

**REASONS FOR THE DECISION OF THE TRIBUNAL : MR C RAYMOND**, SENIOR MEMBER. State Administrative Tribunal, Western Australia. Commercial & Civil Stream. 30<sup>th</sup> November 2006

**Summary of Tribunal's decision**

- 1 The applicant sought to review a decision of an adjudicator made under the *Construction Contracts Act 2004* (WA), in which the adjudicator had held that the application had been prepared and served in accordance with s 26 of the *Construction Contracts Act 2004*.
- 2 The Tribunal held that the effect of s 46(1) and s 46(3) read with s 31(2) of the *Construction Contracts Act 2004* was to limit the right of appeal or review to a decision by an adjudicator to dismiss an application for adjudication on one of the grounds stated in s 31(2)(a). Further that if the adjudicator determined that the application did not fall to be dismissed on those grounds and proceeded to determine the merits of the adjudication, that determination was not reviewable by the Tribunal.
- 3 The application was accordingly dismissed.
- 4 The Tribunal's reasons, taken from the transcript and edited in minor respects to aid clarity, were as follows.

**Introduction**

- 5 In this matter the applicant applies for a review of an adjudication decision. An order is sought that the decision by the adjudicator of 22 May 2006 that the written application by Esslemont Nominees Pty Ltd was made within the time prescribed by s 26(1) of the *Construction Contracts Act 2004* (WA) be set aside and the application by Esslemont Nominees Pty Ltd to have a payment dispute adjudicated be dismissed. The adjudication itself is dated 12 June 2006. It refers in the body of the adjudication to an argument put forward by the applicant that the payment claim was out of time according to the *Construction Contracts Act 2004*, and, "This issue was dealt with in my letters dated 19 May and 22 May 2006 which form part of this adjudication".
- 6 There is a limited right of review of the decision of an adjudicator set out in s 46 of the *Construction Contracts Act 2004*. Section 46(1) provides that: "A person who is aggrieved by a decision made under section 31(2)(a) may apply to the State Administrative Tribunal for a review of the decision."
- 7 Section 46(3) says that: "Except as provided by subsection (1), a decision or determination of an adjudicator on an adjudication cannot be appealed or reviewed."
- 8 The whole principle on which adjudication is based, as evident from the second reading speech in the legislative assembly dated 3 March 2004, is that adjudication is meant to be a rapid process, and I quote from that speech:  
*"The rapid adjudication process allows an experienced and independent adjudicator to review the claim and, when satisfied that some payment is due, make a binding determination for money to be paid. The rapid adjudication process is a trade-off between speed and efficiency on the one hand and contractual and legal precision on the other. Its primary aim is to keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted or complex disputes. The process is kept simple and therefore cheap and accessible, even for small claims. In most cases the parties will be satisfied by an independent determination and will get on with the job. If a party is not satisfied it retains its full right to go to court or use any other dispute resolution mechanism available under the contract. In the meantime the determination stands, and any payments ordered must be made on account pending an award under the more formal and precise process."*
- 9 Thus once a determination is made it is intended, as evidenced by s 46(3), that it should not be subject to appeal or review. In this case an adjudication has been made, but the applicant seeks to go behind it to a decision made on 22 May 2006, in terms of which the adjudicator obviously satisfied himself on particular jurisdictional facts and determined that he should proceed with the adjudication. I acknowledge of course that that decision has been incorporated in, and forms part of, the final adjudication.
- 10 Section 46(1) as I have indicated says that a person who is aggrieved by a decision made under s 31(2)(a) may apply for a review. It is necessary therefore to determine what is meant by a reference to a decision under s 31(2)(a). Section 31(2) says:  
*"An appointed adjudicator must, within the prescribed time or any extension of it made under section 32(3)(a) –*  
*(a) dismiss the application without making a determination of its merits ...*  
*... (b) otherwise, determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment, or to return any security and, if so determine –*  
*(i) the amount to be paid or returned and any interest payable..."*
- 11 In making a decision under s 31(2)(a), the direction is that the adjudicator must dismiss the application if:  
*(1) the contract concerned is not a construction contract;*  
*(2) the application has not been prepared and served in accordance with s 26.*
- 12 It is not necessary for me to refer to s 31(3) and s 31(4), but the manner in which s 31(2)(a) is framed, in my view, shows that the decision which is reviewable is the decision to dismiss because the contract is either not a construction contract or, in this case, the application has not been prepared and served in accordance with s 26. If that is the decision, then it is reviewable.

- 13 In this case the adjudicator decided quite the opposite. He decided that, notwithstanding what had been put before him, in effect that the application had been prepared and served in accordance with s 26 and then proceeded to determine the application under s 31(2)(b). For those reasons I conclude that it is sufficiently clear that only a decision in terms of which an adjudicator determines that he does not have jurisdiction by reason of a negative finding in relation to each of the jurisdictional facts which must be found under s 31(2)(a)(i) – s 31(2)(a)(iv) gives rise to a reviewable decision. I conclude that the application must fail and I will make an order dismissing it.

I certify that this and the preceding [13] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

*For the Applicant : Bowen Buchbinder Vilensky represented by : Mr L. Buchbinder  
For the Respondent : No appearance represented by No appearance*