undertakes or procures (relevantly) Settled Solid and Liner Remediation in accordance with Schedule 20. It is only Liner Remediation Work that is relevant to these proceedings.

34 It will be recalled that the Works to be carried out by MP Water under the WTSC include all work required to design, engineer, construct, test and commission the Facility, including the Mine Water Buffer Pond. Annexure 10 to the Scope of Works and Services requires MP Water to develop and implement a *"Commissioning and Testing Plan"* for the Works in consultation with the Customer. Clause 6 of Annexure 10 provides that successful commissioning requires MP Water to demonstrate that all systems comprising the Works comply with the requirements of the WTSC and the Commissioning and Testing Plan and evidence that process requirements for all process streams are operating and interfacing in a satisfactory manner. MP Water is required to provide a commissioning report to the Customer as soon as practicable after completion of commissioning. Clause 8 requires MP Water to undertake acceptance testing to demonstrate that Treated Water meets specified performance standards.

35 Clause 8.3 of the WTSC requires MP Water to commence performing the *"Services"* on the *"Services Commencement Date"* and to perform them *"expeditiously and without delay"*. The *"Services Commencement Date"* is defined, relevantly, as the day after the *"Commercial Acceptance Date"*, which is in turn defined as the date on which a *"Commercial Acceptance Certificate"* is issued by the Independent Completion Certifier under clause 17.11(a) or (b) certifying that *"Commercial Acceptance"* has been achieved.

36

The Independent Completion Certifier is appointed in accordance with a process set out in clause 17.14 of the WTSC. Mr Chris Morris of SMEC Australia Pty Ltd was appointed as the Independent Completion Certifier (the **Certifier**).

37 Clause 17.6 of the WTSC provides:

> "**Commercial Acceptance**
>
> The term 'Commercial Acceptance' means that stage in the execution of the Works when:
>
> (a) those Works are complete in accordance with this Contract except for minor Defects:
>
> (1) which do not prevent those works from being used for the Intended Purpose;
>
> (2) which the Independent Completion Certifier determines, acting reasonably, Project Co has reasonable grounds for not promptly rectifying;
>
> (3) the existence and making good of which will not inconvenience or adversely affect the Customer, having regard to the Intended Purpose; and
>
> (4) which do not cause any legal impediment to the use or occupation of the Works;
>
> (b) the Works have achieved Provisional Commercial Acceptance;
>
> (c) Project Co has delivered to the Customer and the Independent Completion Certifier:
>
> (1) all Key Documents and other information required by this Contract to have been delivered by Project Co to the Customer, prior to Commercial Acceptance, in a form approved by the Customer acting reasonably;
>
> (2) certification from each of Project Co's Design consultants who performed design work in respect of the Works (in the form set out in Schedule 19) that those Works have been executed, and those Works completed, in accordance with the design prepared by that design consultant;
>
> (3) certification from each of Project Co's design consultants and proof engineers (in the form set out in Schedule 19) stating the Key Documents submitted by Project Co to the Customer comply with the requirements of this Contract; and
>
> (4) certification from a licenced surveyor (in the form set out in Schedule 19) to the effect that the Works are within the boundaries required by this Contract and that the structural elements of the Works are within the spatial tolerances specified in this Contract;
>
> (d) the Commissioning and the Acceptance Testing and all other tests required to be performed by this Contract prior to or at Commercial Acceptance, have been carried out, have been passed and demonstrate that those Works are in a state that is capable of being operated in accordance with this Contract;
>
> (e) the Works have achieved the Guaranteed Flow and Process Capacity and Water Product Performance Standards;
>
> (f) all Approvals (other than the Customer Approvals) which are necessary for the use of the Works in accordance with the requirements of this Contract have been obtained and are in effect and copies of which have been provided to the Customer and Independent Completion Certifiers; and
>
> (g) any other matters or conditions required by this Contract in order to achieve Commercial Acceptance have been satisfied (including those specified in Annexure 10)."

38 Clause 17.11 of the WTSC provides:

> "**Commercial Acceptance Certificate**
>
> (a) The Independent Completion Certifier must issue a Commercial Acceptance Certificate where Project Co has submitted a Commercial Acceptance Claim and the Independent Completion Certifier is satisfied that Commercial Acceptance has been achieved.
>
> (b) Where no Commercial Acceptance Claim has been submitted, the Customer's Representative may, in its sole and absolute discretion, request the Independent Completion Certifier issue a Commercial Acceptance Certificate, and the Independent Completion Certifier must issue a Commercial Acceptance Certificate if the Independent Completion Certifier is satisfied that Commercial Acceptance has been achieved."

39

Clause 17.13 provides that the issue of a Commercial Acceptance Certificate does not relieve MP Water from any of its obligations under the WTSC or prejudice any claim by the Customer.

40 Clause 3 of Schedule 20 to the WTSC requires MP Water to:

(1) immediately notify the Customer if MP Water identifies *"any concern in relation to the structural integrity of a Pond, including in relation to the integrity of a liner in any Pond"*; and

(2) provide to the Customer a *"Pond Infrastructure Report"* on every second anniversary of the *"Commencement Date"*. The Pond Infrastructure Report must be *"a detailed survey of the liners, walls, existing mechanical infrastructure and electrical infrastructure forming part of the Ponds (but excluding any infrastructure forming part of the Works) to document its condition"* that documents issues, concerns, recommended investigations and provides an updated forecast asset replacement and refurbishment cost profile for the Ponds for the remainder of the term (which expires 15 years after the Services Commencement Date).

41 The Commencement Date is defined in clause 1.1 of the WTSC as the date on which the Customer issues a notice to MP Water to proceed under the WTSC after all conditions precedent have been satisfied or waived.

Relevant provisions of the D&C Contract

42 Clause 8.1 of the D&C Contract requires Veolia to *"perform and complete the Works, including design, engineer, procure, supply, construct, test and commission the Facility, in accordance with … the Scope of Works"*.

43 The *"Works"* are defined in clause 1.1 as *"all work which* [Veolia] *is or may be required to perform to comply with its obligations under this Contract, including the design, engineering, procurement, supply, construction, testing and commissioning of the Facility in accordance with this Contract"* and including *"all work described in the Scope of Works"*.

44 The *"Scope of Works"* is contained Attachment 1 to the D&C Contract.

45 The *"Facility"* as defined in clause 1.1 and in the Glossary to the Scope of Works has the same meaning as in the WTSC referred to at [12]-[21] above, with one exception. The reference to *"this Contract"* in the chapeau of the definition of *"Facility"* in the WTSC is replaced with a reference to *"the Water Services Treatment Contract"* in the chapeau of that definition in the D&C Contract.

46 The term *"Mine Water Buffer Pond"* is defined in clause 1.1 and in the Glossary to the Scope of Works in substantially the same terms as the definition in the WTSC set out at [13] above. The definition reads (emphasis added):

> "the existing Blowdown Pond B owned by Energy Australia at MPPS after it has been repurposed by the Contractor to function as the Mine Water Buffer Pond and which will be part of the Facility, **with all modifications and additions necessary to be compliant with Schedule 20 of this Contract**; where:
>
> > 1 all modifications and additions are to be designed, engineered, procured, supplied, constructed, tested, and commissioned by the Contractor, as further described in Attachment 1; and

2 which will be operated and maintained by the Services Provider in accordance with Schedule 20 of the Services Provider Agreement and the Mine Water Buffer Pond Operating Protocol."

47 As I have already mentioned at [4] above, Veolia is both the *"Contractor"* referred to in item 1 of the definition and the *"Services Provider"* referred to in item 2.

48 The emphasised words in the definition above identify departures from the definition in the WTSC. As will become apparent, those departures reflect the fact that some of MP Water's obligations under Schedule 20 of the WTSC are subcontracted to Veolia as Contractor under Schedule 20 of the D&C Contract (obligations relating to the Pond Baseline Condition Report and the Liner Remediation Work) and others are subcontracted to Veolia as Services Provider under Schedule 20 of the SPA (obligations relating to the Pond Infrastructure Report).

49 The term *"Water Treatment Facility"* is defined in clause 1.1 and in the Glossary to the Scope of Works in substantially the same terms as the definition in the WTSC set out at [20] above, with the only differences being those emphasised below:

> "the water treatment plant and associated equipment to be utilised for treating Mine Water and producing Treated Water, Mine Water Brine and Residuals to be designed, engineered, procured, supplied, constructed, tested, commissioned and maintained and owned by **the Principal** on the Site **in accordance with the Water Treatment Services Contract**, as further described in the Scope of Works and Services and which forms part of (or, where the context requires, will form part of, the Facility"

50 As referred to at [4] above, MP Water is the *"Principal"* referred to in the D&C Contract.

51 The terms "*Mine Water"*, *"Mine Water Receipt Point"* and *"Treated Water"* have the same meanings in the D&C Contract as in the WTSC. The substance of those definition is set out at [14] and [21] above.

52 Clause 3 of the Scope of Works reflects the back-to-back nature of the D&C Contract and the SPA with the WTSC, and the interaction between the Works to be performed under the D&C Contract with the Services to be performed under the SPA. Clause 3 provides:

> "**Interaction with Scope of Services**
>
> The Contractor acknowledges and agrees that:
>
> (a) the Scope of Works and Services describes the Works and Services required to be performed under the Water Treatment Services Contract by the Principal, and that the obligations set out in the Scope of Works and Services are either obligations of the Contractor, of the Services Provider, or of both (as determined and/or allocated by this Scope of Works or the Scope of Services, or otherwise as determined by the dispute resolution process set out in clause 15 of the Interface Deed);
>
> (b) it has reviewed the Scope of Services and warrants that the performance of the Works by it in accordance with this Contract will permit and enable the Services Provider to perform its obligations in accordance with the Services Provider Agreement;
>
> (c) unless expressly made clear to the contrary in this Scope of Works. Sections of the Scope of Works and Services:
>
> (1) that relate to performance of the Works are obligations of the Contractor;
>
> (2) that require performance of obligations on or before the achievement of Commercial Acceptance are obligations of the Contractor;
>
> (3) that relate to performance of the Services are obligation of the Service Provider; and
>
> (4) that require performance of obligations after the achievement of Commercial Acceptance are obligations of the Services Provider; and
>
> (d) for the avoidance of doubt, it accepts by incorporation from the Scope Services into this Scope of Works, all standards, operating requirements and obligations relevant to its performance of the Minimum Services under section 7.1 of Annexure 10."

53

The *"Scope of Services"* is defined as the Scope of Services under the SPA. The *"Scope of Works and Services"* is defined as the Scope of Works and Services under the WTSC.

54 Clause 5.1(a) of the Scope of Works provides that the Works include all work required to design, engineer, procure, supply, construct test and commission the Facility, defined as referred to at [12] and [45] above.

55 Clause 5.3 of the Scope of Works in the D&C Contract requires Veolia (as Contractor) to design the Works so that the Facility is capable of achieving, and will be operated by Veolia (as Services Provider) to achieve, the Guaranteed Capacity referred to at [24] above of continuous and uninterrupted acceptance of Mine Water at a rate of not less than 36ML per day (without using standby or backup equipment), with capacity for occasional acceptance of Mine Water at the rate of not less than 42ML per day for up to 60 days (with standby or backup equipment).

56 I have referred at [25] above to MP Water's right under clause 5.5(g)(3) of the Scope of Works and Services in the WTSC to request the Customer to cease the flow of Mine Water in the event of *"an actual or expected overflow of the Mine Water Buffer Pond"*.

57 Clause 5.5(g)(3) of the Scope of Work in the D&C Contract provides:

> "(g) Water management
>
> …
>
> (3) The Contractor [Veolia] acknowledges that if the Services Provider [Veolia] requires the Principal [MP Water] to stop or reduce the flow of Mine Water due to one or more of the following events (each a '**Facility Outage**'):
>
> …
>
> (B) an actual or expected overflow of the Mine Water Buffer Pond;
>
> …
>
> the Services Provider must provide a written request to the Principal to direct the Customer to stop or reduce the flow of Mine Water as soon as the Services Provider becomes aware of the relevant event or circumstances as set out above, but in any event no later than 20 hours prior to when the Services Provider requires the Principal to take such action."

58 Clause 5.5(h) of the Scope of Work records that MP Water requires that the Mine Water Buffer Pond capacity include a minimum 42ML reserve storage capacity as *"Customer Freeboard"* (in addition to any temporary storage capacity designed to allow for scheduled maintenance outages or intermittent fluids storage).

59 Clause 5.6(a) of the Scope of Works to the D&C Contract provides that the Water Treatment Facility must be able to continuously accept Mine Water up to the Guaranteed Capacity whilst accommodating regular maintenance activities. Clause 5.6(a) also contains an acknowledge by Veolia (as Contractor) that Veolia (as Services Provider) must maintain not less than the 42 ML Customer Freeboard *"for the sole purpose of receiving Mine Water inflow from the Customers on an unfettered basis."*

60 Clause 5.9(a) of the Scope of Works to the D&C Contract provides:

> "The Contractor is wholly responsible for all Works necessary to repurpose the existing Blowdown Pond B as the Mine Water Buffer Pond, including isolation of the pond from Blowdown Pond A, and all diversion work required; except as otherwise provided in Schedule 20 of the Contract."

61

Clauses 5.9(b)-(e) describe the other sources of water to be received by the Mine Water Buffer Pond in addition to the Mine Water. As I have already mentioned, those other sources of water and the provisions of clauses 5.9(b)-(e) are not relevant to these proceedings.

62 Under Schedule 20 to the D&C Contract, MP Water owes the same obligation to Veolia to procure the Pond Baseline Condition Report as the Customer owes to MP Water under Schedule 20 to the WTSC. Schedule 20 to the D&C Contract imposes the same obligations on MP Water and Veolia as Schedule 20 to the WTSC imposes on the Customer and MP Water (respectively) in relation to Settled Solid and Liner Remediation, including Liner Remediation Work: see [29]-[32] above.

63 Clause 2(b) of Schedule 20 to the D&C Contract provides that the Pond Baseline Condition Report is deemed to be *"Relied Upon Information"*. Pursuant to clause 10.4 of the D&C Contract, the Veolia is therefore entitled to claim an adjustment to the Contract Sum under the D&C Contract or other compensation in the event that the Pond Baseline Condition Report contains information that is incorrect. The WTSC contains provisions to the same effect for the benefit of MP Water as against the Customer.

64 Thus, the effect of clause 5.9(a) of the Scope of Works and Schedule 20 to the D&C Contract is that Veolia is *"wholly responsible for all Works necessary to repurpose the existing Blowdown Pond B as the Mine Water Buffer Pond"* except to the extent that MP Water undertakes or procures Settled Solid and Liner Remediation in accordance with Schedule 20 to the D&C Contract. As I have already mentioned, it is only Liner Remediation Work that is relevant to these proceedings.

65 Pursuant to Annexure 10 to the Scope of Works to the D&C Contract, Veolia owes to MP Water the same obligations in relation to commissioning and acceptance testing of the Works that MP Water owes to the Customer under Annexure 10 to the Scope of Works and Services to the WTSC: see [34] above.

66 Clause 17.6 of the D&C Contract provides for *"Commercial Acceptance"* in terms that operate back-to-back with the provisions clause 17.6 of the WTSC set out at [37] above. Clause 17.6 of the D&C Contract provides:

> "Commercial Acceptance
>
> The term "Commercial Acceptance" means that stage in the execution of the Works when:
>
> (a) those Works are complete in accordance with this Contract except for minor Defects:
>
> (1) which do not prevent those Works from being used for the Intended Purpose;
>
> (2) which the Independent Completion Certifier determines under clause 17.6(a)(2) of the Water Treatment Services Contract that the Principal has reasonable grounds for not promptly rectifying;
>
> (3) the existence and making good of which will not inconvenience or adversely affect the Principal or the Customer, having regard to the Intended Purpose; and
>
> (4) which do not cause any legal impediment to use or occupation of the Works;
>
> (b) the Works have achieved Provisional Commercial Acceptance;
>
> (c) the Contractor has delivered to the Principal:

(1) all Key Documents and other information required to be delivered by the Principal to the Customer under clause 17.6(c) of the Water Treatment Service Contract prior to Commercial Acceptance, in a form approved by the Principal acting reasonably;

(2) certification from the Contractor (in the form set out in Schedule 19) that the works have been executed, and the Works completed, in accordance with the design prepared by the Contractor;

(3) certification from the Contractor (in the form set out in Schedule 19) stating that the Key Documents submitted by the Principal to the Customer under the Water Treatment Services Contract comply with the requirements of the Water Treatment Services Contract; and

(4) certification from the Contractor (in the form set out in Schedule 19) to the effect that the Works are within the boundaries required by the Water Treatment Services Contract and that the structural elements of the Works are within the spatial tolerances specified in the Water Treatment Services Contract;

(d) the Commissioning and the Acceptance Testing and all other tests required to be performed by this Contract prior to at Commercial Acceptance, have been carried out, have been passed and demonstrate that those Works are in a state that is capable of being operated in accordance with this Contract;

(e) the Works have achieved the Guaranteed Flow and Process Capacity and Water Product Performance Standards;

(f) for Approvals (other than the Principal Approvals) which are necessary for the use of the Works in accordance with the requirements of this Contract have been obtained and are in effect and copies of which have been provided to the Principal; and

(g) any other matters or conditions required by this Contract in order to achieve Commercial Acceptance have been satisfied (including those specified in Annexure 10)."

67 Clause 17.11 of the D&C Contract provides:

"**Commercial Acceptance Certificate**

(a) The parties acknowledge that the Independent Completion Certifier must issue a Commercial Acceptance Certificate under the Water Treatment Services Contract, where the Principal has submitted a Commercial Acceptance Claim and the Independent Completion Certifier is satisfied that Commercial Acceptance has been achieved under the Water Treatment Services Contract.

(b) The parties acknowledge that where no Commercial Acceptance Claim has been submitted under the Water Treatment Services Contract, the Customer's Representative may, in its sole and absolute discretion request the Independent Completion Certifier issue a Commercial Acceptance Certificate, and the Independent Completion Certifier must issue a Commercial Acceptance Certificate if the Independent Completion Certifier is satisfied that Commercial Acceptance has been achieved under the Water Treatment Services Contract.

(c) In the absence of manifest error, an issue of Commercial Acceptance Certification under the Water Treatments Services Contract is deemed to be an issue of a Commercial Acceptance Certificate under this Contract and the Principal's Representative will issue a Commercial Acceptance Certificate. For the avoidance of doubt, Commercial Acceptance under this Contract will not occur until Commercial Acceptance has been achieved under the Water Treatment Services Contract and the Principal's Representative must not issue a Commercial Acceptance Certificate until the Independent Completion Certifier has issued a Commercial Acceptance Certificate under the Water Treatment Services Contract."

68 Clause 17.13 of the D&C Contract relevantly provides that the issue of a Commercial Acceptance Certificate does not relieve Veolia from any of its obligations or prejudice any claim by MP Water under the D&C Contract.

69 Clause 17.14A of the D&C Contract, contains an acknowledgement by MP Water and Veolia that the *"Independent Completion Certifier"* is appointed by the Customer and MP Water in accordance with the WTSC (the **Certifier**), that the Certifier will perform the functions set out in the WTSC and an Independent Completion Certifier Deed of Appointment provided for the WTSC, and that the Certifier is obliged to act independently of MP Water and Veolia.

Relevant provisions of the SPA

70 Clause 8.2 of the SPA requires Veolia to *"operate and maintain the Facility and perform and complete the Services, in accordance with … the Scope of Services"*. Similarly, clause 19.1 of the SPA requires Veolia to provide *"the Services … in the manner and to the standard described in the Scope of Services"* during the *"Operations Phase"* and to *"comply with all of its obligations, requirements and responsibilities as set out in the Scope of Services"*. The *"Operations Phase"* is defined in clause 1.1 of the SPA as *"the period commencing on the Services Commencement Date and expiring on the Expiry Date or earlier termination of this Contract"*. The *"Expiry Date"* is the date that is 15 years after the *"Services Commencement Date"*. The *"Services Commencement Date"* has the same meaning as in the WTSC, where it is relevantly defined as the day after the *"Commercial Acceptance Date"*. As referred to at [35] above, the *"Commercial Acceptance Date"* under the WTSC is the date on which the Certifier issues a *"Commercial Acceptance Certificate"* under the WTSC.

71 Clause 19.2 of the SPA contains a warranty and undertaking by Veolia that *"at all relevant times it has or will have available to it the resources, expertise and experience necessary to provide the Services in accordance with this Contract"*.

72 The Services are relevantly defined in clause 1.1 as *"the services in respect of the Facility to be provided by the Services Provider"*, including *"all services described in the Scope of Services"*.

73 The Scope of Services is set out in Attachment 1 to the SPA.

74 The term *"Facility"* is defined in clause 1.1 of the SPA and in the Glossary to the Scope of Services in the same terms as in the D&C Contract: see [12] and [45] above.

75 The term *"Mine Water Buffer Pond"* is defined in the same terms as in the D&C Contract, save for some changes in terminology that achieve the same effect as the D&C Contract definition. It is nevertheless convenient to set out in full the definition of *"Mine Water Buffer Pond"* in the SPA:

> "the existing Blowdown Pond B owned by Energy Australia at MPPS after it has been repurposed by the Construction Contractor to function as the Mine Water Buffer Pond and which will be part of the Facility, with all modifications and additions necessary to be compliant with Schedule 20 of the Construction Contract; where:
>
> 1 all modifications and additions are to be designed, engineered, procured, supplied, constructed, tested, and commissioned by the Construction Contractor, as further described in Attachment 1; and
>
> 2 which will be operated and maintained by the Services Provider in accordance with Schedule 20 of this Contract and the Mine Water Buffer Pond Operating Protocol."

76 References to *"Construction Contract"* in the WTSC and the SPA are references to the D&C Contract. The SPA defines *"Construction Contractor"* as meaning Veolia in its capacity as contractor under the D&C Contract.

