Marine & Civil Bauer Joint Venture v Leighton Kumagai Joint Venture [2005] Adj.L.R. 10/04

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REASONS FOR DECISION OF THE TRIBUNAL: MR C RAYMOND (Senior Member) State Administrative Tribunal, Western Australia. 4th October 2005.

Summary of the Tribunal's decision

1 The applicant applied for a review of an adjudicator's decision made under the *Construction Contracts Act 2004* (WA) (CC Act), in terms of which the adjudicator found that the contract between the parties did not fall within the scope of construction contracts to which the CC Act applied.

2 The Tribunal found that the adjudicator had erred in the manner in which he had construed the effect of a letter of intent entered into prior to, and a Works Contract entered into subsequent to, the coming into operation of the CC Act on 1 January 2005. Further, that the respondent's contention that no payment claim had arisen under the contract was a matter for determination by the adjudicator, and that there was no right to review this issue. The right of review applied only to a decision made under s 31(2)(a) of the CC Act in relation to a decision to dismiss the application without making a determination of its merits, and the only basis on which the adjudicator had dismissed the application, was on the above basis.

3 In accordance with s 46(2) of the CC Act, the Tribunal reversed the adjudicator's decision and the matter will have to be referred back to the adjudicator to make a determination under s 31(2)(b) of the CC Act within 14 days of the date of the decision, or any extension of that time consented to by the parties.

4 An application for the hearing to be conducted in private and for a restriction on publication was refused, having regard to the fundamental principle of, and public interest in, the open administration of justice.

The application and issues for determination

5 This is an application for the review of a decision of an adjudicator made pursuant to s 46(1) of the CC Act.

6 The issues raised by the application are as follows:

1. Whether, as found by the adjudicator the construction contract entered into between the parties was not a construction contract to which the CC Act applied because it was entered into after he coming into operation of the CC Act on 1 January 2005, in consequence of which the adjudicator lacks jurisdiction;

7 Mr Wilenski made the preservation of confidentiality application on behalf of the respondent at the commencement of the hearing. The application was based upon subsections 61(4)(g) and s 62(3) of the SAT Act, whereunder the Tribunal may make orders that a hearing, or any part of it, be held in private and that only specified persons may be present, and that identified confidential information not be published.

8 The Tribunal was handed a copy of a document described as the Final Project Deed between **Leighton Contractors Pty Ltd (Leighton**), one of the members in the respondent joint venture, and the Public Transport Authority for the provision of design, construction and maintenance works for the New MetroRail City Project Contract No 27/03. As appears further below, **Leighton** has subcontracted the works to the respondent joint venture.

9 Clause 21.4 of the Final Project Deed provides that the contractor (**Leighton**) must keep confidential the terms of the Deed and any information relating to the Project including the discussions and negotiations leading to the Deed. Clause 21.4(b) provides that the contractor is not obliged to keep confidential any information, the disclosure of which is required by law, given with the prior consent of the Public Transport Authority, or given to a court in the course of proceedings to which the contract is a party. The basis upon which the confidentiality obligations may have been transferred to the respondent joint venture was not made clear. The Tribunal considers, in any event, that, as **Leighton** is a party to the joint venture and is bound in its own right to the terms of the Project Deed, the respondent has a sufficient interest to make the application.

10 The applicant did not oppose the application.

11 The Tribunal advised that it would reserve for a short period on the application. However, the respondent indicated that the only parties present in the hearing room were known to the respondent. On that basis, and to avoid delay, it was arranged that the hearing would proceed and that Mr Wilenski would renew the application in the event that any other person entered the hearing room. In the result, the argument was concluded without having to consider further the request that the hearing be held in private. Nevertheless, it remains necessary to determine whether the Tribunal should make an order under s 62(3) of the SAT Act that any of the evidence given, or the contents of any documents produced not be published, except as the Tribunal might specify.

12 Section 61(1) provides that, unless another provision of the Act provides otherwise, hearings of the Tribunal are to be held in public. That requirement reflects the longstanding and fundamental principle of, and public interest in, the open administration of justice: see, for example, ***Raybos Australia Pty Ltd v Jones*** (1985) 2 NSWLR 47, per Kirby J; also ***Re Bromfield; ex parte West Australian Newspapers Ltd*** (1991) 6 WAR 153, Malcolm CJ 164 165; ***ADI Ltd and Ors and Equal Opportunity Commission and Ors*** [2005] WASAT 49. Those cases reflect the even more fundamental principle that justice must not only be done, but also be seen to be done. Further, that any statute purporting to impinge on this principle should be narrowly construed, and that the onus on a party seeking public anonymity as a plaintiff or any other limitation on publicity with respect to proceedings must necessarily be heavy.