77 The term *"Water Treatment Facility"* in the SPA has the same meaning as in the D&C Contract, save that MP Water is referred to in the SPA definition as *"Project Co"* rather than as *"the Principal".* As referred to at [49] above, the D&C Contract definition is the same in substance as the WTSC definition. The definitions of *"Mine Water"*, *"Treated Water"* and *"Mine Water Receipt Points"* in the SPA are the same as in the D&C Contract and the WTSC: see [12]-[21] and [45]-[51] above.

78

The Services are described in clause 5.1 in the Scope of Services in the same terms as clause 5.1 of the Scope of Works and Services to the WTSC, namely as including all activities and services required to (*inter alia*) receive Mine Water at the three Mine Water Receipt Points, transfer Mine Water to the Water Treatment Facility, treat Mine Water at the Water Treatment Facility and transfer Treated Water to TWDP1, TWDP2 and TWDP3 in accordance with the SPA.

79 Clause 5.3 of Scope of Services in the SPA contains an acknowledgment by Veolia (as service provider under the SPA) that Veolia (as construction contractor under the D&C Contract) must design the Works so that the Facility is capable of achieving, and will be operated by Veolia (as service provider) to achieve the Guaranteed Capacity referred to at [24] and [55] above. In relation to the Water Treatment Facility, the Guaranteed Capacity is continuous and uninterrupted acceptance of Mine Water at a rate of not less than 36ML per day (without using standby or backup equipment), with capacity for occasional acceptance of Mine Water at the rate of not less than 42ML per day for up to 60 days (with standby or backup equipment). Acceptance occurs at the Mine Water Receipt Points, as explained at [14]-[15] above.

80 Clause 20.1(a) of the SPA provides:

> "Mine Water is deemed to have been delivered to the Services Provider in accordance with this Contract when the Mine Water passes or enters into a Mine Water Receipt Point."

81 Clause 20.2(a) of the SPA relevantly provides that Veolia *"must accept and process all … Mine Water made available at the Mine Water Receipt Points subject to the Guaranteed Flow and Process Capacity"* unless *"expressly provided otherwise"* by another provision of the SPA.

82 Clause 20.2(b) of the SPA and clause 1.1(a) of Annexure 3 to the Scope of Services provide that neither the Customer nor MP Water gives any warranty as to the quality of the Mine Water. However, clause 20.3 of the SPA makes provision for circumstances in which the quality of Mine Water delivered is outside or materially outside the range for specified parameters set out in clause 1.1 of Annexure 3 to the Scope of Services – referred to as *"Out-of-Envelope Mine Water"* and *"Materially Out-of-Envelope Mine Water"*.

83 Clause 20.3(a) of the SPA requires Veolia to notify the Customer and MP Water as soon as Veolia becomes aware that Out-of-Envelope Mine Water has been delivered. Clauses 20.3(b) and (c) provide that Mine Water is deemed to comply with the quality parameters if Veolia fails to give that notice within specified timeframes. If Materially Out-of-Envelope Mine Water is delivered, clause 20.3(d) permits Veolia to direct MP Water to issue a direction to the Customer under the WTSC to reduce the quantity of Mine Water. Clause 20.3(e) provides that, *"[e]xcept as provided for in clause 20.3(d)"*, Veolia *"must receive and process all Mine Water at the Facility and deliver the Services in accordance with this Contract"*. Clauses 1.1(b) to (d) of Annexure 3 of the Scope of Services are to similar effect.

84 Clause 20.3(f) of the SPA requires MP Water to pay Veolia a *"Mine Water Quality Out-of-Envelope Services Volumetric Charge"* for processing Out-of-Envelope Mine Water in respect of which Veolia has given the notice required by clause 20.3(a).

85 Clause 21.1(a) of the SPA requires Veolia to process the Mine Water at the Facility and to deliver the resulting Treated Water to specified delivery points. Clause 21.1(b) requires Veolia to ensure that the Treated Water meets specified standards. Clause 21.2 requires Veolia to make all Treated Water available for delivery to the Customer at the *"MPPS Treated Water Delivery Point"*, but also contains an acknowledgment by Veolia that the Customer may take as much Treated Water as is available in its sole and absolute discretion and is not obliged to take any Treated Water at that delivery point. Clause 21.5 provides:

> "**No Relief**
>
> Other than as expressly stated in this Contract, the quality or volume of Mine Water delivered by the Customer to a Mine Water Receipt Point will not relieve the Services Provider from or alter its liabilities or obligations under this Contract (including the Services Provider's obligation under clauses 21.1(a) and 21.2)."

86 Clause 28(a) of the SPA relevantly provides:

> "Without limiting any other obligation of the Services Provider (including the Services Provider's obligations under clause 19) or any rights or remedies of Project Co, during the Operations Phase, the Services Provider must (at its own cost and expense and other than as expressly stated in this Contract):
>
> (1) subject to clauses 35 and 35A, keep the Facility operating at all times;
>
> …"

87 Clause 35 of the SPA makes provision for *"Force Majeure Events"*.

88 Clause 35A provides for suspension of Veolia's obligations under the SPA during the Operations Phase if it is prevented from performing any part of the Services or otherwise meeting its obligations by reason of an *"Abatement Relief Events"*, provided that Veolia complies with the notice and other requirements of clause 35A.2. Clause 1.1 of the SPA contains a very wide definition of *"Abatement Relief Event"*, including an act or omission of the Customer or MP Water (other than a proper exercise by the Customer or MP Water of certain contractual rights).

89 Clause 28.2 of the SPA requires Veolia to notify MP Water if it has been, or is likely to be, prevented from performing its obligations under clause 28.

90 I have referred at [25] and [56]-[57] above to the provisions of clause 5.3(g)(3) of the Scope of Works and Services in the WTSC and clause 5.5(g)(3) of the Scope of Works in the D&C Contract. Clause 5.5(g)(3) to the Scope of Services in the SPA relevantly provides:

> "If the Services Provider requires Project Co to stop or reduce the flow of Mine Water due to one or more of the following events (each a '**Facility Outage**'):
>
> …
>
> (B) an actual or expected overflow of the Mine Water Buffer Pond;
>
> …
>
> the Services Provider must provide a written request to Project Co to direct the Customer to stop or reduce the flow of Mine Water as soon as the Services Provider becomes aware of the relevant event or circumstance set out above, but in any event no later than 20 hours prior to when the Services Provider requires Project Co to take such action. Project Co must procure that the Customer promptly complies with any such request, having regard to the 20-hour notice requirement. Other than as expressly stated in this Contract, and subject to section 1.1(c) of Annexure 3, a request from the Services Provider pursuant to this section 5.5(g)(3) or otherwise to the Customer or Project Co to stop, reduce or divert the flow of Mine Water in response to any request by the Services Provider pursuant to this section 5.5(g)(3) of otherwise will not relieve the Services Provider of any obligation or liability under this Contract…"

91 Clause 5.5(g)(6) of the Scope of Services in the SPA provides:

> "The Blowdown Ponds are not configured or engineered for physical access, such as excavator access, for the purpose of desludging any accumulated solids. The Services Provider must ensure that its process, any repurposing and any ongoing operation of the ponds provides for this condition."

92 Clauses 5.5(h) and 5.6(a) of the Scope of Services in the SPA contain provisions in relation to Customer Freeboard in substantially the same terms as those clauses in the Scope of Works attached to the D&C Contract: see [59] above.

93 Clause 5.9(a) of the Scope of Services contains an acknowledgment by Veolia (as services provider) that:

> "… the existing Blowdown Pond B will be repurposed by the Construction Contractor as the Mine Water Buffer Pond, including isolation of the pond from Blowdown Pond A, and all diversion work required."

94 Clauses 5.9(b)-(e) describe the other sources of water to be received by the Mine Water Buffer Pond in addition to the Mine Water. As I have already mentioned, those other sources of water and the provisions of clauses 5.9(b)-(e) are not relevant to these proceedings.

95 Schedule 20 to the SPA contains provisions that operate back to back with the provisions of Schedule 20 of the WTSC referred to at [40]-[41] above. Veolia is required to notify MP Water of any concern in relation to the structural integrity of a pond (including the integrity of a liner). Veolia is required to provide the Pond Infrastructure Report to MP Water on every second anniversary of the *"Commencement Date"*. The *"Commencement Date"* in Schedule 20 of the SPA has the same meaning as in the WTSC, as referred to at [41] above. I note that this pre-dates the *"Services Commencement Date"* referred to below.

96 If a notification or Pond Infrastructure Report under those provisions of Schedule 20 results in capital work being undertaken to a pond, that work is an Abatement Relief Event and the provisions of clause 35A of the SPA apply.

97 Clause 8.3(a) of the SPA also requires Veolia to commence the *"Pre-Operations Services"* on the Commencement Date. Clause 18A describes a wide range of matters included in the *"Pre-Operations Services"*, including the preparation of an *"Operations Mobilisation Plan"*, reviewing the design and construction of the Facility, monitoring whether Veolia has performed the relevant commissioning tests under the D&C Contract, undertaking all things necessary to prepare to operate the Facility and cooperating with MP Water and with Veolia (as contractor under the D&C Contract) to *"receive handover of the Facility at the Services Commencement Date and in accordance with this Contract"*.

98 Pursuant to clause 8.3(a) of the SPA, Veolia is obliged to commence providing all other Services (that is, other than the Pre-Operations Services described in clause 18A)) on the *"Services Commencement Date"*. Clause 1.1 of the SPA provides that *"Services Commencement Date"* has the same meaning as in the WTSC, namely the later of the day after the *"Commercial Acceptance Date"* and 1 May 2019. This, in turn, picks up the definitions of *"Commercial Acceptance Date"* and *"Commercial Acceptance"* in the WTSC and the provisions in the WTSC concerning the issue of a *"Commercial Acceptance Certificate"* referred to at [35]-[38] above. Clause 8.3(b) of the SPA requires Veolia to perform the Services *"expeditiously and without delay"*.

99

Annexure 11 to the Scope of Services in the SPA requires Veolia to ensure that the Facility satisfies minimum residual service life requirements when delivered up to MP Water at end of the term of the SPA. Liners in lagoons are required to have a minimum residual service life of 5 years.

100 Clause 1.1 of the SPA, defines a *"Major Service Failure"* as:

> "the occurrence of one or more of the following:
>
> 1 the Services Provider fails to submit a report to Project Co outlining risk mitigation measures in accordance with (including within the timeframe set out in) section 2.3(b) of Schedule 12 or does not carry out the proposed risk mitigation measures set out in that report within the timeframes set out in that report …;
>
> 2 the Service Provider accumulates an aggregate of 200 Service Failure Points or more within a period of 16 consecutive Operating Months or less; or
>
> 3 the Facility fails or ceases to be able to accept Mine Water at a capacity which is at least the Guaranteed Flow and Process Capacity for a continuous period of 48 hours (unless otherwise agreed in writing by Project Co)."

101 As referred to at [24], [55] and [79] above, the Guaranteed Capacity for the Water Treatment Facility is continuous and uninterrupted acceptance of Mine Water at a rate of not less than 36ML per day (without using standby or backup equipment of the Facility), with capacity for occasional acceptance of Mine Water at the rate of not less than 42ML per day for up to 60 days (with standby or backup equipment).

102 Clause 1.1 of the SPA specifies 14 matters that constitute a *"Services Provider Default"*. One of those matters is: *"where … a Major Service Failure occurs"*.

103 Clause 42.2 of the SPA relevantly provides:

> "**Services Provider Default**
>
> (a) If the Services Provider commits a Services Provider Default, Project Co may give the Services Provider a written notice requiring the Services Provider to remedy the Services Provider Default (Services Provider Default Notice).
>
> (b) A Services Provider Default Notice must:
>
> (1) state that it is a Services Provider Default Notice;
>
> (2) specify the alleged Services Provider Default; and
>
> (3) if the Services Provider Default is:
>
> (A) capable of being remedied, specify a time and date by which the Services Provider must remedy the Services Provider Default, which must allow for a reasonable period of time to remedy the Services Provider Default in the circumstances; or
>
> (B) not capable of being remedied, specify the requirements of Project Co which the Services Provider must comply with in order to overcome the effects of the Services Provider Default and a time and date by which the Services Provider must comply with those requirements, which must allow for a reasonable period of time to overcome the effects of the Service Provider Default in the circumstances.
>
> **(Applicable Cure Period).**
>
> (ba) Not used.
>
> (c) Upon receipt of a Services Provider Default Notice, the Services Provider must remedy the Services Provider Default or comply with the requirements of Project Co to overcome the effects of the Services Provider Default by the time prescribed by, and otherwise in accordance with the Services Provider Default Notice.
>
> (d) Not used.
>
> (e) If the Services Provider reasonably determines that it requires an extension to an Applicable Cure Period it may, no later than the expiration of the Applicable Cure Period) submit in writing to Project Co:
>
> (1) evidence that the Services Provider has diligently pursued and is continuing to diligently pursue a remedy, or overcome the effects of the Services Provider Default Notice; and

(2) the period of time proposed by the Services Provider to be the extended Applicable Cure Period for the applicable Services Provider Default Notice.

(f) Project Co will not unreasonably refuse to grant an extension of the Applicable Cure Period for the applicable Services Provider Default Notices if the Services Provider strictly complies with the requirements of clause 42.2(e)."

104 The WTSC contains provisions that essentially operate back-to-back with the default provisions of the SPA referred to above. The WTSC defines *"Major Service Failure"* in the same terms as the definition in the SPA referred to at [100]-[101] above, save that the failures in items 1 and 2 of that definition refer to failures by *"Project Co"* (that is, MP Water) rather than by the Services Provider. The WTSC specifies 16 matters that constitute a *"Project Co Default"*. One of those matters is: *"where … a Major Service Failure occurs".* Clause 42.2 of the WTSC permits the Customer is issue a *"Project Co Default Notice"* if MP Water commits a *"Project Co Default"*. The requirements for a *"Project Co Default Notice"* and the rights and obligations of the Customer and MP Water in relation to such a notice under clause 42.2 of the WTSC are the same in all relevant respects as clause 42.2 of the SPA, *mutatis mutandis*.

105 Clause 44(a) of the SPA relevantly provides:

"**Step-in Rights**

(a) If at any time during the Operations Phase:

(1) a Services Provider Default Termination Event occurs;

(2) a Services Provider Default occurs and the Services Provider has failed to diligently pursue the relevant Services Provider Default Notice; or

(3) it is necessary for Project Co to take immediate action to discharge its statutory duties or powers, or comply with its obligations under applicable Laws and Approvals,

(4) a 'Project Co Default Termination Event' occurs under and as defined in the WTSC;

(5) a 'Project Co Default' occurs under and as defined in the WTSC and Project Co has failed to diligently pursue the relevant 'Project Co Default Notice' under and as defined in the WTSC; or

(6) it is necessary for the Customer to take immediate action to discharge its statutory duties or powers, or comply with its obligations under applicable Laws and Approvals,

Project Co (in the case of paragraphs (1) to (3)) or the Customer (in the case of paragraphs (4) to (6) and in accordance with clause 44 of the WTSC) may elect, and if it so elects the Services Provider will assist Project Co or the Customer wherever and however possible to ensure that Project Co or the Customer is able, to:

(7) temporarily take or assume total or partial possession, management and control of the Facility (or any part of the Facility) and the provision of the Services (or any of them);

(8) take such other steps as are necessary or desirable to continue the provision of the Services as required by this Contract or to minimise the risk to the Environment, to other members of the general public or of material damage to the Facility, as applicable; and

(9) do anything which the Services Provider is entitled to do under an O&M Project Contract or with respect to the Project.

(each a **Step-in Right**)."

106 A *"Services Provider Default Termination Event"*, referred to in clause 44(a)(1) above is defined in clause 1.1 of the SPA as including the occurrence of a Services Provider Default which has not been remedied, or its effects have not been overcome, in accordance with clause 42.2.

107 Clause 44 continues:

"(b) When exercising Step-In Rights, Project Co will use (or procure that the Customer uses) reasonable endeavours to operate the Facility in a manner which is consistent with the provision of the Services required by this Contract.

(c) Each of Project Co and the Customer may exercise its Step-in Rights without prior notice to the Services Provider but Project Co will, if reasonably practical to do so, give prior notice to the Services Provider and in any event will, as soon as practical, provide notice to the Services Provider that it or the Customer is exercising its Step-in Rights.

(d) Upon either Project Co or the Customer exercising its Step-in Rights, the Services Provider's rights and obligations under this Contract are suspended to the extent necessary to permit Project Co or the Customer to exercise those Step-in Rights.

(e) The Services Provider:

(1) irrevocably appoints Project Co, and such persons as are from time to time nominated by Project Co, jointly and severally as its attorney with full power and authority to exercise its Step-in Rights; and

(2) agrees to ratify and confirm whatever action an attorney appointed under clause 44(e)(1) takes in accordance with that clause.

(f) If Project Co or the Customer has exercised its Step-in Rights, it may cease to exercise those Step-in Rights at any time and in any event Project Co will cease (or will procure that the Customer will cease) to exercise those Step-in Rights as soon as:

…

(2) if Project Co has exercised its Step-in Rights pursuant to clause 44(a)(2), the Services Provider Default has been remedied or its effects overcome or Project Co ceases to pursue a remedy or the overcoming of its effects;

…

(g) Project Co or the Customer may elect to cease to exercise its Step-in Rights without prior notice to the Services Provider but Project Co will (or procure that the Customer will), if reasonably practical to do so, give prior notice to the Services Provider and in any event will (or precure that the Customer will), as soon as practical, provide notice to the Services Provider that Project Co or the Customer has ceased to exercise its Step-in-Rights.

(h) The Services Provider acknowledges and agrees that:

(1) neither Project Co nor the Customer will have any liability to the Services Provider, and the Services Provider will not be entitled to make any Claim and the Services Provider releases Project Co and the Customer from any such Claim, arising out of or in connection with the exercise of Step-in Rights by Project Co or the Customer, subject to Project Co's express obligations under this clause 44 and except to the extent that such liability or Claim is a result of a fraudulent, unlawful or negligent act or omission of Project Co or the Customer;

(2) neither Project Co nor the Customer is obliged to remedy or overcome the effects of any Services Provider Default Termination Event, Services Provider Default, 'Project Co Default Termination Event' (as defined in the WTSC) or 'Project Co Default' (as defined in the WTSC), or overcome or mitigate any risk or risk consequences in respect of which Project Co or the Customer exercises Step-in Rights;

(3) the exercise of any Step-in Rights does not limit any other right of Project Co under this Contract or the Customer under the WTSC, including any rights arising pursuant to the applicable Services Provider Default Termination Event or Project Co Default Termination Event' (as defined in the WTSC); and

(4) it will not (by act or omission) do anything which materially prejudices or frustrates Project Co's or the Customer's exercise of its Step-in-Rights.

(i) Upon Project Co or the Customer ceasing to exercise any Step-in-Rights pursuant to clause 44(g):

(1) the Services Provider must immediately recommence performance of the Services Provider's obligations which were suspended pursuant to clause 44(d); and

(2) Project Co will (or procure the Customer will), at the cost and expense of:

(A) the Services Provider, to the extent the Step-In Right has been exercised under clause 44(a)(1) or 44(a)(2), or clause 44(a)(4) or 44(a)(5) (where caused or contributed to by the Services Provider or a Services Provider Responsible Party);

(B) Project Co, to the extent the Step-In Right has been exercised under clause 44(a)(3), 44(a)(4), 44(a)(5) or 44(a)(6) where not caused or contributed to by the Services Provider or Services Provider Responsible Party,

give reasonable assistance to the Services Provider to ensure that the process of Project Co or the Customer ceasing to exercise Step-in Rights and the Services Provider recommencing to the perform its obligations is effected as smoothly as possible.

(j) During any period in which Project Co or the Customer has exercised its Step-in Rights then for so long as and to the extent that the Step-in Rights are being exercised in a manner preventing the Services Provider from providing any part of the Services:

(1) the Services Provider will be relieved from its obligations to provide that part of the Services and no further Services Provider Default or Services Provider Default Termination Event will arise to the extent caused by the exercise of the Step-in Rights;

(2) in circumstances of a Step-in Right being exercised pursuant to clauses 44(a)(1) and 44(a)(2), or clauses 44(a)(4) and 44(a)(5) (where caused or contributed to by the Services Provider or a Services Provider Responsible Party), the O&M Charges for the relevant Month will be reduced by:

(A) the greater of any costs avoided by the Services Provider and the amount of the costs actually incurred by Project Co or the Customer in providing the relevant Services; and

(B) the costs incurred by Project Co or the Customer in curing the Services Provider Default, Services Provider Default Termination Event, 'Project Co Default' (as defined in the WTSC) or 'Project Co Default Termination Event' (as defined in the WTSC); and

(3) in circumstances of Step-in Rights being exercised pursuant to clause 44(a)(3) or 44(a)(6), the O&M Charges for that Month will be reduced by the amount Project Co reasonably determines to be the amount of the costs not incurred by the Services Provider by reasonable of the exercise of that Step-in Right.

(k) The Services Provider acknowledges that Project Co or the Customer may exercise any Step-in Right through a delegate or nominee of Project Co or the Customer (as applicable)."

108 The Customer has equivalent Step-in Rights against MP Water under clause 44 of the WTSC.

EVENTS GIVING RISE TO THESE PROCEEDINGS

109 In these reasons, references to Pond B are to be understood as the pond that the WTSC and the D&C Contract require to be repurposed as the Mine Water Buffer Pond.

110 On 30 April 2018, MP Water provided to Veolia a report dated 1 September 2017 by Dredging Solutions Pty Ltd (the **Dredging Solutions Report**) and a report dated 24 April 2018 by Total Lining Systems in relation to ponds, including Pond B (the **TLS Report**).

111 MP Water relies on these two reports as together comprising the Pond Baseline Condition Report required by Schedule 20 of the D&C Contract. Veolia did not contend that the reports did not constitute a *"Pond Baseline Condition Report"*, notwithstanding that the reports were provided to Veolia significantly later than the time by which they were required under Schedule 20 of the D&C Contract. As will become apparent, the dispute that emerged between the parties after the provision of these reports principally concerned whether the TLS Report identified that the integrity of the liner in Pond B would, or was reasonably expected to, materially adversely affect Veolia's performance of the Services under the SPA. That was also the focus of the parties' submissions in these proceedings. It is therefore not necessary to say anything further about the Dredging Solutions Report.

112 The TLS Report stated:

"Energy Australia engaged Total Lining Systems (TLS) to take samples and conduct laboratory testing of HDPE geomembrane pond liners installed at the Mt Piper power station. The purpose of the sampling and testing is to determine the remaining service

> life of the installed HDPE pond liners. At the time of writing this report, laboratory testing is currently ongoing and final results are yet to be received."

113 Samples taken from the pond liners, including three samples taken from the liner in Pond B, were tested to determine retained antioxidant levels, stabilizer levels, the presence of microcracking, the level of surface oxidation, retained strength and elongation properties, any significant changes in melt flow index and stress crack resistance. At the time the TLS Report was prepared, the results of the tests undertaken to determine microcracking were not available.

114 The TLS Report stated that the specifications for the pond liners at the time they were installed in 1991 were not available, so the liner samples had been tested against *"GRI-GM13"*, which the report described as *"a standard published by the Geosynthetic Research Institute"* that *"sets forth a set of minimum physical, mechanical and chemical properties that must be met, or exceeded by the geomembrane being manufactured"*.

115 The three Pond B liner samples tested were taken from the north slope, south slope and anchor trench of Pond B. The anchor trench is a trench that runs around the perimeter of a pond. A liner is placed in an anchor trench not to contain wastewater but as a mechanical means to anchor the pond liner around the perimeter and to prevent wind uplift or displacement. The TLS Report stated that liner buried in anchor trenches is covered with backfill to secure the liner around the perimeter and the backfill often contains items such as rocks, sticks and other particles that may damage the liner.

116 As referred to at [19] above, the capacity of Pond B is 104ML. Each of the samples taken from the anchor trench, and the north and south wall of Pond B was approximately 500mm x 500mm, being the minimum sample size possible for testing against GRI-GM13. No samples were taken from the floor of Pond B.

117 The results of the tests undertaken on the three Pond B liner samples may be summarised as follows.

118 In relation to the testing of tensile properties to determine strength and elongation properties, all three samples met or exceeded the GRI-GM13 values for strength at yield and elongation at yield. The Pond B anchor trench sample did not meet or exceed the GRI-GM13 values for strength at break and elongation at break. The TLS Report stated that this may be attributable to the anchor trench liner having been damaged by backfill material. One of the other Pond B liner samples did not meet the GRI-GM13 standard for tensile elongation at break.

119 All three of the Pond B liner samples failed to meet the GRI-GM13 requirements for antioxidant levels and stabilizer levels. The TLS Report explained that antioxidants and stabilizers protect the liner from degradation due to UV radiation and chemicals over its life. The antioxidant and stabilizer levels in the three Pond B liner samples were below the GRI-GM13 values. The TLS Report stated that the results:

> "… would indicate that the antioxidants and stabilizers in the HDPE liners in the ponds at Mt Piper are severely depleted in comparison to a new HDPE geomembrane. It should be noted that this conclusion is based on the assumption that the new HDPE liner installed to the ponds at Mt Piper was of a similar standard and had similar properties to HDPE liners as per GRI-GM13. Without the original material specification for the liners installed at Mt Piper, it is not possible to say with certainty if the stabilizers and antioxidants have severely depleted over time, or were below the GRI-GM13 standard to begin with."

120

The TLS Report explained that surface oxidization results from exposure to the elements and the contents of the ponds. All three of the Pond B liner samples were significantly oxidized. The report stated that there was no direct relation between the service life of a liner and the surface oxidization test results, but the results could be used over the service life to monitor oxidization levels.

121 The three Pond B liner samples were below the GRI-GM13 values for stress crack resistance. As I have already mentioned, microcracking test results were not available at the time of the TLS Report.

122 The TLS Report predicted the service life of each of the pond liners, based only on the tensile elongation at break test results. The TLS Report did not explain why the prediction was based solely on that specific property, notwithstanding that the report acknowledged that the contents, operation and level of UV exposure would be relevant to the service life of the liners and that there had been loss of antioxidants and moderate to significant oxidization in all of the pond liners. As referred to above, the oxidization loss was found to be significant for the Pond B liner samples tested.

123 Applying an approach based on a paper published by the Geosynthetic Institute, the TLS Report estimated that a 50 per cent reduction in the performance of liners compared to the GRI-GM13 value for tensile elongation at break indicated that the service life of the liner was half the service life that it would otherwise have. The TLS Report stated:

> "… for ponds where elongation at break values currently meet or exceed GRI-GM13 values, we revert to the greater than 36 years lifetime prediction as stated in table 6 and the original installation date of 1991 as stated by Energy Australia. For ponds where elongation at break values do not meet or exceed GRI-GM13 values, we recommend further testing at regular intervals to monitor the loss of performance for this design parameter."

124 As noted above, the liner sample from the south wall of Pond B failed to meet the GRI-GM13 standard for tensile elongation at break. The anchor trench sample also failed to meet that standard, but TLS disregarded this for the reasons referred to at [115] above.

125 Notwithstanding the failure of the Pond B south wall liner sample to meet the relevant standard, it appears that TLS nevertheless attributed service life of greater than 36 years to the Pond B liner, expiring at some time after 2022, on the basis that annual testing for tensile properties was recommended.

126 This conclusion was qualified by the following comment in the report:

> "… we note that assessment of the lifetime prediction for the ponds at Mt Piper should also consider the condition of all HDPE seams – both wedge and extrusion welds, terminations to pipework and concrete structures (if any) and condition of liners in the floor of the ponds in addition to materials on slopes and in anchor trenches. This report covers the material properties of HDPE geomembrane sheet however, anecdotally, we note that failures in HDPE liner generally occur over time at seams and terminations rather than in the middle of installed panels of liners."

127 The TLS report also stated:

> "TLS notes there are means to test installed HDPE lined ponds using dipole testing or electrostatic spark testing to ascertain if there are any holes in HDPE geomembranes."

128 MP Water contended that the Pond Baseline Condition Report determined that the Settled Solids and Liner Remediation was not required. However, Veolia considered that the information in the TLS Report identified that the integrity of the liner in Pond B

would, or could reasonably be expected to, materially adversely affect the performance of the Services under the SPA and that Liner Remediation Work was therefore required.

129 For reasons that are not explained by any evidence identified in the parties' submissions, this disagreement was continuing almost two years after MP Water provided the TLS Report to Veolia.

130 On 4 March 2020, Veolia wrote to MP Water advising that it did not accept *"the purported handover"* of Pond B. The letter stated that the condition of Pond B was *"inappropriate for handover and contrary to the requirements in* [the D&C Contract]*"* because, among other reasons:

> "Schedule 20 in relation to Pond Management required the condition of the Pond liners to be investigated by the Principal and … required repairs undertaken if *'the integrity of the liner in any Pond will, or is reasonably expected to materially adversely affect the performance of the Services'* (clause 2(c)(3)). According to the Customer's Pond Baseline Condition Report dated 24 April 2018, the condition of the liner has been acknowledged as inadequate for the duration of the Services. The Contractor is concerned with the high risk of failure of the liner system in Blowdown Pond B and consider that it will materially affect the performance of the Services. We note that in accordance with Schedule 20, clause 2(e)(2), the Principal must undertake or procure the undertaking of the Settled Solid and Liner Remediation."

131 The letter concluded:

> "For the avoidance of doubt, neither the handover of Blowdown Pond B nor any work required prior to handover is required to achieve (and accordingly does impact the timing of) Commercial Acceptance on 5 March 2020 as previously notified. We refer to the email from the Customer's Representative on 15 November 2019 in this regard."

132 On 9 April 2020, Veolia wrote to MP Water referring to correspondence between MP Water and the Customer in November 2019 in which it had been agreed (as between MP Water and the Customer) that the acceptance testing for the Mine Water Buffer Pond would be removed from the acceptance testing requirements under the WTSC (and thereby not required in order to achieve Commercial Acceptance under the WTSC) and would become a *"demonstration criteria"* that would be *"classed as a defect to be completed within the post commercial acceptance period"*. Veolia complained that the Customer was now contending that the agreement recorded in the November 2019 correspondence was subject to certain matters that had not occurred. Veolia's letter stated it had relied on the representations in the November 2019 correspondence and that the Customer was estopped from maintaining its present position and denying Commercial Acceptance.

133 The letter continued by setting out Veolia's position that MP Water had not performed its obligations under clause 2 of Schedule 20 of the D&C Contract because the Pond Baseline Condition Report had identified (relevantly) that the integrity of the liner in Pond B would, or was reasonably expected to, materially adversely affect the performance of the Services under the SPA. MP Water had failed to request a Pond Remediation Quotation for the Settled Solid and Liner Remediation in accordance with Schedule 20 of the D&C Contract. Veolia contended that, in those circumstances, there was an implied obligation in Schedule 20 for MP Water to undertake or procure the Settled Solid and Liner Remediation, notwithstanding that MP Water had failed to obtain a quotation for that work.

134 The letter continued:

> "There are several consequences flowing from the Principal's failure to comply with clause 2 of Schedule 20 of the Contract, including that the Mine Water Buffer Pond cannot yet be handed over.
>
> The Customer appears to refer to a *'plan to reline the pond when required in the future … Details of timing are yet to be agreed with Project Co but can be agreed once the Facility is in operation.'* This comment overlooks the Principal's (and Customer's) obligations, prior to hand over (set out above) and appears to be an attempt to circumvent the Customer's (and Principal's) obligations by pushing these out to a future unknown date. There is no question that this would materially adversely affect the performance of the Services.
>
> As per the Principal's obligations under clause 2, Schedule 20, the Contractor requests that the Principal immediately undertake, or procure the undertaking of, the Settled Solid and Liner Remediation."

135 The letter concluded that, having regard to those matters (and other matters raised in the letter, including MP Water's failure to dewater Pond B for handing over to Veolia), *"the Mine Water Buffer Pond has not been handed over, in accordance with the Contract or otherwise"*. Nevertheless, as referred to at [132] above, Veolia maintained the contention set out in its 4 March 2020 letter referred to above that this need not delay Commercial Acceptance.

136 On 14 May 2020, Veolia wrote to MP Water again in relation to its alleged non-compliance with clause 2 of Schedule 20 to the D&C Contract. Relevantly, the letter disputed that the Dredging Solutions Report and TLS Report met the requirements in Schedule 20 of the D&C Contract for a Pond Baseline Condition Report and that, if they did, the TLS Report identified that the integrity of the liner in Pond B was, or would reasonably be expected to materially adversely affect the performance of the Services under the SPA. The letter then reiterated Veolia's contentions that, having failed to obtain a Pond Remediation Quotation in accordance with Schedule 20 of the D&C Contract, MP Water was obliged to undertake the Settled Solid Liner Remediation *"prior to hand over of Pond B"*. Veolia sought confirmation that MP Water was proceeding to undertake that work without delay.

137 On 29 May 2020, MP Water and the Customer entered into an agreement that the parties refer to as the **Side Agreement**.

138 The Side Agreement relevantly provided:

> "2. Immediately upon signing of this letter by both parties, the Customer and Project Co will issue a joint instruction to the Independent Completion Certifier substantially in the form of **Annexure A** in relation to completion of the 'Deferred Works' (**Deferred Works**), the settled solid and liner remediation works to Blowdown Pond B required to achieve the criteria set out in sections 2(c)(4) and 2(c)(5) of Schedule 20 of the WTSC and otherwise as set out in **Annexure B** to be performed in accordance with section 6 of Schedule 20 of the WTSC (**Mine Water Buffer Pond Works**) and the 'Mine Water Buffer Pond Demonstration Criteria Work' (**Mine Water Buffer Pond Demonstration Criteria Work**) as defined in **Annexure C.** Any additional fees charged by the Independent Completion Certifier will be paid in accordance with the WTSC other than additional fees charged by the Independent Completion Certifier as a result of the Mine Water Buffer Pond Works, which fees will be paid by the Customer.
>
> 3. Promptly following the issue of the joint instruction referred to in paragraph 2 above, the Independent Completion Certifier will assess whether Commercial Acceptance has occurred in accordance with the Independent Certifier Deed of Appointment.
>
> 4. The parties agree that if, following an assessment referred to under paragraph 3 above the Independent Completion Certifier does not certify Commercial Acceptance within 3 Business Days after receipt of the joint instruction referred to in paragraph 2 above, unless otherwise agreed by the parties in writing this letter will terminate and will be of no effect. If this letter terminates pursuant to this paragraph 4, neither party will be entitled to rely on any part of this letter or the contents of it to support any claim against the other party.
>
> 5. If the Independent Completion Certifier issues a Commercial Acceptance Certificate, Project Co will issue the equivalent Commercial Acceptance Certificate to Construction Contractor pursuant to clause 17.11 of the Construction Contract.

6. Promptly following paragraph 5 above, Project Co will notify the Construction Contractor of the Defects existing as the Commercial Acceptance Date and direct the Construction Contractor to rectify those Defects pursuant to clauses 13.5(b)(1) and 13.5(c) of the Construction Contract substantially in the form of **Annexure D.**

…

Mine Water Buffer Pond Works

10. Following the Commercial Acceptance Date, the Customer will procure the performance of the scope of work of the Mine Water Buffer Pond Works and:

(a) expeditiously and without delay and will use reasonable endeavours to ensure the Mine Water Buffer Pond Works is completed by 30 September 2020; and

(b) not withstanding paragraph 10(a), by no later than the date that is 20 months after the Commercial Acceptance Date.

11. The Customer acknowledges that while the Mine Water Buffer Pond Works is being performed, Project Co's, the Construction Contractor's and the Services Provider's ability to perform their obligations under their relevant contracts may be affected.

…

Completion of Mine Water Buffer Pond Works and Mine Water Buffer Pond Demonstration Criteria Work

14. The Customer will regularly report on progress of the Mine Water Buffer Pond Works and will notify Project Co if it considers the Mine Water Buffer Pond Works will not be completed by the date referred to in paragraph 10(a) above.

15. The Customer will notify Project Co at least 14 days before it expects to complete and confirming the date on which it expects to handover of Blowdown Pond B will occur, substantially in the form of **Annexure F**.

16. Following receipt of the notice referred to in paragraph 15 above, Project Co will issue an equivalent notice to the Construction Contractor substantially in the form of **Annexure G.**

17. Pursuant to the joint instruction referred to in paragraph 2 above, the Independent Completion Certifier will be asked to verify completion of the Mine Water Buffer Pond Works in accordance with the joint instruction referred to in paragraph 2 above. The date of certification of the Mine Water Buffer Pond Works will be the date of handover of Blowdown Pond B from the Customer to Project Co (**Customer Handover Date**).

18. On the Customer Handover Date, Project Co will procure the Construction Contractor commences the Mine Water Buffer Pond Demonstration Criteria Work pursuant to the notice referred to in paragraph 6 above.

19. On the date of completion of the Mine Water Buffer Pond Demonstration Criteria Work to the Independent Completion Certifier's satisfaction, handover of the Mine Water Buffer Pond from the Construction Contractor to the Services Provider will take place (**Project Co Handover Date**)."

139 The *"Deferred Works"* referred to in the Side Agreement are not relevant to the issues in these proceedings.

140 The *"Mine Water Buffer Pond Works"* were described in a scope of works document in Annexure B to the Side Agreement. The scope of works was described as *"all works required to clean, inspect and repair the existing liner and installation of a second liner"*, including dewatering, desilting and cleaning of Pond B, inspection and repairs *"as required"* of the existing liner, and the installation and commissioning of a new liner (to be supplied by the Customer to GRI-GM13 standard specification) over the existing liner. Section 1.5 of the scope of works stated (my emphasis):-[5]

"1. You must inspect the existing liner in each pond, **where there is a fault that would cause damage to the new liner**.

(d) You must provide us with a quote and a repair procedure to fix the defect to an acceptable standard to both parties.

(e) The quote must be based on clause 2, Schedule of Rates in Schedule 4.

(f) Any repair would be carried at the same time as the new liner.

2. You must install and commission a new liner over the existing liner for the Blowdown Pond B."

141 The *"Mine Water Buffer Pond Demonstration Criteria Works"* were defined in Annexure C to the Side Agreement as:

> "(a) Commissioning and Acceptance Testing of the Mine Water Buffer Pond and associated systems including introduction of Mine Water to the Mine Water Buffer Pond, MPPS Mixed Waters at the MPPS Mixed Water Receipt Point and Blowdown Waters at the Blowdown Receipt Point 2 at the Mine Water Buffer Pond in accordance with the Commissioning and Testing Plan; and
>
> (b) completion of the WTF Minimum and Maximum Capacity tests in accordance with clause 7.4.5 of the approved Acceptance Test Procedure."

142 Clauses 20 to 22 of the Side Agreement relieved MP Water from certain obligations under the WTSC during the period from Commercial Acceptance until the completion of the Mine Water Buffer Pond Demonstration Criteria Work to the Certifier's satisfaction (or, if earlier, 20 days after the Certifier verifies completion of the Mine Water Buffer Pond Works). The relief was limited to the extent reasonably necessary and to the extent that MP Water was unable to perform the relevant obligations directly as a result of the Mine Water Buffer Pond Works and the Mine Water Buffer Pond Demonstration Criteria Works. The obligations in respect of which relief was granted include the Guaranteed Capacity obligations (in specified scenarios only) and the obligation under clause 5.9(e) of the Scope of Works and Services to accept and treat certain waters at the Mine Water Buffer Pond. Clause 22(b) provided that the Customer would accept those waters and overflow into "Pond D" for treatment.

143 There was no agreement entered into between MP Water and Veolia containing back to back provisions with, or otherwise reflecting, the Side Agreement.

144 On 29 May 2020, MP Water and the Customer jointly issued an instruction to the Certifier in accordance with the Side Agreement (the **Joint Instruction**). It stated that *"Deferred Works"* and the *"Mine Buffer Pond Demonstration Criteria Work"* were not required to be completed as a pre-condition to Commercial Acceptance and were instead to be completed by MP Water to the Certifier's satisfaction after the Commercial Acceptance Date.

145 As I have already mentioned, the *"Deferred Works"* are not relevant to the issues in these proceedings.

146 The Joint Instruction defined the *"Mine Buffer Pond Demonstration Criteria Work"* in the same terms as Annexure C to the Side Agreement set out at [141] above.

147 The Joint Instruction requested the Certifier to consider whether Commercial Acceptance had been achieved.

148 The Joint Instruction also stated:

> "The Customer and Project Co [MP Water] have agreed that the Customer will procure the performance of the settled solid and liner remediation works to Blowdown Pond B required to achieve the criteria set out in sections 2(c)(4) and 2(c)(5) of Schedule 20 of the WTSC and otherwise as set out in Attachment 3 to be performed in accordance with section 6 of Schedule 20 of the WTSC (**Mine Water Buffer Pond Works**)."

149 Attachment 3 to the Joint Instruction was the same scope of work document that was Annexure B to the Side Agreement, referred to at [140] above.

150 The Joint Instruction then set out the procedures to be followed upon completion of the Mine Water Buffer Pond Works by the Customer and completion of the Deferred Works and Mine Water Buffer Pond Demonstration Criteria Work by MP Water and the notices

to be issued by the Certifier stating whether they are satisfied that the work has been completed.

151 After the issue of the Joint Instruction, the Certifier issued a Commercial Acceptance Certificate dated 29 May 2020 under the WTSC. The Certifier's letter referred to the Joint Instruction and stated:

> "Under the terms of the WTSC, and the ICC Deed, the ICC issues this letter as a Commercial Acceptance Certificate based on compliance with Items 17.6, 17.9 and Annexure 10 Section 9 of the WTSC. Commercial Acceptance was achieved on 29th May 2020."

152 I will refer to this as the **WTSC Commercial Acceptance Certificate**.

153 The WTSC Commercial Acceptance Certificate attached the Certifier's compliance assessment against the requirements of clause 17.6 of the WTSC.

154 The terms of clause 17.6 are set out at [37] above. It will be recalled that Commercial Acceptance is reached at the stage when the Works satisfy the six requirements in sub-clauses (a)-(g).

155 Clause 17.6(a)(1) of the WTSC requires that the Works be complete in accordance with the WTSC *"except for minor Defects which do not prevent those Works from being used for the Intended Purpose"*. The *"Intended Purpose"* is defined in clause 1.1 of the WTSC as meaning the intended purpose of the Facility, the Works and Services (and each component thereof) as stated in the WTSC or as could be reasonably inferred by a competent contractor from what is stated in the WTSC. In relation to clause 17.6(a)(1), the Certifier's compliance assessment stated:

> "The Mine Water Buffer Pond has not been commissioned or demonstrated as complete however has been agreed by the parties as a "Deferred Works Item" under the Instruction to the ICC.
>
> The ICC certify that the remainder of the Works can be used for the Intended Purpose as far reasonably possible without the agreed Deferred Works."

156 Clause 17.6(d) of the WTSC requires that the Commissioning and Acceptance Testing and all other tests required to be performed by this Contract prior to or at Commercial Acceptance have been carried out, have been passed and demonstrate that those Works are in a state that is capable of being operated in accordance with the WTSC. In relation to clause 17.6(d), the Certifier's compliance assessment stated:

> "All works satisfactorily commissioned and passed performance testing with the exception of the mine water buffer pond which has been agreed as **Mine Water Buffer Pond Demonstration Criteria Work** therefore not subject to this assessment. Refer Direction to the ICC."

157 Clause 17.6(e) of the WTSC requires that the Works have achieved the Guaranteed Capacity and the *"Water Product Performance Standards"*. In relation to clause 17.6(e), the Certifier's compliance assessment stated:

> "Agreed as **Mine Water Buffer Pond Demonstration Criteria Work**. Refer Direction to the ICC."

158 The Certifier's compliance assessment also stated that the Mine Water Buffer Pond had been removed from acceptance testing during a commissioning meeting held on 27 November 2019.

159 MP Water then forwarded the WTSC Commercial Acceptance Certificate to Veolia together with a certificate issued by MP Water under clause 17.11 of the D&C Contract dated 29 May 2020 notifying Veolia that Commercial Acceptance was reached on that

date. The certificate stated that it did not relieve Veolia of any of its obligations under the D&C Contract, including the obligations to perform the Works in accordance with the D&C Contract. I will refer to this as the **D&C Commercial Acceptance Certificate**.