13 No evidence was produced to justify the need for confidentiality other than the provisions of the Deed to which reference has been made above. The New MetroRail City Project has been under construction for some time. The need for preservation of confidentiality of terms and conditions, particularly rates, might have been more easily justified during the negotiation stage of the project but is not obviously now apparent.

14 In the absence of any compelling evidence, or indeed any evidence other than the Deed itself, to justify the need for confidentiality, the Tribunal declines to make any order to protect the confidentiality of the evidence or documents produced in the proceedings.

Background

15 On 20 April 2004, the respondent issued the applicant with a letter of intent of that date. The terms were accepted by the applicant commencing work and it was later signed by the parties.

16 The express purpose of the letter was to notify the applicant of the respondent's intention to award a contract to the applicant for the installation of bored piling in accordance with the Scope of Works detailed in annexure K of attachment 1 thereto (Works), those Works forming part of the Project Works being the provision of design, construction and maintenance works under a contract (the Project Deed) entered into between **Leighton** Contractors Pty Ltd (as observed above, one of the members of the respondent joint venture) with the Public Transport Authority for the New MetroRail City Contract (project). It was recorded that **Leighton** Contractors had entered a subcontract to carry out the project works under the Project Deed with the respondent joint venture.

17 In order for the respondent to fulfil its obligations under the Project Deed, the respondent requested that the applicant commence and implement all necessary actions, before the issue of the formal executed Works Contract by the respondent.

18 The letter of intent was expressed to be subject to a number of conditions, and reference is made to those which are relevant below.

19 It was expressly provided that no acceptance of any tender or proposal issued or given by the respondent was given by providing the letter of intent, and that the legal relationship between the parties was governed solely by the terms of the letter until it was superseded by a signed formal Works Contract.

20 The applicant was to initiate necessary actions as directed by the respondent to enable the timely and expeditious progression of the Project Works before the issue of the formal executed Works Contract which was expected to be within two weeks of the date of the letter of intent.

21 The applicant was to carry out any work directed by the respondent and was to comply with any reasonable program, milestone dates or other timing required by the respondent and detailed in annexure O of the draft Works Contract included as attachment 1, was to carry out the work in accordance with all technical requirements and documentation requirements made known to it by the respondent, and was to comply with the technical and documentation requirements of the Public Transport Authority.

22 Importantly, the applicant would only be entitled to claim payment for Works completed at the direction of the respondent and performed in accordance with the terms of the letter. The applicable rates and prices for payment were detailed in annexure M of the draft Works Contract included as attachment 1. Payment would be made by the respondent once the formal Works Contract had been signed, at the time of payment of the first progress claim made under that contract. Alternatively, if the formal Work Contract was not signed, payment would be made when the respondent notified the applicant that it would not be signed and that the applicant was to cease execution of the work, or at the time when the respondent gave notice that it no longer required the applicant to carry out the work. By condition 7, it was again stated that the letter of intent would be superseded by the formal executed Works Contract. Where any inconsistency arose between the signed formal Works Contract and the letter of intent, the formal Works Contract would take precedence.

23 It was stated that the type of contract agreement which the respondent would use when formalising the contract with the applicant would be based on the respondent's Works Contract, a copy of which was supplied with the letter as attachment 1.

24 It is common cause that the Works Contract was not executed until 16 February 2005. There was some limited negotiation over some provisions of the final Works Contract.

25 On or about 7 September 2005, the applicant commenced an adjudication application against the respondent pursuant to the CC Act.

26 The adjudication application was based on the Works Contract dated 16 February 2005. It alleged that a payment dispute arose on 13 July 2005, consequent upon the respondent's part-payment of a progress claim made on 25 June 2005. The progress claim, being progress claim No 11, consisting of part 11A and part 11B, was for an amount of $1 191 971 (excluding GST). The respondent paid an amount of $433 473 (excluding GST) so that the alleged payment dispute was for an amount of $758 498.

27 The payment dispute related to delay/disruption costs, industrial action costs, preliminaries and variation costs.

28 The respondent opposed the application. In doing so, it described itself as being the principal under a letter of award dated 20 April 2004 (being the letter of intent, as apparent from the copy attached) and under a subsequent Works Contract executed on 16 February 2005.