160 In accordance with clause 6 of the Side Agreement (to which Veolia was not a party), MP Water sent a *"Notice of Defects and direction to rectify"* to Veolia under the D&C Contract on 30 May 2020. Adopting the terminology used in subsequent correspondence between the parties, I will refer to this as the **Defects Letter**.

161 The Defects Letter stated:

> "[MP Water] is aware of the following Defects existing as at the date of this letter:
>
> (a) failure to perform the Commissioning and Acceptance Testing of the Mine Water Buffer Pond and treatment of MPPS Mixed Waters, Blowdown Diversion and Blowdown MF Waste at the Mine Water Buffer Pond prior to the Commercial Acceptance Date (**Mine Water Buffer Pond Defect**); and
>
> (b) the other items of work (Deferred Works) set out in the document titled 'Outstanding Works List' … included as Attachment 1 to this letter."

162 The *"Deferred Works"* referred to in (b) above are not relevant to these proceedings.

163 In relation to the alleged Mine Water Buffer Pond Defect referred to in (a) above, the Defects Letter stated that MP Water directed Veolia pursuant to clauses 13.5(a), 13.5(b) and 13.5(c)(2) to *"rectify the Defect within 10 Business Days of the date Blowdown Pond B is handed over* [Veolia]*"*. The notice further stated:

> "In respect of the Mine Water Buffer Pond Defect, the Principal [MP Water] directs that the activities required to rectify the Mine Water Buffer Pond Defect (as set out in **Attachment 2** to this letter) (**Mine Water Buffer Pond Demonstration Criteria Work**) will commence on the date of handover of Blowdown Pond B to the Contractor [Veolia] following completion of certain works to Blowdown Pond B by the Customer and must be completed within 10 Business Days from that date or as otherwise agreed by the Principal. The target date for completion of the relevant works to Blowdown Pond B is currently 30 September 2020. The Principal will provide the Contractor with updates as to progress of these works.
>
> The Principal considers that these dates and timeframes are reasonable having regard to the timeframe for completion of the relevant works to Blowdown Pond B by the Customer.
>
> Except as expressly stated in this letter, nothing in this letter affects the obligations of the Contractor to rectify Defects or otherwise perform the Works in accordance with the Contract. Except as expressly stated in this letter, [MP Water] reserves all of its rights under the Contract and at Law."

164 Attachment 2 to the Defects Letter was in the same terms as Attachment 2 to the Joint Instruction and Annexure C to the Side Letter, the terms of which are set out at [141] above.

165 On 17 June 2020, Energy Australia NSW Pty Ltd (one of the Customers) entered into a Works Contract with Lendlease Services Pty Ltd (**LLS** and the **LLS Contract**). The scope of the work to be performed by LLS was described in Schedule 2 of the LLS Contract in the same or substantially the same terms as Annexure B to the Side Agreement and Attachment 3 to the Joint Instruction.

166 Clause 1.2 of Schedule 2 to the LLS Contract provided:

> "Scope of Works
>
> This scope is for all works required to clean, inspect and repair the existing liner and installation of a second liner.
>
> Your activities include all necessary things and tasks required to:
>
> (a) Dewatering, desilting and cleaning of Blowdown Pond B in preparation for relining.
>
> (b) Inspection and repairs as required of the existing HDPE membrane.

(c) Install and commission new liner over the existing liner for the Blowdown Pond B.

(d) Provision of anchor trench for the new liner including excavation and backfilling with suitable material."

167 Clause 1.3 of Schedule 2 required LLS to supply a geomembrane liner to the appropriate Australian and Industry Standard, including the GRI-GM13 Standard Specification.

168 Clause 1.5 of Schedule 2 relevantly provided:

> "1. You must inspect the existing liner in each pond, where there is a fault that would cause damage to the new liner.
>
> a) You must provide us with a quote and a repair procedure to fix the defect to an acceptable standard to both parties.
>
> b) The quote must be based on clause 2, Schedule of Rates in Schedule 4.
>
> c) Any repair would be carried at the same time as the new liner.
>
> 2. You must, install and commission a new liner over the existing liner for the Blowdown Pond B.
>
> …
>
> 7. Final Lining Report
>
> You shall provide a final lining report on the final condition of the existing liner and details of the installation of the secondary liner. The report is to include QA documentation, accreditation of welders, repairs photos of repairs and post testing results."

169 LLS carried out the work during August and September 2020. For the duration of that work, certain waters that would otherwise have been directed to Pond B were diverted into another pond known as Pond D. Pond D is located next to Pond B, and is owned and operated by the Customer. It is not clear from the evidence whether the water diverted to Pond D included Mine Water accepted at the Mine Water Receipt Points, or whether all such Mine Water was processed through the Water Treatment Facility immediately following acceptance during the period of the LLS work.[6]

170 On 26 October 2020, the Certifier wrote to MP Water and the Customer stating that the Customer had *"provided supporting evidence for the completion of the Mine Water Buffer Pond Works, as defined in clause 3 of the Joint Instruction – Commercial Acceptance dated 29 May 2020"*.

171 The letter listed the supporting evidence as follows:

Attachment	Title	Company/Author	Date Received
2	Final Test Report and Analysis – Mt Piper HDPE Pond Liners	Total Lining Systems	11/09/2020
3	Sludge Survey Report - Mount Piper Power Station	Dredging Solutions	11/09/2020
4	Blowdown Pond B Report – Liner Assessment and Installation	Lend Lease	07/10/2020
5	Appendix A – Material Technical Data Sheets	Atarfil	07/10/2020
6	Appendix B – Inspection and Test Plan – CW Blowdown Pond 'B' – Cleaning and Relining Works	Lendlease	07/10/2020
7	Construction Quality Assurance Report – Primary Liner	EcoLine	22/10/2020
8	Construction Quality Assurance Report –Secondary Liner	EcoLine	22/10/2020
9	Authorisation Matrix	Lendlease	22/10/2020
10	Letter – Re: CQA Report – Blowdown Pond B Mt Piper	EcoLine	22/10/2020

172 Attachments 2 & 3 referred to in the above table are the Pond Baseline Condition Reports referred to earlier in these reasons.

173 Attachment 4 is the report prepared by LLS pursuant to clause 1.5(7) of Schedule 2 to the LLS Contract referred to above (the **LLS Report**). The purpose of the work was described in that report as being *"to determine the integrity and condition of the existing pond liner, repairs or maintenance where required and install a new secondary liner"*. The report stated that entire floor of the existing liner of Pond B had been replaced after *"extensive damage"* was found there, and repair work had been undertaken to parts of the liner on the walls of the pond. That replacement and repair work was undertaken in August 2020. The new liner (referred to by LLS as the secondary liner) had then been installed during the period from 11 September to 30 September 2020. The report stated that all welding on the existing liner and new liner had been subjected to non-destructive testing and all welds were compliant. The report also stated that all work had been carried out in accordance with the International Association of Geosynthetic Installers HDPE and LLDPE Geomembrane Installation Specifications.

174 The remaining attachments referred to in the Certifier's letter dated 26 October 2020 comprise a quality assurance report concerning the LLS work and other documents relating to the work undertaken by LLS and the materials used in that work. It is not necessary to refer to them in detail.

175 After referring briefly to the substance of attached reports and documentation, the Certifier's letter stated:

> "In accordance with Clause 4(b)(1) of the Joint Instruction – Commercial Acceptance dated 29 May 2020, the ICC are satisfied that the Mine Water Buffer Pond Works are complete. This is based on the evidence provided that satisfies the requirements of Clause 3 of the Joint Instruction …"

176 MP Water accepts that the Certifier's letter of 26 October 2020 had no contractual force as between MP Water and Veolia, as Veolia was not a party to the Side Agreement.

177 On 2 November 2020, there was a meeting between representatives of the Customer, MP Water and Veolia to discuss the steps to be taken in order to handover Pond B to Veolia, including the removal of the pipe that had diverted waters to Pond D as provided for in the Side Agreement. At that time, Pond B was empty of liquids. At that meeting, Veolia confirmed that it would provide an updated commissioning schedule.

178 On 3 November 2020, MP Water wrote to Veolia under the D&C Contract in the following terms:

> "As noted in the Defect Letter the Customer was to undertake certain works to Blowdown Pond B including the removal of settled solids and the relining of Blowdown Pond B (**Mine Water Buffer Pond Works**). The Contractor [Veolia] has been kept apprised of the progress of these works via the Updates and in various meetings and discussions with the Principal [MP Water] and the Customer.
>
> The Independent Completion Certifier (ICC) has signed off that the Mine Water Buffer Pond Works are complete.
>
> Blowdown Pond B will be handed over to [Veolia] on 4 November 2020 (**Pond B Handover Date**) to allow the Contractor to complete Mine Water Buffer Pond Demonstration Criteria Work as set out in the Defect Letter. The Mine Water Buffer Pond Demonstration Criteria must be completed in accordance with the Contract and the Defects Letter. It must be completed within 10 Business Days after the Pond B Handover Date."

179 The pipe diverting water to Pond D (so as to bypass Pond B) was removed on 4 November 2020.[7]

180

Veolia engaged Red Earth Engineering Pty Ltd (**Red Earth**) to review the Certifier's 26 October 2020 letter and accompanying documents in respect of Pond B. Red Earth issued a Technical Memorandum on 4 November 2020 setting out its comments on the work undertaken by LLS in relation to Pond B and highlighting what Red Earth considered to be the risks associated with the design of the Pond B liners and documentation of the LLS work (the **RE Report**).

181 The RE Report made a number of comments that either did not raise concerns about the LLS work, or raised potential concerns that have not been taken up by the expert witnesses in these proceedings. It is not necessary to refer to those matters.

182 The RE Report also expressed the view that a *"composite liner system"* should incorporate a drainage layer between the two liners, referred to as a leak detection and recovery system or **LDRS**.

183 The RE Report concluded:

> "The Pond B liner system is not a conventional one. We do not understand the philosophy behind the design. Perhaps knowledge of the regulatory requirements would shed some light on the issue. The documentation supplied for review does not include design specifications, design drawings, associated calculations, action leakage rates, operating manual etc., all of which are good industry practises [sic] and may be required by regulators.
>
> In simple terms, one of the main items missing from the design is a sloping floor with LDRS connected to a collection sump for the safe removal of leakage. There exists a myriad of risks associated with the current liner system, which have been documented in Table 2 of this TM."

184 Table 2 of the RE Report then set out a list of risks that Red Earth considered were associated with the Pond B lining system installed by LLS, and conventional control measures in relation to each risk. The list expressly stated that Red Earth did not know what existing control measures existed in relation to each risk.

185 There was correspondence between MP and Veolia on 5 November 2020 concerning Veolia's increased estimate of the time that would be required for commissioning and acceptance testing of Pond B, which exceeded the 10 business days that MP Water said Veolia had agreed to in mid-2020.

186 On 6 November 2020, Veolia wrote to MP Water under the D&C Contract replying to MP Water's 3 November 2020 letter referred to at [178] above. The letter enclosed a copy of the RE Report and stated that Veolia *"does not accept the purported handover of Blowdown Pond B"*, because the RE Report indicated that the condition of Pond B was *"inadequate for its purpose and inappropriate for handover"*. On the basis of the RE Report, Veolia contended that MP Water *"cannot be said to have adequately resolved the issues in relation to liner integrity of Blowdown Pond B in accordance with its accordance with its obligations under Schedule 20 of the Contract"*.

187 MP Water wrote to Veolia under the D&C Contract on 11 November 2020 maintaining that Pond B had been handed over to Veolia on 4 November 2020 and stating that the D&C Contract did not entitle Veolia to refuse to accept the handover of Pond B to perform commissioning activities, whether on the basis asserted in Veolia's 6 November 2020 letter or on any other basis. MP Water's letter stated that Veolia was required to complete the Mine Water Buffer Bond Demonstration Criteria Work referred to in the Defect Letter within 10 business days after the handover of Pond B – that is, by 18 November 2020.

188 Veolia maintained, and continues to maintain, its position that Pond B had not been handed over to it (as Contractor under the D&C Contract and as Services Provider under the SPA), commissioning of Pond B had not occurred and that Veolia was therefore unable to treat water in Pond B.

189 Pond B has been gradually filling with water since the diversion to Pond D was removed on 4 November 2020, as referred to at [179] above. Ms Waterfall gave evidence to the effect that the water filling Pond B is process drainage water and overflows of filtered water (as opposed to Mine Water diverted after delivery to Mine Water Receipt Points).[8] MP Water did not challenge Ms Waterfall's evidence.

190 On 21 April 2021, Veolia sent an email to MP Water and the Customer advising that the volume of Pond B was then at 72ML – that is, above the maximum level permitted in order to maintain the Customer Freeboard – and that water was continuing to flow into Pond B. Veolia identified three options to address the situation:

(1) to permit further inflows to Pond B, effectively using up the capacity that was required to be maintained as customer freeboard;

(2) MP Water to issue an instruction to Veolia under the SPA to treat the water in Pond B; and

(3) reduce the Mine Water flow.

191 On 5 May 2021, Veolia wrote to MP Water under the SPA contending that the Mine Water Buffer Pond had not yet come into existence due to MP Water's failure to handover Pond B and that Veolia therefore had no obligation to comply with clause 5.6 of the Scope of Services in the SPA to the extent that the requirements of that clause applied to the Mine Water Buffer Pond. Against the possibility that Veolia was obliged to comply with clause 5.6 of the Scope of Services (which was denied), Veolia gave notice pursuant to clause 28.2 of the SPA that it was prevented from doing so *"because of [MP Water's] wilful and entirely avoidable failure to handover Blowdown Pond B"*.

192 Veolia's 5 May 2021 letter also stated that MP Water had failed to provide information that had been requested by Veolia repeatedly so that Pond B could be handed over.

193 The issues raised in Veolia's 5 May 2021 letter were the subject of further correspondence the following day, in which Veolia stated that it was ready willing and able to undertake the Mine Water Demonstration Criteria Work, subject to MP Water providing specified information that Veolia had requested in previous correspondence and provided that MP Water procures the Customer to undertake any necessary works to ensure that the Liner Remediation Work complies with clause 6 of Schedule 20 to the D&C Contract.

194 On 6 May 2021, Veolia notified MP Water that the volume of water in Pond B had reached 85ML and that, in order to prevent overflow or spillage from Pond B into the environment, the flow of Mine Water must stop before the water level in Pond B reached 90ML. Veolia referred to clause 5.5(g)(3)(B) of the Scope of Services to the SPA (which permits Veolia to require MP Water to stop or reduce the flow of Mine Water in the event of an actual or expected overflow of the Mine Water Buffer Pond),

whilst maintaining that the Mine Water Buffer Pond had not yet come into existence. The letter requested confirmation from MP Water that a stop to the flow of Mine Water had been implemented, or would be implemented as soon as practicable.

195 At 6.32pm on 6 May 2021, MP Water gave 24 hours' notice to the Customer to stop Mine Water flow. The stop was implemented from approximately 7pm on 7 May 2021.

196 On 10 May 2021, the Customer issued a Default Notice to MP Water under clause 42.2 of the WTSC in respect of the Major Service Failure that the Customer stated had occurred because the Facility had failed or ceased to be able to accept Mine Water at the Guaranteed Capacity for a continuous period from 48 hours from the time the stop had been implemented on 7 May 2021 (the **May Major Service Failure**). The notice required MP Water to remedy the default by restoring the Facility's ability to accept Mine Water at a capacity of at least the Guaranteed Capacity by 5pm on 12 May 2021. The notice stated that the ongoing stop of the flow of Mine Water to the Facility was causing the Springvale Mine to incur significant loss and disruption. I will refer to this as the **10 May WTSC Default Notice**.

197 On 11 May 2021, MP Water issued two notices to Veolia under the SPA. The validity of those notices is disputed by Veolia, although it is only the Step-in Notice subsequently issued on 13 May 2021 that is directly in issue in these proceedings.

198 The first was a Services Provider Default Notice under clause 42.2 of the SPA in respect of the following alleged Major Service Failure (the **11 May SPA Default Notice**):

> "Due to [Veolia's] delays, deliberate and wilful breaches of the [D&C Contract] and failure to rectify Defects in accordance with the [D&C Contract] and [MP Water's] requests … the Mine Water Buffer Pond has not been commissioned. …
>
> Despite that, in breach of the SPA and complicit in [Veolia's] breaches of the [D&C Contract] in failing to commission the Mine Water Buffer Pond as required, [Veolia as Services Provider] has directed water into Blowdown Pond B. This has resulted in a substantial increase of the volume of water in Blowdown Pond B above the Customer Freeboard. Specifically, the volume of water in the pond has increased over the past week or so to approximately 85.8ML which is in excess of 20ML over the Customer Freeboard of 65ML.
>
> [Veolia] has required [MP Water] to request that the customer stop the flow of Mine Water in order to address the potential overflow of Blowdown Pond B… [Veolia] has stated that the request was made 'as a practical matter', however were it not for [Veolia's] contractual breaches such a request would not have been required.
>
> In accordance with its obligations under the SPA and to avoid an environmental incident occurring, [MP Water] procured the Customer to stop the flow of Mine Water to the Facility at or about 1900 on Friday 7 May 2021.
>
> …
>
> The Facility has failed to be able to accept Mine Water at the Guaranteed Flow and Process Capacity since approximately 1900 on Friday 7 May 2021 (a period now in excess of 48 hours, giving rise to a Major Service Failure.
>
> It is a Service Provider Default if a Major Service Failure occurs. Accordingly, a Services Provider Default has occurred."

199 The 11 May SPA Default Notice required Veolia to remedy the alleged Services Provider Default by restoring the Facility's ability to accept Mine Water at a rate of at least the Guaranteed Capacity by 12pm on 12 May 2021. The Notice stated that the Springvale Mine and MP Water were incurring significant loss and disruption.

200 The second notice issued on 11 May 2021 was a direction issued (or purportedly issued) by MP Water to Veolia under the SPA in the following terms (the **11 May Direction**):

"The Services Provider is required to accept, treat and process all Mine Water and the Services Provider must also ensure that the Mine Water Buffer Pond does not overflow at any time (see clause 20.2(a) and section 5.5(g) of Appendix 1 of Attachment 1 to the SPA). Pursuant to clause 21.15 of the SPA, the quality or volume of Mine Water delivered to a Mine Water Receipt Point will not relieve the Services Provider from (or alter) its liabilities or obligations to process Mine Water at the Facility.

It is artificial and incorrect to claim that the Mine Water Buffer Pond 'has not yet come into existence' other than for the convenient or selective benefit of the Services Provider (for example, use by the Service Provider for overflow purposes, at its discretion).

That is, the Services Provider cannot:

(a) obtain the benefit of the Construction Contractor's wilful breach of the Construction Contract in failing to commission the Mine Water Buffer Pond, but then, separately, use the Mine Water Buffer Pond for overflow and alleged process upsets, which it has done regularly since commencing operations (including recently, through its actions which have resulted in the Mine Water Buffer Pond effectively being filled, almost completely),

and also expect:

(b) that it is not obliged to remove or treat that water in accordance with its obligations under the SPA.

Accordingly, further to the Services Provider Default Notice and the 8 May Letter, Project Co directs the Services Provider to:

(a) urgently commence 'Dewatering' of the Mine Water Buffer Pond (as defined in the 8 May Letter – i.e. treating the water in the Mine Water Buffer Pond);

(b) comply with its water treatment and receipt obligations set out in the Services Provider Agreement; and

(c) consistent with directions (a) and (b) noted above, cooperate with and provide reasonable assistance to Project Co and the Customer to manage water in the Mine Water Buffer Pond including by attending an online video call with representatives of each party at 9am on 12 May 2021 … to agree appropriate flow rates as between water sourced from the Mine Water Buffer Pond versus the Mine Water Transfer Pipeline, during implementation of directions (a) and (b) noted above, over the coming days."

201 On 12 May 2021, Veolia sent to MP Water:

(1) a letter disputing the validity of the 11 May SPA Default Notice and claiming that it had been issued in bad faith, and alleging that MP Water was in breach of the D&C Contract which had prevented Veolia from carrying out the Mine Water Buffer Bond Demonstration Criteria and the Deferred Work relating to Pond B described in the Certifier's 26 October 2020 letter; and

(2) a letter responding to the 11 May Direction, rejecting the contents of that letter but setting out two options for the dewatering and commissioning of Pond B.

202 The two options in Veolia's second 12 May letter referred to above involved:

(1) Veolia proceeding immediately to de-water and commission Pond B (referred to as *"the Takeover"*), subject to:

(a) MP Water indemnifying Veolia from loss arising out of or in connection with *"the Takeover"*;

(b) MP Water not making any *"Claim"* against Veolia under the SPA or D&C Contract arising out of or in connection with *"the Takeover"*; and

(c) *"the Takeover"* being an Abatement Relief Event under the SPA until it is commissioned by Veolia; or

(2) MP Water directing Veolia under clause 34.1 of the SPA to perform a *"Variation"* by testing the water in Pond B to determine its chemical composition, draining Pond B by treating the waters therein over time, installing a leak detection and recovery system in Pond B and undertaking certain other work in relation to the

Pond B liner and commissioning and testing Pond B, all of which was to be done at MP Water's cost and on the basis that MP Water would not make any *"Claim"* against Veolia under the SPA or D&C Contract arising out of or in connection with Pond B (including in relation to the Defect alleged in MP Water's 30 May 2020 Defect Letter).

203 On 12 May 2021, MP Water wrote to Veolia under the SPA complaining that Veolia had failed to comply with the 11 May Direction and alleging that this constituted wilful and deliberate default under the SPA and a deliberate and wilful failure on the part of Veolia to *"diligently pursue the remedy to the Services Provider Default"* as set out in the 11 May SPA Default Notice. The letter stated that MP Water reserved its rights under the SPA, including in relation to loss suffered as a result of the *"Facility Outage"* and MP Water's step-in rights under clause 44 of the SPA and termination rights under clause 43.1 of the SPA.

204 MP Water's letter then set out directions to Veolia (as Services Provider) to (the **12 May Directions**):

(1) commence treatment of Mine Water by providing the Services in clause 19.1 of the SPA, including all Mine Water currently in the Mine Water Buffer Pond and, specifically, to treat Mine Water at the rate of between 19ML and 25ML per day from the Mine Water Transfer Pipeline blended with Mine Water at the rate of 1ML per day from the Mine Water Buffer Pond (or such greater amount that can be safely and effectively treated in the Facility so as to reduce the level in the Mine Water Buffer Pond to less than 80ML as soon as practically possible); and

(2) attend an online conference with MP Water and its legal representatives at 8pm on 12 May 2021 to discuss the matters raised in this letter.

205 By further letter dated 12 May 2021, Veolia wrote to MP Water disputing denying the allegations in MP Water's 12 May 2021 letter, disputing the validity of the 12 May Directions, raising concerns about the effectiveness of the work purportedly required by those directions and environmental risks associated with that proposed work, noting that MP Water had not responded to Veolia's two options for the dewatering and commissioning of Pond B proposed in Veolia's earlier letter of 12 May 2021, and stating that any purported step-in or termination by MP Water may be seen as repudiatory.

206 The Customer wrote to MP Water on 12 May 2021 maintaining that there had been a Major Service Failure and Project Co Default under the WTSC and requiring MP Water to remedy that default by restoring the Facility's ability to accept Mine Water at the Guaranteed Flow and Process Capacity by 5pm on 12 May 2021. The Customer subsequently extended the period by which it required MP Water to remedy the alleged default to 5pm on 14 May 2021.

207 Following some further correspondence between MP Water and Veolia on 13 May 2021, MP Water issued (or purported to issue) a Step-In Notice to Veolia under clause 44 of the SPA (the **13 May Step-in Notice**) in the following terms:

> "This is a Step-in Notice under clause 44.1(a) and (b) of the SPA. Pursuant to clause 44(c) of the SPA, Project Co hereby notifies the Services Provider of its intention to exercise Step-in Rights for the sole purpose of remedying the Services Provider Default described in the Services Provider Default Notice.
>
> The extent of the Step-in Right being exercised will be limited to the matters below.

With immediate effect, pursuant to clause 44.1 of the SPA, Project Co elects and the Services Provider, must assist Project Co wherever and however possible to ensure Project Co is able to exercise its Step-in Rights to:

> (a) to commence treatment of Mine Water by providing the Services as set out in clause 19.1 of the SPA, and including treatment of Mine Water at the Facility delivered to the Services Provider pursuant to clause 20.1 (which includes all Mine Water currently in the Mine Water Buffer Pond, and Mine Water which has been placed or directed into that pond by the Services Provider) and specifically to accept and treat at the Facility:
>
> > (i) Mine Water at the rate of between 19ML per Day and 25ML per Day from the Mine Water Transfer Pipeline,
>
> blended with
>
> > (ii) Mine Water at the rate of 1ML per Day from the Mine Water Buffer Pond or such greater amount that can be safely and effectively treated at the Facility so as to reduce the level in the Mine Water Buffer Pond to less than 80ML,
>
> (b) take such other steps as are necessary or desirable to continue the provision of the Services as required by the SPA or to minimise the risk to the Environment, to other members of the general public or of material damage to the Facility, as applicable,

(the **Step-in Direction**).

Project Co will Step-in only to the limited extent and duration described above. Except to the extent and direction of that Step-in, the Services Provider's obligations under the SPA are not and will not be suspended.

Project Co's Representative will attend site for the purposes of the Step-in on Friday, 14 May 2021 at 9am and requires the Services Provider to make itself available for the purpose of implementing the Step-in Direction described above.

Once the Step-in Direction has been given, in Project Co's opinion, the necessary steps to commence Mine Water Treatment as described in the Step-in Direction has occurred, Project Co will, by written notice to the Services Provider cease to exercise its Step-in Rights pursuant to clause 44(f) of the SPA (**Project Co Step-out**), unless Project Co gives a further notice. Upon the occurrence of the Project Co Step-out and, pursuant to clause 44(i)(1), the Services Provider must immediately recommence performance of those Services Provider's obligations suspended pursuant to clause 44(d) of the SPA."

208 The 13 May Step-in Notice defined the *"Services Provider Default Notice"* as the 11 May SPA Default Notice referred to at [198] above. Thus, the alleged Service Provider Default relied on by MP Water in issuing the 13 May Step-in Notice was the Major Service Failure that MP Water claimed had occurred as a result of the Facility failing or ceasing to accept Mine Water at a capacity of at least the Guaranteed Capacity for a continuous period of 48 hours.

209 I will use the term **13 May Step-in Direction** to refer to the *"Step-in Direction"* set out within the 13 May Step-in Notice.

210 Veolia responded to the 13 May Step-in Notice disputing that MP Water had any entitlement to step-in and rejecting the notice as unlawful. Veolia therefore declined to assist MP Water with the purported step-in, and stated that it *"will not be complicit in an environmental incident or causing damage to the Facility as a result of the Step-in"*. Veolia reiterated the two options identified in its second 12 May 2021 letter referred to at [201] above and indicated its willingness to attend a meeting with MP Water provided that the issues raised in Veolia's correspondence were addressed at the meeting.

211 After 13 May, indeed after the commencement of these proceedings, the Customer granted a series of rolling extensions of the Applicable Cure Period for the 10 May WTSC Default Notice, always reserving its rights. The Customer has foreshadowed a claim against MP Water in relation to the loss suffered as a result of the May Major Service Failure.

COMMENCEMENT OF THESE PROCEEDINDGS

212 MP Water commenced these proceedings on 14 May 2021.

213 Following an urgent hearing before Rees J on 20 May 2021, an interim mandatory injunction was granted requiring Veolia to comply with the 13 May Step-in Notice (including the 13 May Step-in Direction) and do all things necessary to comply with any directions given by MP Water under the 13 May Step-in Notice, including directions to treat water in Blowdown Pond B using the Facility. Those interim orders were made on the basis of MP Water giving the usual undertaking as to damages and also undertaking to pump 5ML out of Pond B into other ponds maintained by the Customer and the Customer's undertaking to receive those waters into their ponds.

214 In its Summons filed in Court on 14 May 2021, the final relief sought by MP Water is:

(1) an order requiring Veolia to do all things necessary to comply with the 13 May Step-in Notice (including the 13 May Step-in Direction) by no later than a specified time (which is not completed in the Summons) and

(2) an order requiring Veolia to do all things necessary to comply with any directions given by MP Water to Veolia under the 13 May Step-in Notice; and

(3) damages.

215 On 11 June 2021, the matter was listed for hearing commencing on 26 July 2021 on all issues of liability and quantum, *"with the exception of the quantum associated with the claim against the plaintiff by a customer"*.

216 During the hearing that commenced before me on 26 July 2021, MP Water abandoned any claim for damages for its costs of exercising the Step-in Right.[9] That left only a claim for damages associated with a claim by the Customer against MP Water, in respect of which quantum is to be determined separately pursuant to the order referred to immediately above.

217 On the final day of that hearing, MP Water reformulated the terms of the orders sought in relation to the 13 May Step-in Notice as follows:[10]

> "1. Order [Veolia] to do all things necessary to comply with [the 13 May Step-in Direction] by doing the following specific things:
>
> (a) receiving such Mine Water at the Mine Water Receipt Points as is delivered to that point by the Customer in accordance with cl 5.1(c)(1) of Attachment 1 to the Services Provider Agreement;
>
> (b) transferring Mine Water to the Water Treatment Facility in accordance with cl 5.1(c)(2) of Attachment 1 to the Services Provider Agreement;
>
> (c) treating the Mine Water at the Water Treatment Facility at not less than the Guaranteed Flow and Process Capacity in accordance with cl 5.1(c)(3) of Attachment 1 to the Services Provider Agreement:
>
> (i) subject to [Veolia]'s rights to stop or reduce the flow of Mine Water under cl 5.5 of the Services Provider Agreement or issue a reduced flow direction under cl 20.3(d) of the Services Provider Agreement; and
>
> (ii) in accordance with the Quality Standards specified in cl 5.2 of Attachment 1 to the Services Provider Agreement; and
>
> (d) treating the water in Pond B using the Facility at a rate of 1ML per Day or such greater amount as can be safely and effectively treated at the Facility so as to maintain the level of water in Pond B at below 80ML.
>
> 2. [MP Water] acknowledges that whilst the [13 May Step-in Direction] is in force [Veolia] may issue a Crash Stop or Interlock should the water in Pond B reach or exceed 80ML.
>
> 3. Capitalised terms in these orders have the same meaning as in the Services Provider Agreement."

218 In response to a question raised by me, senior counsel for MP Water accepted that the orders, if made, should be expressed to apply only until MP Water steps out in accordance with clause 44(f) of the SPA.

219 After judgment was reserved, MP Water's solicitor sent an email to my Associate at 9pm on 12 August 2021 stating that:

> "We write to inform her Honour of material circumstances which the plaintiff considers are relevant to her Honour's determination of the final injunctive relief sought by the plaintiff in these proceedings.
>
> Following the conclusion of the hearing, on 29 July 2021, the level of water in Blowdown Pond B has reduced and has maintained a level that is below the Customer Freeboard (being 42ML). In addition to this, the Mine Water flow rate of 36ML/day has been sustained.
>
> The plaintiff has therefore taken the position that the effects of Major Service Failure, the subject of the Plaintiff's Step-In Direction, have been overcome. The plaintiff has given notice to that effect to the defendant.
>
> As a consequence, the plaintiff continues to seek the relief identified in its Summons and Technology & Construction List Statement as pressed at the hearing on 26 July to 29 July 2021, save for the final injunction sought in prayers 11 and 12.
>
> We have written to the solicitors for the defendant and have been unable to reach an agreement on a joint communication informing her Honour of the above developments and the consequent position taken by the plaintiff in respect of the relief its seeks."

220 On the morning of 13 August I caused my Associate to communicate to the parties' solicitors that I regarded the email from MP Water's solicitor as, in substance, an application under r 12.1 of the *Uniform Civil Procedure Rules 2005* (NSW) for leave to discontinue the claims in prayers 11 and 12 of the Summons and that, as I understood the position set out in the email, Veolia did not consent to the discontinuance of those claims.

221 Veolia's solicitor confirmed later that morning that Veolia did not consent to the discontinuance of those claims and would oppose any formal application for leave to discontinue those claims, Veolia would oppose the application.

222 Brereton J (as his Honour then was) said in *Re Mempoll Pty Ltd, Anankin Pty Ltd and Gold Kings Pty Ltd* [2013] NSWSC 301 at [10]:

> "It is a general principle that, although there may be exceptions, rarely will it be appropriate to grant leave to discontinue once the proceedings have proceeded to a contested hearing: see *Stahlschmidt v Walford* [1879] 4 QB 217; *Re Alpha Company Limited* [1903] 1 Ch 203; *Stevens v Theatres Limited* [1903] 1 Ch 860. This is because once the parties have defined their positions, prepared their cases and proceeded to a hearing it is ordinarily regarded as unfair to deprive a party who has obtained a forensic advantage of that advantage. For example, even where leave to discontinue is granted, where a defendant has gained some advantage leave to discontinue is usually granted on terms that preserve the advantage: see *Covell Matthews v French Woolstone* [1977] 2 All ER 591, 594 affirmed [1978] 2 All ER 800; *Young Austin & Young Limited v British Medical Association* [1977] 2 All ER 884; *SCI Operations Pty Limited v Trade Practises Commission* (1984) 2 FCR 113; *Rydges Hotel Limited v Charles of the Ritz Ltd* [No 8] (1987) 12 IPR 75."

223 In the circumstances of this case, there are two matters that would make it particularly unfair to Veolia for MP Water to discontinue the claims in prayers 11 and 12 of the Summons (as amended).

224 First, the interim mandatory injunction is expressed to apply until further order, and does not in terms cease to apply upon the issue of a step-out notice. MP Water wishes to discontinue the claims for relief in prayers 11 and 12 of the Summons, yet does not propose that the Court make any order discharging the interim mandatory injunction.

225

Second, having complied with the interim mandatory injunction, Veolia would be deprived the opportunity to have it discharged by demonstrating at the final hearing that MP Water had no legal right to require Veolia to do that which the interim injunction required. That would, in turn, deprive Veolia of the opportunity to establish a basis to recover compensation under MP Water's undertaking as to damages for any losses suffered by Veolia by reason of the interim injunction: see *Lan v Kaymet Corporation Pty Ltd* [2017] NSWCA 52 at [32]-[43].

226 By contrast, there is no unfairness to either party if, after a four day hearing following which judgment has been reserved, the Court now proceeds to determine MP Water's claims in prayers 11 and 12 of the Summons (as amended). If those claims are determined in favour of MP Water, the orders made will replace the mandatory interim injunction and will expressed to apply until such time as MP Water steps out, as referred to above. If the orders are made, they will not require Veolia to do anything in the events that have happened after judgment was reserved.

227 No formal application was made by MP Water for leave to discontinue the claims for relief in prayers 11 and 12 of the Summons (as amended). If such an application had been made, I would have refused leave for the reasons above.

ISSUES FOR DETERMINATION

228 During the hearing, the parties formulated the issues raised for determination in various ways. The differences between the formulations were differences in priority or emphasis pursued as a matter of advocacy rather than differences of substance. The substance of the issues to be determined may conveniently be summarised as follows.

(1) whether there was a Services Provider Default as alleged in the 11 May SPA Default Notice;

(2) if so, whether *"the prevention principle"* precluded MP Water from relying on the Services Provider Default by issuing in the 11 May SPA Default Notice;

(3) if "no" to (2) above, whether Veolia failed to *"diligently pursue"* the 11 SPA May Default Notice within the meaning of clause 44(2)(a) of the SPA;

(4) whether clause 44 of the SPA obliges Veolia to assist MP Water by complying with MP Water instructions or directions requiring Veolia to perform the Services;

(5) whether orders should be made in relation to the 13 May Step-in Notice in the terms now sought by MP Water; and

(6) whether Veolia breached its obligations under the SPA by:

(a) causing or allowing the May Major Service Failure to occur;

(b) failing to comply with the 11 May SPA Default Notice;

(c) failing to comply with the 11 May SPA Direction;

(d) failing to comply with the 13 May Step-in Notice; and

(e) otherwise failing to provide the Services in accordance with the SPA.

CONSIDERATION AND DETERMINATION

Issue 1: Was there a Services Provider Default as alleged in the 11 May SPA Default Notice?

229 It will be recalled that the 11 May SPA Default Notice alleged that the Facility had failed to accept Mine Water at the Guaranteed Capacity for a period of more than 48 hours (since approximately 7pm on 7 May 2021) and that this constituted a Major Service Failure, and therefore a Services Provider Default, under the SPA.

230 There is no dispute that, as a matter of fact, Mine Water had not been accepted at the Guaranteed Capacity for a continuous period of more than 48 hours at the time the 11 May SPA Default Notice was issued.

231 MP Water submitted that the plain meaning of the language used by the parties in item 3 of the definition of *"Major Service Failure"* in the SPA is that a Major Service Failure occurs when the Facility fails or ceases to accept Mine Water at a capacity of at least the Guaranteed Capacity for a period of 48 hours continuously, irrespective of the reason for that cessation or failure. Thus, MP Water submitted that the failure that had persisted for more than 48 hours as at 11 May 2021 was a Services Provider Default as defined in the SPA, whether or not Veolia had caused or contributed to that failure.

232 Veolia did not contend that a Major Service Failure under the SPA required fault on the part of the Services Provider. However, Veolia submitted that a Major Service Failure of the kind relied on by MP Water occurs only if the *"Facility"* (as defined in clause 1.1 of the SPA) fails or ceases to be able to accept Mine Water at a capacity of at least the *"Guaranteed Flow and Process Capacity"* for 48 hours continuously. The relevant *"Guaranteed Flow and Process Capacity"* is that specified in clause 5.3(a) of the Scope of Services for the *"Water Treatment Facility"*. The *"Facility"* and the *"Water Treatment Facility"* include the Mine Water Buffer Pond. The *"Mine Water Buffer Pond"* as defined in the Scope of Services does not yet exist because Pond B has not yet been repurposed, commissioned and tested by Veolia. It was submitted that there was therefore no *"Major Services Failure"* within the meaning of the SPA because there was no *"Facility"* in existence that had failed or ceased to accept Mine Water.

233 Thus, the resolution of the first issue depends principally on the proper construction of the definition of *"Facility"* as it applies in the context of the definition of *"Major Service Failure"* in the SPA.

234 The principles applicable to the construction of commercial contracts were recently summarised by Bathurst CJ (with whom Meagher and Gleeson JJA agreed) in *Lawrence v Ciantar* [2020] NSWCA 89 at [98]–[99]):

> 98 The principles surrounding the construction of commercial contracts in this country are well established. In *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640; [2014] HCA 7 at [35] , the plurality (French CJ, Hayne, Crennan and Kiefel JJ) stated that '[t]he meaning of the terms of a commercial contract is to be determined by what a reasonable businessperson would have understood those terms to mean' in context. The Court stated that 'it will require consideration of the language used by the parties, the surrounding circumstances known to them and the commercial purpose or objects to be secured by the contract": see also *Mount Bruce Mining* at [46]–[49]; *Simic v New South Wales Land and Housing Corporation* (2016) 260 CLR 85; [2016] HCA 47 at [78] ; *Ecosse Property Holdings Pty Ltd v Gee Dee Nominees Pty Ltd* (2017) 261 CLR 544; [2017] HCA 12 at [16] ; *Victoria v Tatts Group Ltd* (2016) 90 ALJR 392; [2016] HCA 5 at [51] .
>
> 99 In *Mount Bruce Mining* it was pointed out at [46] that context includes 'the entire text of the contract as well as any contract, document or statutory provision referred in the text of the contract'."

235

The text of the contract is not required to pass through some *"ambiguity gateway"* before surrounding circumstances may be taken into account, but the language chosen by the parties is the starting point and the ending point in construing a written commercial contract: *Cherry v Steele-Park* (2017) 96 NSWLR 548; [2017] NSWCA 295 at [57]-[86] (Leeming JA, Gleeson JA agreeing) and [123]-[124] (White JA) and the authorities there referred to.

236 The conduct of the parties after the SPA, D&C Contract and WTSC were entered into on 13 November 2017 is not relevant to the construction of the SPA. Neither party submitted that the post-contractual conduct in this case was relevant to identifying the purpose or objects of the SPA or provided evidence of surrounding circumstances existing at the time the SPA was entered into.

237 As MP Water submitted, Veolia's obligation to provide the Services under the SPA is engaged on the Services Commencement Date pursuant to clause 8.3 of the SPA and during the Operations Phase pursuant to clause 19.1 of the SPA. The Operations Phase commences on the Services Commencement Date: see [70] and [98] above.

238 From the Services Commencement Date, Veolia is required to perform the Services in accordance with the Scope of Services and the SPA: see clause 8.2 referred to at [70] above. The Services are defined as *"the services in respect of the Facility"*, including *"all services described in the Scope of Services"*: see [72] above. The description in the Scope of Services is very wide and includes receiving Mine Water at the Mine Water Receipt Points: see [78] above. Unless expressly provided otherwise by another provision of the SPA, Veolia is required by clause 20.2(a) of the SPA to accept and process all Mine Water made available at the Mine Water Receipt Points subject to the Guaranteed Capacity: see [81] above.

239 MP Water submitted that clause 20.3(d) is the only express provision of the SPA that qualifies Veolia's obligation under clause 20.2(a). Clause 20.3(d) applies where Materially Out-of-Envelope Mine Water is delivered: see [81]-[83] above Neither party submitted that the exception in clause 20.3(d) of the SPA was relevant in this case.

240 In my opinion, clause 35A of the SPA is also capable of qualifying Veolia's obligation under clause 20.2(a) if an Abatement Relief Event (as defined in clause 35A) prevented it from performing that obligation and if the notice and other requirements of clause 35A were complied with: see [88]. Veolia's submissions did not rely on clause 35A as having any application to the events which culminated in the 11 May SPA Default Notice and the 13 May Step-in Notice.

241 In my opinion, the following provisions of the SPA confirm that there are no other exceptions to Veolia's obligation under clause 20.2(a):

(1) clause 20.3(e), which provides that *"the Services Provider must receive and process all Mine Water at the Facility and deliver the Services in accordance with this Contract"*, except as provided for in clause 20.3(d): see [81]-[83] above;

(2) clause 21.5, which provides that, other than as expressly stated in the SPA, the quality or volume of Mine Water delivered by the Customer to the Mine Water Receipt Points will not relieve Veolia from, or alter, its liabilities or obligations under the SPA: see [85] above; and

(3) clause 5.5(g)(3) of the Scope of Services, which provides that a request made by Veolia to stop or reduce the flow of Mine Water due to (relevantly) an actual or expected overflow of the Mine Water Buffer Pond does not relieve Veolia of any obligation or liability under the SPA: see [90] above.

242 Veolia expressly abandoned its contention that the Services Commencement Date had not occurred after it accepted (correctly, in my view) that this had not been set out in its Commercial List Response and MP Water complained that it would have relied on conventional estoppel if the Services Commencement Date contention had been raised in Veolia's Commercial List Response.

243 Veolia's submissions did not identify any express provision of the SPA as qualifying its obligation under clause 20.2(a) that applied from the Services Commencement Date.

244 As I have referred to above, Veolia submitted that the Facility in respect of which the Services are to be provided did not exist as at the Services Commencement Date, and still does not exist, because the Mine Water Buffer Pond (being one of the elements included in the definition of the *"Facility"*) has not yet been repurposed, and commissioned and tested by Veolia. Consequently, Veolia submitted that there was no Facility in respect of which a Major Service Failure as defined in the SPA had occurred and the events of 7 to 11 May 2021 therefore did not constitute a Services Provider Default under the SPA.

245 Veolia's submissions turn on the definitions of *"Facility"* and *"Mine Water Buffer Pond"* in the SPA. Those definitions are set out at [12], [45] and [74] above (*"Facility"*) and [75] above (*"Mine Water Buffer Pond"*).

246 Veolia submitted that the parties to the SPA should be taken to have intended that Veolia (as Services Provider) was required to perform the Services only after the construction of all elements of the definition of *"Facility"* had been completed in accordance with the terms of the D&C Contract. In support of that submission, Veolia relied on clause 8.3 of the SPA as demonstrating that its obligation to perform the Services, including accepting Mine Water at the Guaranteed Capacity, did not arise until the Services Commencement Date.

247 It followed, in Veolia's submission, that the parties to the SPA should be taken to have intended by the definition of *"Major Service Failure"* that such a failure would occur when *"those elements of what is described in the definition of 'Facility'"* exist and are unable to treat the Mine Water at the Guaranteed Capacity of 36ML per day under normal flow conditions. Veolia submitted that, if the SPA were construed as requiring Veolia to treat 36ML of Mine Water per day in circumstances where one of the elements set out in the definition of *"the Facility"* did not exist, and particularly where the Mine Water Buffer Pond did not exist, this would give the SPA an operation that is absurd.

248 I accept Veolia's submission that its obligation to perform the Services, including accepting Mine Water at the Guaranteed Capacity, did not arise until the Services Commencement Date. That much is plain from clause 8.3 of the SPA and the other provisions to which I have referred at [237]-[241] above. I also accept that, because the Services Commencement Date is tied to the Commercial Acceptance Date under the

WTSC, the intention to be attributed to the parties to the SPA is that the Services Commencement Date would not occur before the Facility reached a sufficient state of completion to satisfy the Certifier that Commercial Acceptance had been achieved: see [36]-[39] and [70] above.

249 Importantly, the contractual mechanisms employed by the parties to give effect to that intention were to define the *"Services Commencement Date"* in the manner that I have described, and to require Veolia to provide the Services from that date (including accepting and processing all Mine Water made available at the Mine Water Receipt Points subject to the Guaranteed Capacity, as required by clause 20.2(a) of the SPA), subject only to the exceptions expressly provided for in the SPA. Foreseeable difficulties arising from the quality of the Mine Water were expressly provided for in clause 20.3(d) and unforeseen difficulties were provided for under the Abatement Relief Event regime in clause 35A, as referred to above.

250 Veolia's submissions that the obligation to accept Mine Water at the Guaranteed Capacity (or to provide any Services at all) did not commence unless and until the nine elements referred to in the definition of *"Facility"* had been constructed in accordance with the D&C Contract were, in substance, an attempt to argue (using different language) that the Services Commencement Date had not occurred. That is the very contention that Veolia accepted that it was not entitled to press as a matter of procedural fairness.

251 Moreover, as MP Water submitted, the definition of *"Facility"* is cast in the future tense as *"the whole of the facility to be designed, engineered, procured, supplied, constructed, tested, commissioned, operated, maintained and owned by* [MP Water] *on the Site in accordance with the WTSC"*. It is defined as including (but not limited to) the nine elements listed in the definition. Each of the nine elements is a defined term, and most of them are defined in a manner that includes several components.

252 In my opinion, a reasonable businessperson would not have understood the definition of *"Major Services Failure"* to be engaged only in circumstances where each and every element and component of the Facility had been designed, engineered, procured, supplied, constructed, tested and commissioned and was being operated and maintained in accordance with the WTSC (the terms of which were replicated in the D&C Contract and, in relation to operation and maintenance, in the SPA). Such a construction would require the parties to satisfy themselves of those matters in order to know whether, at any given time during the 15 year term, a failure to accept Mine Water at the Guaranteed Capacity would constitute a Major Services Failure. The position would be liable to change if, for example, latent defects were discovered in the design or construction of any element or component of the Facility that represented a departure from the requirements of the WTSC. In my opinion, that would give the definition of *"Major Services Failure"* an impractical and uncommercial operation that would be inconsistent with the commercial purpose and object of the SPA, as referred to below. Veolia endeavoured to draw attention away from this outcome by submitting that it is only the nine elements that one has to take into account. However, this

involves a rewriting of the definition of *"Facility"* as limited to the nine elements, and also ignores the many components and parts included within each of the nine elements.

253 In my opinion, having regard to the future tense in which the definition of *"Facility"* is cast, the number and complexity of the elements and parts comprising the Facility, and the provisions of clause 35A of the SPA, the reasonable business person would understand the term *"Facility"* in the context of the definition of *"Major Services Failure"* as descriptive of the facility in the state in which it exists whenever there is a cessation or failure after the Services Commencement Date to achieve the Guaranteed Capacity for a continuous period of 48 hours.

254 I consider that the construction immediately above is consistent with the apparent commercial purpose and object of the SPA. It appears from the recitals to the WTSC that the Customer required extraction of water from their underground mines for safety reasons and to comply with relevant laws. The Facility Diagram referred to in clause 6.2 of the WTSC shows that this was to occur via the Mine Water Transfer Pipeline (which is part of the Water Transfer System within the Facility). It is plain from the provisions of the WTSC and SPA referred to in detail earlier in these reasons that this was an ongoing and constant requirement, and that any decrease in the rate of Mine Water acceptance below the Guaranteed Capacity could not be accommodated by the Customer without prior notice, and only then in very limited circumstances. At the same time, it may readily be inferred that an upper limit on the volume of water that the Facility was obliged to accept would assist in the efficient management and operation of the Facility. The Guaranteed Capacity provisions in the SPA (and the equivalent obligations in the WTSC) were plainly designed to serve both of those objects.

255 In my view, it would be inconsistent with the objects referred to above, and would create much uncertainty for MP Water in discharging its obligations to the Customer under the WTSC, if Veolia's Guaranteed Capacity obligations in the SPA were subject to change according to the state of the Facility at any given time during the term of the SPA (other than in circumstances enlivening the Abatement Relief Event provisions, which include a strict notice regime). That would be the effect of the construction of *"Facility"* for which Veolia contended.

256 Veolia also submitted that:

(1) the Guaranteed Capacity applies to the Water Treatment Facility;

(2) the Water Treatment Facility includes the Mine Water Buffer Pond;

(3) the Water Treatment Facility did not exist on the Services Commencement Date, and still does not exist, because the Mine Water Buffer Pond does not exist; and

(4) clause 20.2(a) of the SPA therefore did not require Veolia to accept and process Mine Water at the Guaranteed Capacity in those circumstances.

257 I accept Veolia's submission that the Guaranteed Capacity applies to the Water Treatment Facility. That is clear from the text of clause 5.3(a) of the Scope of Services, which relevantly provides:

> "The Services Provider acknowledges that the Construction Contractor must design the Works so that the Facility is capable of achieving, and will be operated by the Services Provider to achieve, the following flow and process capacities (the '**Guaranteed Flow and Process Capacity**'):
>
> (a) in respect of the Water Treatment Facility (including the components of the Water Transfer System upstream of the Water Treatment Facility):
>
> (1) capacity for the continuous and uninterrupted acceptance of Mine Water at the rate of not less than 36 ML per Day throughout the Term ('**Normal Flow**'), without using Facility equipment designated as standby or backup equipment …
>
> (2) capacity for the occasional acceptance of Mine Water at the rate of not less than 42 ML per Day for up to 60 Days in any one event ('**Occasional Flow'**) …"

258 However, I reject Veolia's submission that the Water Treatment Facility includes the Mine Water Buffer Pond. As referred to at [15]-[20], [49] and [77], the Water Treatment Facility is defined in the SPA (and in the D&C Contract and the WTSC) as *"the water treatment plant and associated equipment to be utilised for treating Mine Water and producing Treated Water, Mine Water Brine and Residuals"*. In my opinion, a reasonable businessperson reading these words in the context of the Facility Diagram, would have understood them as referring to the plant and equipment by which Mine Water is treated so as to produce and deliver the specified treated water products. I do not consider that a reasonable businessperson would have understood the words to refer to a pond to which Mine Water could be diverted and stored pending treatment at a later time. A further contextual consideration that supports this construction is that the definition of Facility in the SPA expressly refers to certain elements of the Facility, and the Water Treatment Facility and Mine Water Buffer Pond are there listed as distinct elements. This construction is consistent with the commercial purpose and objects of the SPA referred to above. Provided that the Guaranteed Capacity is maintained, it matters not to MP Water or to the Customer whether Veolia immediately treats Mine Water accepted at the Mine Water Receipt Points or chooses to divert it to the Mine Water Buffer Pond for operational reasons. Veolia may store the Mine Water in the Mine Water Buffer Pond for such period as it chooses, provided that it continues to accept Mine Water at the Guaranteed Capacity and maintains the Customer Freeboard.

259 For the reasons immediately above, I also reject Veolia's submissions that the Water Treatment Facility has not yet come into existence and that clause 20.2(a) of the SPA therefore did not require Veolia to accept and process Mine Water at the Guaranteed Capacity.

260 In any event, the definition of *"Water Treatment Facility"* is also cast in the future tense. My reasons for rejecting Veolia's submissions about the definition of *"Facility"* in the context of a *"Major Services Failure"* apply equally to the meaning of *"Water Treatment Facility"* in the context of the definition of *"Guaranteed Flow and Process Capacity"* in clause 5.3(a) of the Scope of Services as applied in clause 20.2(a) of the SPA. Those reasons do not turn on whether or not the *"Mine Water Buffer Pond"* as defined in the SPA exists. I have not found it necessary to address the parties' competing contentions about that question for the purpose of determining Issue 1.

261 For those reasons, there was a *"Major Service Failure"* as alleged in the 11 May SPA Default Notice (the **May Major Services Failure**). This finding disposes of the only basis on which Veolia disputed that the Services Provider Default had occurred.

262 MP Water relies on clause 44(a)(2) of the SPA as entitling it to exercise Step-in Rights as at 13 May 2021.

263 Both parties accepted that clause 44(a)(2) has two elements:

(1) a Services Provider Default occurs; and

(2) the Services Provider has failed to diligently pursue the relevant Services Provider Default Notice.

264 It follows from my conclusion at [261] above that the first of those two elements was satisfied.

265 Whether the second element of clause 44(2)(a) is satisfied turns on:

(1) whether the *"prevention principle"* precluded MP Water from relying on the May Major Services Failure in issuing the 11 May SPA Default Notice; and

(2) if not, whether Veolia failed to diligently pursue the 11 May SPA Default Notice.

Issue 2: The prevention principle

266 Veolia submitted that MP Water's own breaches of Schedule 20 of the D&C Contract caused the May Major Services Failure because Veolia had been unable to commission and test Pond B in accordance with the D&C Contract until MP Water carried out the Liner Remediation Work in accordance with Schedule 20 of the D&C Contract. Veolia contends that the Liner Remediation Work has still not been completed in accordance with Schedule 20 of the D&C Contract and that it is therefore unable to treat the water in Pond B which has not yet been commissioned as the Mine Water Buffer Pond. As referred to earlier in these reasons, water has simply been building up in Pond B since early November 2020, with no water being returned from Pond B to the Water Treatment Facility for treatment. It will be recalled that it was the risk of overflow from Pond B that caused the May Major Services Failure.

267 Veolia submitted that, in those circumstances, the *"prevention principle"* operates to preclude MP Water from relying on the May Major Service Failure to issue the 11 May SPA Default Notice (and from relying on that Services Provider Default Notice to issue the 13 May Step-in Notice).

268 The *"prevention principle"* precludes a party from insisting on the performance of a contractual obligation by the other party if the first party's wrongful conduct is the cause of the other party's non-performance: *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* [2017] NSWCA 151 (*"**Probuild**"*) at [114] (McColl JA, Beazley ACJ and Macfarlan JA agreeing); *Bensons Property Group Pty Ltd v Key Infrastructure Australia Pty Ltd* [2021] VSCA 69 (***Bensons***) at [101]-[112].

269 Whilst there is some debate about the juridical basis for the principle, the weight of authority favours the view that it is a manifestation of an implied obligation for each party to co-operate in doing all that is necessary on its part for the carrying out of their contract, by which they have agreed to do something that cannot be done unless both parties concur in doing it: *Probuild* at [114].

270

Irrespective of whether the prevention principle is to be applied by reference to breach of an implied obligation to co-operate, the principle has two elements: wrongful conduct and the consequences of that wrongful conduct: *Bensons* at [109]-[111].

271 The conduct that is said to be wrongful must be assessed by reference to the terms of the contract: *Bensons* at [111]-[112].

272 If the two elements referred to above are satisfied, the operation of the prevention principle may nevertheless be modified or excluded by contract: *Probuild* at [117].

273 MP Water submits that the prevention principle does not apply to the 11 May SPA Default Notice and the 13 May Step-in Notice because the event of the Facility ceasing to accept Mine Water at the Guaranteed Capacity for a continuous 48 hour period from approximately 7pm on 7 May 2021 was a Major Service Failure, and therefore a Services Provider Default, irrespective of the underlying causes of that event. Clause 44 of the SPA is equally agnostic to the underlying causes of the Services Provider Default relied on as enlivening the power under clause 44(a)(2) to issue a Step-in Notice.

274 I accept these submissions. That is to say, the prevention principle has been excluded by the express provisions of the SPA referred to at [237]-[242] above, the definitions of *"Facility" and "Major Services Failure"* construed in the manner I have determined under Issue 1 above, the definition of *"Services Provider Default"* and the provisions of clause 44 which create a Step-in Right if there is a Services Provider Default (including a Major Service Failure, irrespective of the cause) and a failure by the Services Provider to diligently pursue the Services Provider Default Notice. The effect of those express provisions of the SPA is that MP Water is entitled to require Veolia to achieve the Guaranteed Capacity, and to issue a Services Provider Default Notice if this is not achieved, irrespective of the reasons why it has not been or is not being achieved at the time of the Services Provider Default Notice (unless the express exceptions in clause 20.3(d) or clause 35A of the SPA apply). As MP Water submitted, that is consistent with the purpose and objects of the SPA referred at [254] above, particularly having regard to the mine safety considerations underlying those objects.

275 I accept Veolia's submission that clause 44(a)(2) of the SPA requires not only a Services Provider Default but also a failure by the Services Provider to diligently pursue the relevant Services Provider Default Notice. A Step-in Right under clause 44(a)(2) arises only if both of those elements are satisfied. That express requirement of clause 44(a)(2) is not relevant to the prevention principle and is considered under Issue 3 below.

276 Strictly speaking, my conclusion at [274] above renders it unnecessary to determine whether MP Water has failed to comply with its obligations under Schedule 20 of the D&C Contract. However, I will determine that issue in case a different view be taken about the prevention principle in any appeal.

277 It will be recalled that Schedule 20 of the D&C Contract required MP Water to:

(1) obtain a Pond Baseline Condition Report; and

(2)

if that report identified that the integrity of a liner in a pond would, or would reasonably be expected to, materially adversely affect the performance of the Services under the SPA, to obtain a quotation to remediate or replace that liner to the extent necessary to ensure that the integrity of the liner will not materially adversely affect the performance of the Services.

278 As referred to at [111] above, MP Water obtained two reports that together constituted the Pond Baseline Condition Report. Only the TLS Report is relevant to the issues in dispute. As referred to at [128]-[136] above, there was a lengthy dispute between MP Water and Veolia about whether or not the TLS Report identified that the integrity of the liner in Pond B would, or would reasonably be expected to, materially adversely affect the performance of the Services. That dispute culminated in MP Water entering into the Side Agreement with the Customer, following which LLS performed the work referred to at [165]-[169] above.

279 MP Water contends that:

(1) the TLS Report did not identify that the integrity of the existing liner in Pond B would, or would reasonably be expected to, materially adversely affect the performance of the Services; and

(2) in any event, the work subsequently carried out by LLS to repair that existing liner and install a new liner over the top of it so as to create two layers of liner ensures that the integrity of the liner will not materially adversely affect the performance of the Services.

280 Veolia disputes both of those contentions. Veolia contends that MP Water breached Schedule 20 of the D&C Contract by failing to obtain a quote for, or carry out, Liner Remediation Work after obtaining the TLS Report and by failing to ensure that the work subsequently carried out by LLS was performed in the manner required by clause 6 of Schedule 20 of the D&C Contract. It was submitted that those breaches by MP Water precluded Veolia from undertaking the commissioning and acceptance testing activities required by clause 17.6(d) of the D&C Contract and Annexure 10 to the Scope of Works in respect of the Mine Water Buffer Pond and, in turn, resulted in the accumulation of water in that Pond which ultimately caused the May Major Service Failure.

The TLS Report

281 I have referred to the substance of the TLS Report at [112]-[127] above.

282 MP Water relies on the report's conclusion that the expected service life of the existing liner would not expire until after 2022. MP Water submitted that it is not permissible to go behind this conclusion and interrogate the information and reasoning underlying it as set out in the report. MP Water submitted that, because Schedule 20 of the SPA requires detailed surveys of pond liners every second year, with any capital work required to the ponds to be undertaken at MP Water's cost, the expiry of the expected service life of the Pond B liner at some time after 2022 would not reasonably be expected to materially adversely affect the performance of the Services: see [40] and [95]-[96] above.

283

I reject those submissions.

284 In my opinion, a reasonable businessperson would have understood Schedule 20 of the D&C Contract to require MP Water to obtain a quotation for remediation or replacement of a pond liner if, in substance, the Pond Baseline Condition Report read as whole and having regard to the information on which it was based, identified that the liner would, or would reasonably be expected to, materially adversely affect the performance of the Services.

285 When the TLS Report is read as a whole, it is my opinion that it did identify that the integrity of the liner of Pond B was reasonably likely to materially adversely affect the performance of the Services because the liner was likely to reach the end of its service life during the term of the SPA.

286 The conclusion of the TLS Report in relation to the expected service life of the liner was based on only one of the tests undertaken on the liner samples, ignoring the results of the other tests. For most of those other tests, the Pond B liner samples failed to meet the current standard. Mr Luke Adams, an environmental engineering consultant, gave expert evidence in these proceedings in a report tendered by MP Water, in a joint report following a conclave with Mr Roderic McLeod, and in oral evidence given concurrently with Mr McLeod during the hearing. It is Mr Adams' opinion based on all of the test results included in the TLS Report that the liner in the state in which it existed at the time of that report was approaching the end of its service life.[11]

287 As MP Water submitted, Schedule 20 of the SPA establishes an ongoing inspection, maintenance and capital renewal regime for the Mine Water Buffer Pond and other ponds. However, in my opinion, it does not follow that the performance of the Services would not reasonably be expected to be materially adversely affected by the need to replace a liner in the Mine Water Buffer Pond that was at or nearing the end of its service life. It is true that Schedule 20 of the SPA requires MP Water to bear the cost of any such replacement (subject to certain exceptions that are not presently relevant). However, that has no bearing on whether the performance of the Services would be reasonably likely to be materially adversely affected by such work.

288 The two month period required for the LLS work[12] provides some guide as to the period for which the Mine Water Buffer Pond would be likely to be unavailable to provide a "*buffer*" for storage of Mine Water if the liner were required to be replaced during the term of the SPA. Whether that would in fact impact on the performance of the Services would depend on many variable factors and cannot be known with certainty in advance. For example, Veolia appears to have been able to perform the Services, including accepting Mine Water at the Guaranteed Capacity and maintaining the Customer Freeboard, during the period from early November 2020 until about April or early May 2021. The question is whether, at the time that the limited remaining service life of the Pond B liner was identified in the TLS Report, the unavailability of the Mine Water Buffer Pond due to liner replacement works during the Term of the SPA was reasonably likely to materially adversely affect the performance of the Services. In my opinion, having regard to Mr Bowen's evidence that the Mine Water Buffer Pond is *"critical to the proper functioning of the Facility"*,[13] the answer to that question is: yes.

289

For completeness, I note that the risk that works to ponds during the term of the SPA may prevent Veolia from performing part of the Services or meeting its obligations under the SPA was recognised by the parties by the inclusion of item 13 in the definition of *"Abatement Relief Event"* in clause 1.1 of the SPA and by clause 3(e)(4) of Schedule 20. The fact that Veolia may be entitled under clause 35A of the SPA to be relieved from liability for any materially adverse effect on the performance of Services resulting from any replacement of the Mine Water Buffer Pond liner during the term of the SPA does not detract from the occurrence of the material adverse effect. It is the occurrence to which clause 2(c)(3) of Schedule 20 to the D&C Contract is directed.

290 For those reasons, I find that the TLS Report identified that the integrity of the liner in Pond B (as at the date of the TLS Report) would reasonably be expected to materially adversely affect the performance of the Services under the SPA.

Remediation and replacement of the Pond B liner

291 As explained at [173]-[174] above, the work undertaken by LLS involved the repair of the existing liner followed by the installation of an additional liner over the top of the existing liner.

292 The LLS Report states that the existing liner was tested, including by visual inspections, vacuum box testing, pressure testing and arc testing. The entire surface of the liner was tested with an arc tester, which involves applying a current to the sheet that detects any holes in the HDPE geomembrane.[14] Damaged sections of the liner identified during testing were repaired with patches or extrusion beads. The whole of the floor of the liner was replaced, as this was a more efficient solution than individual repairs to damaged sections of the floor.[15]

293 The new liner installed by LLS over the repaired existing liner is an HDPE geomembrane. The LLS Report states that it was installed *"as per the International Association of Geosynthetic Installers HDPE and LLDPE Geomembrane Installation Specification"*[16] (the **Specification**), which sets out requirements relating to subgrade preparation, geomembrane placement, seams and other matters.[17]

294 The LLS Report also states that quality assurance testing was performed on all liner welds. The weld testing, and other testing of the kind described at [292] above is extensively recorded in a Construction Quality Assurance Report prepared by Ecoline Solutions.[18]

295 The Court heard expert evidence from Mr Adams and Mr McLeod.

296 As mentioned earlier in these reasons, Mr Adams is an environmental engineering consultant. Mr Adams was awarded a Bachelor of Geological Engineering in late 2002. Since that time, he has worked in the waste services and environmental management industries. He is experienced in the design, installation and auditing of lining systems. When asked about the number of pond liners he had worked on in the course of his career, Mr Adams replied that it would be something *"under a hundred"*.[19]

297 Mr McLeod is a project manager with 20 years' experience in the project management of design, construction and commissioning of water infrastructure, including industrial ponds storing groundwater and facilities associated with groundwater treatment. Mr

McLeod's qualifications are Bachelor of Science in Building Studies and a Masters in Applied Finance.

298 Mr McLeod's experience is more limited than Mr Adams' experience in several respects that are relevant to the matters addressed by the expert witnesses in this case. First, Mr McLeod has no experience in designing ponds. Rather, he is a project manager of pond installation *"on the customer's side"*.[20] Second, Mr McLeod's experience is limited to the installation of new ponds. He has project managed the installation of about 10 ponds. He has no experience in the remediation or replacement of liners in existing ponds.[21] Third, Mr McLeod candidly admitted that it was outside the scope of his expertise to opine as to whether the new liner material was appropriate for the qualities of the waters to be received from various sources into the Mine Water Buffer Pond. That is a matter that Mr McLeod would refer to an appropriately qualified consultant as and when required in the course of his work.[22] Fourth, although he is an installation project manager, Mr McLeod had no experience in applying or using the Specification. Indeed, he had never seen the Specification until it was provided to him on the same day that his oral evidence commenced in these proceedings.[23]

299 To my observation, both Mr Adams and Mr McLeod gave their evidence in a manner that was honest and genuinely endeavoured to assist the Court.

300 Mr McLeod objected to the use of the term *"composite liner"* to refer to the work undertaken by LLS because he considers that this term is ordinarily used to refer to a two layer system involving different liner material in each layer. In this case, both layers are HDPE geomembrane. I will therefore refer to existing Pond B liner as remediated by LLS, together with the new liner laid over the top of it, as the **double liner**.

301 MP Water submitted that the LLS Report, the other materials attached to the Certifier's letter issued on 26 October 2020[24] and the expert evidence of Mr Adams, establish that the double liner meets the requirements of clause 2(5)(c) of Schedule 20 of the D&C Contract and that the work was carried out in a manner that complied with clause 6 of Schedule 20 to the D&C Contract.

302 Veolia relied on the scope of works in the LLS Contract and the expert evidence of Mr McLeod in submitting that MP Water had breached clause 2(c)(5) of Schedule 20 to the D&C Contract.

303 The provisions of clause 2 of Schedule 20 to the D&C Contract have been referred to at [62]-[63] above but it is convenient to set out in full here the terms of clause 2(c) that relate to the integrity of the liner:

> "(c) To the extent that the Pond Baseline Condition Report identifies that:
>
> …
>
> (3) the integrity of the liner in any Pond will, or is reasonably expected to, materially adversely affect the performance of the Services,
>
> the Principal [MP Water] must request the Contractor [Veolia], and Veolia will no later than 8 Business Days from the Principal's request, prepare and provide the Principal with a quotation (**Pond Remediation Quotation**):
>
> …
>
> (5) to remediate or replace any relevant liner to the extent necessary to ensure the integrity of the liner will not materially adversely affect the performance of the Services"

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It will be recalled that the effect of clause 2 of Schedule 20, read together with clause 5.9(a) of the Scope of Works, is that Veolia is *"wholly responsible for all Works necessary to repurpose the existing Blowdown Pond B as the Mine Water Buffer Pond"* except to the extent that MP Water undertakes or procures Settled Solid and Liner Remediation in accordance with Schedule 20 to the D&C Contract: see [60]-[64] above. It is only Liner Remediation Work that is relevant to these proceedings

305 Clause 6 of Schedule 20 of the D&C Contract requires that the work be performed in a sound and workmanlike manner, with due care and skill, using materials of merchantable quality that are fit for the intended purpose, to the standard of a competent contractor and in accordance with all applicable laws.

306 Veolia submitted that clause 2(c)(5) of Schedule 20 to the D&C Contract provides that *"the remediation works that are in fact carried out to the liner cannot materially adversely affect the performance of the Services"*. I reject that submission as contrary to the plain meaning of the words of clause 2(c)(5), read in the context of Schedule 20. As MP Water submitted, it is the integrity of the liner itself (after the remediation or replacement works) that must not materially adversely affect the performance of the Services. Clause 2(c)(5) delineates the extent of the work required to be performed by reference to that end result. Clause 2(c)(5) is not speaking to the manner in which the work is performed. Clause 6 of Schedule 20 to the D&C Contract stipulates the manner in which the work is required to be performed.

307 MP Water submitted that the words *"remediate or replace"* in clause 2(c)(5) of Schedule 20 of the D&C Contract connote *"like for like"* and that the work required by that clause cannot be expanded to include an LDRS that was not previously installed at Pond B. I find it unhelpful to approach the question of whether the work complied with clauses 2(c)(5) and 6 of Schedule 20 through the prism of *"like for like"*, which is an inaccurate gloss on the words of those clauses. However, I accept that the work required by clause 2(c)(5) is remediation or replacement of the liner. I also accept Veolia's submission that the manner in which clause 6 requires that work to be performed is to the standard of a competent contractor at the time that the work was undertaken in 2020. That standard is not reduced or qualified by reason of the fact that the existing liner retained as part of the double liner was 28 years old.

308 Veolia submitted that the LLS Contract did not refer to clauses 2(c)(5) and 6 of Schedule 20 to the WTSC or equivalent provisions in Schedule 20 of the D&C Contract. Veolia then submitted that LLS *"did not have regard to clause 2(c)(5) … so that when it carried out the works under the* [LLS Contract] *it would ensure the integrity of the liner would not materially adversely affect the performance of the Services."*

309 I accept the first submission but reject the second submission above. It does not follow from the fact that the LLS Contract did not include an express reference to clause 2(c)(5) of Schedule 20 of the D&C Contract (to which LLS was not a party) that the LLS work did not *"remediate or replace* [the liner] *to the extent necessary to ensure the integrity of the liner will not materially adversely affect the performance of the Services."* That is the standard that clause 2(c)(5) of Schedule 20 of the D&C Contract requires the remediated or replaced liner to meet.

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Thus, the question is whether the integrity of the double liner will not materially adversely affect the performance of the Services. That question falls to be determined on the basis of the evidence concerning the qualities of the two liner layers, operating together, that are relevant to the capacity of the double liner to hold and contain the waters required to be stored in the Mine Water Buffer Pond in the course of performing the *"Services"* as defined in the SPA.

311 Veolia submitted that MP Water breached its obligations under clause 2(c)(5) and clause 6 of Schedule 20 to the D&C Contract in five respects:

(1) by constructing an irregular form of double liner (new liner over existing liner) without any risk assessment or leak detection and recovery system (**LDRS**);

(2) by failing to provide the necessary information about the construction of the liner that would allow Veolia to carry out the Services;

(3) by putting Veolia in a position that it will be unable to comply with its "*handback*" obligations under the SPA by retaining the existing, 28 year old liner together with the new liner;

(4) by failing to carry out an inspection of the subgrade prior to *"construction of the remediated liner"*; and

(5) by failing to provide Veolia with the documents that it says are necessary to enable it to commence commissioning and acceptance testing of the Mine Water Buffer Pond.

312 Those alleged breaches provide a convenient framework for assessing the evidence relating to the LLS work and determining whether it complied with Schedule 20 of the D&C Contract. I will address them in the order set out above.

313 In relation to the first alleged breach, Veolia submitted that the liner installed was an unusual, double layer system involving a new liner on top of an old liner in circumstances where the floor section of the old liner had been replaced and the old liner therefore contained welds joining the floor and wall sections. It was submitted that both expert witnesses agreed that a risk assessment was required for the design of this unusual liner system and MP Water had breached its obligations under Schedule 20 of the D&C Contract by reason of the fact that no such risk assessment had been undertaken before the double liner system was installed.

314 It was further submitted that, in circumstances where no risk assessment was undertaken, an LDRS was required to mitigate the risk of "*whaling*" (build up of pressure between the two layers of the liner) which would materially adversely affect the performance of the Services if it occurred. Veolia submitted that MP Water was in breach of clause 6 of Schedule 20 of the D&C Contract by reason of the fact that no LDRS had been installed.

315 Further or alternatively, Veolia submitted that clause 6 of Schedule 20 to the D&C Contract required that an LDRS be installed because a competent contractor carrying out the work would have complied with the *Exploration Code of Practice: Produced Water Management Storage and Transfer* (the **Code**), and the Code requires a produced water storage facility to have the capability to detect leaks.

316 The expert evidence relevant to these issues may be summarised as follows.

317 Mr Adams and Mr McLeod agreed that the double liner was unusual, although it is not unprecedented in Mr Adams' experience.[25] Mr McLeod described it as *"highly irregular"*.[26] However, that appeared to be just another way of saying that it was unusual. Mr McLeod did not claim to have formed any opinion about the risks and benefits of the double liner in this case.[27]

318 It was common ground between the experts that there is no documentary evidence of a risk assessment having been undertaken before the double liner was installed by LLS. However, the experts emphasised that it did not follow that the double liner was not appropriate for the risk profile.[28]

319 The experts gave the following evidence in relation to the double liner:

(1) the new liner that was installed as part of the double liner complies with GRI-GM13 standard;[29]

(2) Mr Adams identified the upper limit of the water quality parameters (correlating with the highest quantity of contaminants) specified in the WTSC for each of the sources of water required to be contained in the Mine Water Buffer Pond, reviewed the manufacturers' certification sheets for the HDPE geomembrane liner material used for the new liner, and satisfied himself that the new liner would not be under attack or at risk of breakdown by reason of the qualities of the waters to be introduced into the lined Mine Water Buffer Pond;[30]

(3) on the basis of his assessment referred to immediately above, Mr Adams opined that it was entirely reasonable to expect the new liner to have a service life of 36 years or thereabouts;[31]

(4) Mr McLeod lacks the experience to undertake the assessment that Mr Adams carried out, but did not disagree with Mr Adams opinions referred to at (2) and (3) above;[32]

(5) LLS undertook the repair of the existing liner and installation of the new liner with due care and skill;[33]

(6) neither Mr Adams nor Mr McLeod identified any evidence suggesting that the LLS work had not been installed in accordance with the Specification, as stated in the LLS Report. Mr McLeod had not seen documentary records that he would have expected to see in relation to some aspects of that work. In Mr Adams' experience it is not uncommon for contractors not to generate records of the kind referred to by Mr McLeod;[34] and

(7) if the existing liner were to fail in the future, the new liner would effectively act as a single layer liner for the waters contained in the Mine Water Buffer Pond.[35]

320 Mr McLeod gave evidence that liquid or gas can build up between the two layers of a double liner, causing the liners to bulge (known as *"whaling"*) which can damage the liner system leading to a leak into the environment. Mr McLeod identified an LDRS as a means of avoiding this risk.[36] However, Mr McLeod characterised liquid or gas build up and consequent *"whaling"* as a low risk.[37]

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Although he characterised *"whaling"* and resulting environmental leaks as a low risk, Mr McLeod said that he would have expected an assessment of this risk to be carried out and the for the assessor to *"advise what to do in those … situations"* and for those matters to be addressed within an operations and maintenance manual.[38] Whilst he identified an LDRS as one means of addressing the risk of pressure build up or *"whaling"*, Mr McLeod also gave evidence that, if *"whaling"* did occur in this case, it would easily be addressed by putting venting around the sides of the pond or applying ballast to the surface of the liner. Mr McLeod has used these techniques in the past and gave evidence that they would *"absolutely"* work in this case if required.[39]

322 Mr Adams agreed that the build-up of pressure between two layers of a double liner can occur, and that an LDRS is one way to combat that risk. However, Mr Adams said he did not see evidence of a likelihood of pressure build-up occurring this case.[40]

323 It was common ground between Mr McLeod and Mr Adams that any decision to include an LDRS in the design of a liner system is *"based on risk profile"*, taking into account "[L]*ikelihood, consequence, contaminant and surrounding environment"*.[41]

324 Mr Adams gave evidence that he would not have made the decision whether to install the double liner (as opposed to removing the existing liner before installing the new liner) in this case without conducting a risk assessment, or relying on a risk assessment conducted by someone else. However, the risk assessment need not be documented.[42]

325 Mr Adams said that the risk assessment would only address the risk of pressure build-up between the two liner layers *"If it was likely and if I had evidence to support that."*.[43] As I have mentioned above, Mr Adams' evidence is that he did not see evidence of a likelihood of pressure build-up in this case.[44]

326 Contrary to Veolia's submissions, Mr Adams did not give evidence that he would not have installed the double liner in this case *"without undertaking a risk assessment as to whether the installation of an LDRS was necessary."*.[45] Contrary to Veolia's submissions, Mr McLeod did not give evidence that the object of the risk assessment that he would have expected to be undertaken was *"to determine whether an LDRS was required"*.[46]

327 Mr Adams rejected the proposition that, if no risk assessment was carried out, then an LDRS should be installed.[47]

328 Mr McLeod did not give evidence that an LDRS should have been installed for the Mine Water Buffer Pond in the absence of a risk assessment. On the contrary, Mr McLeod's evidence that an LDRS should have been installed was based solely his view that the Code required and LDRS.[48]

329 The Code states that:[49]

> "This Code only applies if imposed as a term of an activity approval. Title holders should refer to the terms imposed by the NSW Resources Regulator on the grant of an activity approval or renewal or transfer of a prospecting title to determine whether this Code applies."

330 There was no evidence that the Code was imposed by any term of an activity approval in respect of the Springvale Mine, the Angus Place Mine or the Facility.

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It was common ground between the experts that a competent contractor would be aware of, and have regard to, all available recommended practice standards relevant to their work when performing liner repairs, including the Code, irrespective of whether those standards applied as a matter of law. It was also common ground that a competent contractor would not necessarily comply with a non-legally binding standard or code.[50]

332 Mr Adams gave evidence that, in this particular case, his analysis of the chemistry of the waters to be contained in the Mine Water Buffer Pond is a further reason why he would not apply the Code in this case if it was not required by law to be applied.[51]

333 Mr McLeod gave evidence that he would apply the Code in this case in the absence of a thorough analysis of the water that may be contained in the Mine Water Buffer Pond and in the absence of a risk assessment based on that water analysis.[52] However, as I have already referred to, Mr McLeod did not disagree with Mr Adams' analysis of the water qualities that was based on the upper end of the range of contaminants documented in the WTSC. Nor did Mr McLeod disagree with Mr Adams' conclusion that the new liner was not at risk of attack from those contaminants and could reasonably be expected to have a 36 year service life. Nor did Mr McLeod suggest that Mr Adams' analysis was not thorough.[53]

334 The expert evidence summarised above supports Veolia's submissions that the double liner is unusual and a competent contractor undertaking the work required by clause 2(c)(5) of Schedule 20 to the D&C Contract would have undertaken a risk assessment (whether formally documented or not) before proceeding to install the double liner. There is no evidence that any such assessment was undertaken. If a risk assessment was undertaken, that is a matter that would be within the knowledge of MP Water, who made the arrangements for the Customer to undertake the work, rather than Veolia. On the basis of the expert evidence concerning a risk assessment and MP Water's failure to adduce any evidence of a documented risk assessment or undocumented risk review, I find that no risk assessment was undertaken and that this was a breach of clause 6(f) of Schedule 20 to the D&C Contract.

335 However, it does not follow from the absence of a risk assessment that the double liner fails to meet the standard required by clause 2(c)(5) of Schedule 20 to the D&C Contract – namely, that the integrity of the double liner *"will not materially adversely affect the performance of the Services."* Indeed, Veolia did not rely on the absence of a risk assessment as a breach of clause 2(c)(5) of Schedule 20.[54]

336 I reject Veolia's submission that, in the absence of a risk assessment, clause 6 of Schedule 20 to the D&C Contract required that an LDRS be installed.[55] That submission is contrary to the expert evidence summarised above. The experts identified build-up of pressure between the layers of the double liner as a risk that was either low (Mr McLeod) or non-existent (Mr Adams) and for which an LDRS is but one of several available solutions. In view of Mr Adams' more extensive experience, I prefer his evidence that he would not have addressed this issue in a risk assessment in this case to the evidence of Mr McLeod referred to at [321] above. Mr Adams expressly rejected the proposition that an LDRS should have been installed if no risk assessment was undertaken. Mr McLeod's evidence that an LDRS should have been installed

turned solely on his opinion that a competent contractor should have complied with the Code. That opinion, in turn, was based on Mr McLeod's assumption that the Code applied to the Mine Water Buffer Pond.[56]

337 The Code, where applicable, requires an LDRS for storage ponds with capacity greater than $5m^3$.[57] However, as referred to at [329]-[330] above, there is no evidence that the Code applied to this project. To the extent that Veolia's submissions suggest that the Code applied, I reject those submissions.

338 Given Mr Adams' extensive experience in the design, installation and auditing of lining systems in ponds of this nature referred to at [296] above, I accept his evidence that a competent contractor would have regard to the Code but would not comply with it if it did not apply as a matter of law. Indeed, Mr McLeod gave the same evidence in the joint expert report.[58] It is readily understandable that the burden of complying with applicable legal requirements is such that a competent contractor would not take on the burden of complying with additional requirements, even where those additional requirements are found in standards that may provide useful information for a particular project.

339 Contrary to Veolia's submissions, Mr Adams did identify a specific additional reason why a competent contractor would not comply with the Code in this case. That is because the analysis of the chemistry of the waters contained in the Mine Water Buffer Pond shows that the new liner will not come under attack from those chemicals.[59] Mr McLeod did not disagree with Mr Adams' analysis of the chemistry or with his conclusions that the new liner would not come under attack and that the new liner could reasonably be expected to have a 36 year service life.[60]

340 I reject Mr McLeod's evidence that a competent contractor would have complied with the Code because that evidence is based on his assumption that the Code applied, and that assumption has not been proved correct. To the extent that Mr McLeod put forward any alternative basis for his view that a competent contractor would have complied with the Code, it appears to be grounded in the uncertainty that he would have (standing in the contractor's shoes) about whether the new liner would withstand the chemicals in the waters to be received in the Mine Water Buffer Pond.[61] That uncertainty is the product of Mr McLeod's lack of expertise to form his own view about that matter.[62] There is no reason to attribute that lack of expertise to the competent contractor who is the reference point for the standards required by clause 6 of the D&C Contract.

341 For those reasons, I find that the failure to conduct a risk assessment before installing the double liner in the Mine Water Buffer Pond constituted a breach of clause 6 of Schedule 20 of the D&C Contract. The failure to install an LDRS did not constitute a breach of clause 6. I note that Veolia did not rely on failure to install an LDRS as a breach of clause 2(c)(5) of Schedule 20.[63]

342 Veolia did not submit that the failure to conduct a risk assessment had caused the May Major Service Failure by preventing Veolia from commissioning and testing the Mine Water Buffer Pond. Nor did Veolia's submissions identify any evidence that would support such a finding. Accordingly, even if the prevention principle applied (contrary to

my conclusion at [274] above), the failure to conduct a risk assessment prior to installing the double liner would not preclude MP Water from relying on the May Major Service Failure to issue the 11 May SPA Default Notice.

343 In relation to the second alleged breach, Veolia submitted that MP Water failed to provide specified reports and documents that a competent contractor installing the double liner would have provided to Veolia. It was submitted that the reports and documents were necessary for Veolia to:

(1) prepare Pond Infrastructure Reports as required by clause 3(a) of Schedule 20 to the SPA; and

(2) develop the Mine Water Buffer Pond Operating Protocol (which forms part of the Facility Operations Manual) as required by clause 1.3 of Annexure 6 to the Scope of Services in the SPA.

344 Veolia submitted that these alleged breaches of clause 6 of Schedule 20 to the D&C Contract will materially adversely affect Veolia's performance of the Services under the SPA by preventing it from preparing the Pond Infrastructure Reports, the Mine Water Buffer Pond Operating Protocol and a complete Facility Operations Manual.

345 Assuming that Veolia's submissions referred to at [343] above are correct, the submission at [344] above suffers from two fundamental problems.

346 The first problem is that, for the reasons explained at [303]-[307] above, clause 6 of Schedule 20 to the D&C Contract does not require that the work undertaken pursuant to clause 2(c)(5) of Schedule 20 be carried out in a manner that will not materially adversely affect the performance of the Services. Rather, clause 2(c)(5) specifies the extent to which the liner is required to be remediated or replaced, i.e. to the extent necessary to ensure that the integrity of the liner will not materially adversely affect the performance of the Services. Clause 6 of Schedule 20 specifies the standard to which that work must be performed. Clause 6 does not require the preparation of documents or any other additional work on the basis that the absence of such documents or additional work may materially adversely affect the performance of the Services.

347 In many hundreds of pages, the parties have expressly set out what each of them is required to do under the D&C Contract and under the SPA. As referred to in more detail at [237]-[241] above, Veolia's obligation to provide the Services includes the obligation to accept and process Mine Water at the Mine Water Receipt Points up to the Guaranteed Capacity, unless expressly provided otherwise by another provision of the SPA. In this context, a reasonable businessperson would not have understood clause 6 of Schedule 20 to the D&C Contract to require MP Water to provide to Veolia deliverables in respect of any Liner Remediation Work that are not expressly called for by the D&C Contract.

348 I acknowledge the submission made by senior counsel for Veolia that, if Veolia had carried out the Liner Remediation Work itself, it would have the reports and documents that it says are required in order to prepare Pond Infrastructure Reports and the Mine Water Buffer Pond Operating Protocol. However, Schedule 20 to the D&C Contract does not require that the work be carried out by Veolia and expressly contemplates that any Liner Remediation Work may be undertaken by MP Water (or a third party procured

by MP Water). In any event, the fact that a decision was made after the D&C Contract had been entered into for the Liner Remediation Work to be carried out by MP Water (through the Customer) would not be relevant to the exercise of construing clause 6 of the Schedule 20 in accordance with the principles referred at [234]-[236] above.

349 Thus, failure to provide the reports and documents referred to at [343] above was not a breach of the D&C Contract.

350 The second problem is that by issuing the 11 May SPA Default Notice, MP Water was not seeking to enforce Veolia's obligations to prepare Pond Infrastructure Reports or to prepare a Mine Water Buffer Pond Operating Protocol. Rather, MP Water was seeking to enforce Veolia's obligation under clause 20.2(a) of the SPA to accept and process Mine Water up to the Guaranteed Capacity, subject to the exceptions in clause 20.3(d) and clause 35A of the SPA which are not presently relevant.

351 Thus, even if the prevention principle applied (contrary to my conclusion at [274] above), and assuming that the reports and documents referred to at [343] are necessary for Veolia to prepare the Pond Infrastructure Reports or to prepare a Mine Water Buffer Pond Operating Protocol, the failure to provide those reports and documents would not preclude MP Water from relying on the May Major Services Failure to issue the 11 May SPA Default Notice.

352 On the basis of the evidence of Mr Adams and Mr McLeod, I find that the third breach alleged by Veolia did not occur. Veolia's handback obligations under Annexure 11 to the Scope of Services require that *"liners"* have a minimum residual service life of 5 years on the expiry of the term of the SPA. The liner in the Mine Water Buffer Pond is the double liner. I accept that the expert evidence provides strong support for the view that the existing 28 year old liner component of that double liner will not have a minimum residual service life of 5 years on the expiry of the 15 year term of the SPA. However, the minimum residual service life applies to the liner, not individual components of it. The experts agreed that, the new liner component would reasonably be expected to have a service life of 36 years, which would result in a minimum residual service life of substantially more than 5 years when the term of the SPA expires. The experts also agreed that, if the existing liner component were to fail for any reason, then the new liner layer would effectively function as a single liner thereafter. On the basis of that evidence and all of the evidence referred to at [319] above, Annexure 11 to the Scope of Services will not require Veolia to replace the 28 year old liner layer at the expiry of the term of the SPA.

353 In any event, MP Water was not seeking to enforce Veolia's handback obligations by issuing the 11 May SPA Default Notice. Rather, MP Water was seeking to enforce Veolia's obligation under clause 20.2(a) of the SPA to accept and process Mine Water up to the Guaranteed Capacity, subject to the exceptions in clause 20.3(d) and clause 35A of the SPA which are not presently relevant.

354 In relation to the fourth alleged breach, I accept Veolia's submissions that the expert witnesses agreed that they would expect a review to be undertaken of the cause of the extensive damage found to the floor of the existing liner, including potential causes in

the subgrade below the liner. I also accept Veolia's submissions that the expert witnesses agreed that they had seen no records documenting any such review.

355 However, the LLS Report states that all works were undertaken in accordance with the Specification,[64] which requires *inter alia* that *"the geomembrane subgrade shall be uniform and free of sharp or angular objects that may damage the geomembrane prior to installation of the geomembrane"* and an inspection of the surface on each day of the installation *" prior to placement of geomembrane to verify suitability"*.[65] Mr Adams gave evidence that, in his experience, construction supervision records do not contain references to each and every individual requirement of a specification and will often instead simply state that the relevant specification has been complied with. That was Mr Adams' basis for reading the statement in the LLS Report that the Specification had been complied with as indicating that the subgrade had been inspected.[66] I accept the evidence of Mr Adams having regard to his extensive experience referred to at [296] above. The sole basis on which Mr McLeod had any concern about whether the subgrade had been inspected is the absence of records specifically recording those inspections.[67] As I have mentioned at [298] above, Mr McLeod has no experience in the application of the Specification.

356 The evidence does not establish that the subgrade was not inspected. In any event, Veolia's submissions did not identify how a failure to inspect the subgrade (if established) would enliven the prevention principle so as to preclude MP Water from relying on the May Major Service Failure by issuing the 11 May SPA Default Notice.

357 The fifth alleged breach concerns MP Water's failure to provide the same specified reports and documents that Veolia relies on in relation to the second alleged breach. In the context of the fifth alleged breach, Veolia submits that MP Water's failure to provide those reports and documents has precluded and continues to preclude Veolia from commissioning and testing the Mine Water Buffer Pond safely and without harming the environment. It is on that basis that Veolia contends that the fifth alleged breach precludes MP Water from relying on the May Major Services Failure to issue the 11 May SPA Default Notice.

358 I reject Veolia's submissions in relation to the fifth alleged breach.

359 Contrary to Veolia's submission, Schedule 20 of the D&C Contract does not require MP Water to provide the relevant reports and documents for the reasons explained at [346]-[348] above. For that reason alone, failure to provide those materials does not attract the operation of the prevention principle so as to preclude MP Water from relying on the May Major Service Failure to issue the 11 May SPA Default Notice.

360 In any event, the evidence does not establish that Veolia requires the relevant reports and documents in order to commission and test the Mine Water Buffer Pond safely and without harming the environment. The expert evidence on this issue was unsatisfactory, with Mr Adams asserting that further documents were not required for commissioning purposes,[68] and Mr McLeod asserting that specific documents were required.[69] Mr McLeod's evidence on this subject was lengthier, but greater length is no guarantee of increased probative value or weight. In substance, Mr McLeod's evidence was a series of assertions supported only by further assertions about what *"I would expect"*. Many of

Mr McLeod's assertions were founded on the proposition that Schedule 20 of the D&C Contract required MP Water to install an LDRS. For the reasons explained in relation to the first alleged breach above, that proposition is incorrect.

361 Veolia submitted that Mr McLeod's evidence had not been the subject of challenge and must therefore be accepted. That is incorrect to the extent that his assertions were founded on the alleged requirement for an LDRS. Mr Adams' evidence was not the subject of any challenge by Veolia that I regard as effectively undermining his contention that, on the basis of the available documentation, *"there is nothing of a technical nature that would have prevented the commissioning of Pond B"*.[70]

362 In summary, the competing assertions of the experts are of no assistance to the Court. Veolia has failed to adduce evidence demonstrating that it requires the relevant reports and documents for the purpose of commissioning and testing the Mine Water Buffer Pond.

Issue 3: Did Veolia fail to diligently pursue the 11 May SPA Default Notice?

363 As the party seeking orders enforcing compliance with the 13 May Step-in Notice, MP Water bears the onus of establishing that it was entitled under clause 44(a)(2) of the SPA to issue that notice. That requires MP Water to establish that Veolia had failed to *"diligently pursue"* the 11 May SPA Default Notice.

364 When clause 44(a)(2) of the SPA is read in the context of clause 44(a)(1) and clause 42, it is clear that a failure to *"diligently pursue"* a Services Provider Default Notice occurs if the Services Provider fails to act diligently in taking the steps necessary to remedy the default (if it is capable of being remedied) or the steps stipulated in the notice as required in order to overcome the effects of the default (if it is not capable of being remedied), even if the time for those steps to be taken has not yet expired.

365 As referred to at [199] above, the 11 May SPA Default Notice required Veolia to:

> "… remedy the Services Provider Default by restoring the Facility's ability to accept Mine Water at a capacity which is at least the Guaranteed Flow and Process Capacity (as well as giving Project Co notice that the Services Provider Request is removed) as soon as possible and in any event by no later than 12.00 on 12 May 2021 (**Applicable Cure Period**)."

366 The *"Services Provider Request"* refers to Veolia's request issued on 6 May 2021 that the flow of Mine Water be stopped: see [194] above.

367 MP Water submitted that Veolia had failed to diligently pursue the 11 May SPA Default Notice, as evidenced by its response to the notice. I accept that submission for the following reasons.

368 As referred to at [201] above, Veolia's response disputing the validity of the Notice was based on its contention set out in the first letter there referred to that *"the Mine Water Buffer Pond has not yet come into existence"* and that there was therefore *"no requirement in the SPA for the Servicers Provider to comply with any clauses that relate to or refer to the Mine Water Buffer Pond."* Given that the default specified in the Notice was the failure to accept Mine Water at the Guaranteed Capacity for a period of more than 48 hours, Veolia's response is to be understood as contending that it was not required to comply with clause 20.2(a) of the SPA. For the reasons I have explained under Issue 1 above, that contention is incorrect.

369 Veolia submitted that it had not failed to diligently pursue the 11 May SPA Default Notice because the Notice required it to restore the Facility's ability to accept Mine Water at a capacity which is at least the Guaranteed Capacity and *"that's asking* [Veolia] *to restore something that had never been. There never had been the facility treating water at 36 megalitres per day."* If the submission was intended to convey that Mine Water has never been accepted at the Guaranteed Capacity, the Court was not referred to any evidence to that effect and it is contrary to the tenor of the evidence of both parties that the inability to accept water at the Guaranteed Capacity first arose in early May 2021. If the submission was intended to convey that the *"Facility"* as defined in the SPA had never accepted Mine Water at the Guaranteed Capacity, that is incorrect for the reasons explained under Issue 1 above.

370 MP Water also relied on Veolia's second letter of 12 May 2021 referred to at [201]-[202].

371 The first option put forward by Veolia in that letter seeks an indemnity and abatement relief in relation to the commissioning and testing of the Mine Water Buffer Pond. Veolia stated in the letter that it required the indemnity and abatement relief because MP Water had failed to procure the Customer to carry out the Settled Solid and Liner Remediation Work in accordance with clause 6 of Schedule 20 to the D&C Contract and because MP Water had failed to provide the reports and documents referred to at [357] above.

372 For all of the reasons explained under Issue 2 above, Veolia's first proposition that the Settled Solid and Liner Remediation Work had not been performed in accordance with clause 6 of Schedule 20 to the D&C Contract was not correct, except in relation to the failure to conduct a risk assessment (which did not impact on the integrity of the liner or preclude Veolia from commissioning the Mine Water Buffer Pond).

373 For the reasons explained at [359]-[362] above, the evidence does not support Veolia's second proposition. Although MP Water bears the ultimate burden of proof in relation to this Issue 3, there is no contractual obligation for MP Water to provide the relevant reports and documents to Veolia as I have explained at [346]-[348] above. In my opinion, an evidentiary burden falls on Veolia, as the party required to carry out the commissioning and testing, to adduce admissible and cogent evidence identifying with some specificity any reason why it could not do so without the relevant reports and documents. Veolia failed to adduce such evidence, as I have explained at [360]-[362] above.

374 The second option proposed by Veolia in its second 12 May 2021 letter involved varying the SPA by having Veolia undertake work at MP Water's cost, including installing an LDRS. For the reasons explained under Issue 2 above, Schedule 20 of the D&C Contract did not require MP Water to undertake that work. If Veolia considered that an LDRS was necessary or desirable for the provision of the Services, it was Veolia's responsibility to undertake that work under clause 5.9(a) of the Scope of Works.

375

For all of those reasons and for the reasons explained under Issue 2 above, I reject Veolia's submission that it could not take the remedial steps required by the 11 May SPA Default Notice because the Mine Water Buffer Pond was not available and could not be accepted for commissioning and testing due to breaches by MP Water of Schedule 20 of the D&C Contract.

376 For those reasons, I find that Veolia failed to diligently pursue the 11 May SPA Default Notice. It follows from that finding and from my conclusions in relation to Issues 1 and 2 above that both elements of clause 44(a)(2) of the SPA were satisfied. MP Water was therefore entitled to exercise Step-in Rights under clause 44(a)(2) as at 13 May 2021.

Issue 4: Scope of the obligation to assist under clause 44 of the SPA

377 The terms of clause 44 of the SPA are set out at [105]-[107] above.

378 The issue in dispute between the parties is whether Veolia's obligation in clause 44(a) to *"assist"* MP Water where MP Water elects to step in requires Veolia to comply with instructions or directions issued by MP Water specifying steps to be taken by Veolia in providing the Services or overcoming the effects of a Services Provider Default.

379 In my opinion, if MP Water elects to step in under clause 44, Veolia's obligation to assist requires it to do all things possible to ensure that MP Water is able to achieve all of the objectives in sub-clauses (7), (8) and (9) of clause 44(a). Contrary to MP Water's submissions, sub-clauses (7), (8) and (9) are cumulative. They are not an assistance menu from which MP Water is entitled to choose. That is the effect of the word *"and"* between sub-clauses (8) and (9). I reject MP Water's submission that the words at the end of clause 44(a) – *"each a **Step-in Right**"* - mean that sub-clauses (7), (8) and (9) are separate rights and that it is entitled to elect to exercise any one or more of them. It is clear from the language used in sub-clauses (i)(2) and (j)(2) and (3) that the words *"each a **Step-in Right**"* refer to subclauses 44(a)(1), (2), (3), (4), (5) and (6).

380 If one of the Step-in Rights under clauses 44(a)(1) to (3) is exercised, Veolia must do all things possible to ensure that MP Water is able to take possession, management and control of the Facility and the Services. It is plain from the word *"and"* that the words *"possession, management and control"* are a composite expression applying to both the Facility (or part of it) and the Services (or any of them). The possession, management and control may be total or partial, and may relate to only part of the Facility and some of the Services. However, sub-clause 44(a)(7) does not require Veolia to assist MP Water to take total or partial management of some or all Services (by issuing directions or instructions or instructions to Veolia) whilst Veolia remains in possession and control of the whole of the Facility and performs the Services under MP Water's instructions.

381 Contrary to MP Water's submission, that does not involve reading an implied limitation into clause 44 of the SPA. Rather, it is consistent with the ordinary meaning of the words in clause 44(a) and reflects what a reasonable businessperson would have understood them to mean in the context of clause 44 as a whole. As Veolia submitted, this construction of clause 44(a) is supported by the language of clauses 44(b), (d), (i) and (j). Those clauses describe the consequence of the exercise of a Step-in Right as being that MP Water (or, where applicable, the Customer) will be operating the Facility

or part of the Facility (clause 44(b)) and that Veolia's rights and obligations under the SPA will be suspended to the extent necessary to facilitate that (clause 44(d)). Veolia is relieved from its obligations to provide the Services *"for so long as and to the extent that"* MP Water's exercise of the Step-in Rights has prevented Veolia from providing the Services (clause 44(j)(1)). The quoted words convey that the exercise of the Step-in Rights will prevent Veolia from providing the Services to some extent. That is consistent with the Step-in Rights involving MP Water taking total or partial possession, management and control of the Facility and the provision of the Services, rather than merely instructing or directing Veolia what to do for the purpose of Veolia providing the Services. It also explains the requirement for Veolia to *"recommence"* the performance of the Services upon MP Water (or the Customer) ceasing to exercise the Step-in Rights (clause 44(i)).

382 I reject MP Water's submission that this construction of clause 44 of the SPA deprives MP Water of a valuable right. If MP Water wishes Veolia to do or refrain from doing a specific thing consistently with their respective contractual rights and obligations, it has a right to apply to the Court for injunctive relief, including on an urgent interim basis. Clause 44 provides MP Water with a different right to step in and take total or partial possession, management and control in each of the circumstances referred to in clause 44(a)(1) to (3), and to require Veolia to step aside. That is consistent with the important safety and legal compliance considerations that inform the commercial object of the SPA, namely to facilitate the acceptance, processing and treatment of Mine Water at the Facility.

Issue 5: Orders now sought by MP Water

383 For all of the reasons explained under Issue 4 above, MP Water is not entitled to the relief in prayers 11 and 12 of the Summons, as amended as set out at [217] above.

Issue 6: Whether Veolia breached its obligations under the SPA

384 For the reasons explained under Issue 2 above, MP Water had complied with its Settled Solids and Liner Remediation obligations under Schedule 20 of the D&C Contract by the time of the Certifier's letter dated 26 October 2020. The Mine Water Buffer Pond was available to Veolia for commissioning and testing in accordance with the D&C Contract from that time.

385 Veolia's submissions attributed the May Major Services Failure to what Veolia characterised as its inability to commission and test the Mine Water Buffer Pond. For all of the reasons explained under Issues 2 and 3 above, from early November 2020, Veolia was able to undertake that commissioning and testing. Its failure to do so caused the May Major Services Failure. As it was not submitted that Veolia was relieved from its Guaranteed Capacity obligations under clause 20.2(a) of the SPA by reason of clause 20.3(d) or clause 35A of the SPA, the May Major Services Failure involved a breach by Veolia of its obligation to perform the Services in accordance with the SPA for the reasons explained under Issue 1 above.[71]

386 For the reasons explained under Issue 3 above, Veolia failed to diligently pursue and comply with the 11 May SPA Default Notice.

387 MP Water did not address any submissions to the contention that Veolia had failed to comply with the 11 May SPA Direction. That contention is therefore taken to have been abandoned.

388 The terms of the 13 May Step-in Notice are set out at [207] above. The terms of the Notice itself do not make it clear MP Water intended only to direct Veolia to take the steps set out in (a) and (b) of the Notice (as opposed to MP Water itself taking those steps). However, it is plain from MP Water's submissions that it intended the Notice to convey only that it would be issuing directions to Veolia. That is in fact all that MP Water purported to do in giving effect to the Notice. For the reasons explained under Issue 4 above, Veolia did not breach the SPA by failing to comply with those directions in the period between 13 May 2021 and 20 May 2021 when the interim orders were made. There is no allegation that Veolia failed to comply with those interim orders, which must now be discharged in light of my conclusions in relation to Issues 4 and 5 above.

389 As referred to at [215] above, quantum issues as between MP Water and Veolia associated with a claim by the Customer against MP Water have been ordered to be determined separately from the matters that are the subject of these reasons.

390 Whilst MP Water has failed in its claim for the relief set out at [217] above, it has succeeded on other issues that may ultimately affect the outcome of those quantum issues. Determination of the costs of the proceedings to date should therefore await the outcome of the determination of those quantum issues.

CONCLUSION AND ORDERS

391 For all of the reasons above, I make the following orders:

(1) Order 5 made on 20 May 2021 is discharged with immediate effect.

(2) Prayers 11 and 12 of the Summons, as amended during the hearing on 29 July 2021, are dismissed.

(3) List the matter for directions in the Commercial List on 20 August 2021 for directions as to the future conduct of the proceedings in relation to the quantum issue the subject of order 1 made on 11 June 2021 and any claim for compensation by the defendant under the plaintiff's undertaking as to damages given on 20 May 2021.

(4) Costs reserved.

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Endnotes

1. Mr Clark's affidavit sworn on 20 May 2021, paragraphs 1-19.
2. Mr Bowen's affidavit sworn on 19 May 2021, paragraph 42.
3. Mr Bowen's affidavit sworn on 16 July 2021, paragraph 7.
4. Ms Waterfall's affidavit affirmed on 18 May 2021, paragraph 26.
5. Erroneous subparagraph numbering in original.
6. Ms Waterfall's affidavit affirmed on 18 May 2021, paragraphs 30-34; Mr Bowen's affidavit affirmed on 19 May 2021, paragraph 56.

7. Ms Waterfall's affidavit affirmed on 18 May 2021, paragraphs 37-40; Mr Bowen's affidavit sworn 19 May 2021, paragraph 56.
8. Ms Waterfall's affidavit affirmed on 18 May 2021, paragraphs 25, 44(a) and 87(d).
9. T43.41-44.50.
10. MFI2.
11. T78.19-78.25.
12. See [165]-[169] above.
13. See [16]-[17] above.
14. Exhibit 1, p 5094; Mr McLeod's evidence at T104.21-104.27.
15. Exhibit 1, p 5094.
16. Exhibit 1, p 5097, 5100.
17. Exhibit 5.
18. Exhibit 1, pp 5110-5240.
19. T120.44-120.47.
20. T82.16-82.25.
21. T112.40-112.48, 147.50-148.1.
22. T82.15-82.38.
23. T105.22-105.32.
24. See [170]-[171] above.
25. Mr Adams at T113.36-114.11, 120.25-122.1.
26. Mr McLeod at T112.23-113.20.
27. Mr McLeod at T110.24-110.28.
28. Joint Report, answer to Q40 (Exhibit 4).
29. Mr McLeod at T81.7-81.46.
30. Mr Adams at T83.5-85.40.
31. Mr Adams at T85.38-85.43.
32. Mr McLeod at T81.50-83.4, 85.44-85.47.
33. Joint report, answer to Q40 (Exhibit 4).
34. Mr McLeod at T105.23-106.29; Mr Adams at T115.40-118.44.
35. Mr McLeod at T111.40-112.26; Mr Adams at T113.24-113.35.
36. Exhibit 2, paragraphs 15.8 and 28.13, T95.5-95.20.
37. Mr McLeod at T93.46-94, 114.13-114.41.
38. T93.45-94.6.
39. T115.6-115.20.
40. Mr Adams at T93.41-93.45, 95.39-95.44, 96.25-96.30.
41. Joint report, answer to Q28 (Exhibit 4); see also Mr Adams at T95.39-95.44.
42. Mr Adams at T96.3-97.2.
43. Mr Adams at T96.18-96.24.
44. Mr Adams at T93.41-93.45, 95.39-95.44.
45. Veolia's closing submissions, paragraph 43.
46. Veolia's written closing submissions, paragraph 43; see [321] above.
47. Mr Adams at T96.30-97.2.
48. T145.30-145.50.
49. Attached to Mr Adams' report (Exhibit 3), at page 420 of the Court Book.
50. Joint Report answers to Q29 and Q30 (Exhibit 4).

51. T140.38-142.9.

52. T142.10-142.22.

53. Mr Adams and Mr McLeod at T83.5-85.47.

54. Veolia's closing submissions, paragraph 44.

55. Veolia's closing submissions, paragraph 45.

56. Joint report, answer to Q33 (Exhibit 4).

57. Joint report, answer to Q34 (Exhibit 4).

58. Joint expert report, answers to Q29 and Q30 (Exhibit 4).

59. See [332] above.

60. See [319(2)]-[319(4)] above.

61. See [333] above.

62. See [298] and 319(2)]-[319(4)] above.

63. Paragraphs 22 and 23 of Veolia's closing submissions refer to clause 2(c)(5), but the submissions specific to this alleged breach in paragraph 45 and at T166.6-166.50 rely only on clause 6 of Schedule 20 to the D&C Contract.

64. See [293] above.

65. Exhibit 5, section 3.01.

66. Mr Adams at T116.31-118.44.

67. Mr McLeod at T105.23-106.29.

68. Mr Adams' report at paragraph 37 (Exhibit 3).

69. Mr McLeod's report at paragraphs 8.2 and 8.3 and the paragraphs referred to therein.

70. T87.40-88.44.

71. See, in particular, [237]-[243] above.

Amendments

13 August 2021 - Amended formatting of coversheet

16 August 2021 - Error at 383

Decision last updated: 16 August 2021