29 The first defence advanced raised an entitlement to a back charge of approximately $41 000 due to errors in measurements. The second defence raised that approximately some $16 500 had already been dealt with in a previous progress claim and, as more than 28 days had elapsed since those progress claims, could no longer be advanced.

30 Further, it was stated that the applicant had no entitlement to make the progress claim, as certain conditions precedent for the making of the claim had not been met.

31 It was stated that, to the extent that the respondent had, in fact, certified monies, that merely constituted particular instances of waiver under cl 44.4 (of the Works Contract) and did not detract from the respondent's general contractual rights to rely on the condition precedent, and further, none of the rejected claims were waived. Thereafter, the respondent addressed the detail of the particular claims made.

32 On 15 August 2005, the adjudicator addressed a series of questions to both parties concerning the letter of intent and some other matters. Both parties provided further information in relation to the letter of intent, with the respondent requiring confirmation that the adjudicator sought the information because he was of the view that it was not possible to make a determination on the basis of the application and the attachments, and the response and its attachments as required by s 32(1) of the CC Act. That confirmation was given and the information was provided by the respondent.

33 Both parties confirmed that work had commenced under the letter of intent in July 2004. The respondent further stated as follows: *"LKJV's [the respondent's] position is that the signed formal Contract superseded the Letter of Intent, in accordance with clause 7 of the Letter of Intent. Until the time when the formal Contract was signed (which occurred after the date of commencement of the Construction Contracts Act), the Letter of Intent solely governed the contractual relationship between* ***Marine*** *and LKJV. Once the formal Contract was signed the Letter of Intent ceased to govern the works and in the event that issues arose*

(for instance, because work was carried out under the Letter of Intent but claimed for payment after the formal Contract was signed), the order of precedence requirement of clause 7 of the Letter of Intent would apply.

As regards the operation of section 7 of the Act, the contract between ***Marine*** *and LKJV, which governed the performance of the works, was established under the signed Letter of Intent ie before the date of commencement of the Act. The formal Contract, which superseded the Letter of Intent and is now the sole contract governing the works was, however, entered into after the commencement of the Act."*

34 On 20 August 2005, the adjudicator handed down his adjudication, dismissing the application, on the grounds that the construction contract, the subject of the payment dispute, was entered into before the CC Act came into operation, on 1 January 2005.

35 The essence of the adjudicator's reasoning was that, although the Works Contract superseded the Letter of Intent, there did not appear to be an end to the contract formed by the Letter of Intent, and the commencement of a new contract upon the signing of the Works Contract. The adjudicator stated that it was apparent to him that the parties entered into a construction contract, for which, the scope of works, the scheduled rates and works items, conduct of the parties and the site of the works had not changed to any material degree from the time that the work started on site in July 2004, until the time of the current payment dispute, and concluded that, on this basis, "the merits of the applicant's claim and respondent's response have not been considered further."

The statutory regime

The CC Act

36 The CC Act was assented to on 8 July 2004, and came into effect by proclamation in the *Government Gazette* of 14 December 2004 P5999, on 1 January 2005. It was introduced to provide security of payment legislation for the building and construction industry. It applies to contracts for the carrying out of construction work and related services. It provides a rapid adjudication process, having as its primary aim to keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted or complex disputes while retaining the parties' full rights, if not satisfied, to go to court or use any other dispute resolution mechanism available under the contract: see Hansard, second reading speech, Legislative Assembly, 3 March 2004.

37 The payment claim is defined to mean a claim under a construction contract by either a contractor against principal or *vice versa* relating to performance or non-performance by the contractor of its obligations, as the case might be.

38 Section 6 then provides that a payment dispute arises if, relevantly, by the time when the amount claimed in a payment claim is due to be paid under the contract, the amount has not been paid in full, or the claim has been rejected or wholly or partly disputed. By s 7, the CC Act applies to construction contracts entered into after the Act comes into operation.

39 If a payment dispute arises under construction contract, any party to the contract may apply to have the dispute adjudicated, subject to certain exceptions not relevant in this matter (s 25).

40 To apply to have a dispute adjudicated, the application must be made within 28 days, relevantly, in this case, after the dispute arises (s 26).

41 The same section prescribes the method by which application is to be made.

42 The time within which the adjudication process must be completed is extremely limited. The respondent has 14 days after the date on which the application is served to prepare and serve a written response (s 27). Section 31 provides that the adjudicator must, within 14 days after service of the response, either:

(a) dismiss the application without making a determination of its merits if, relevantly, the contract concerned is not a construction contract;

(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, to determine the amount to be paid or returned.

43 Section 32 requires that, for the purpose of making a determination, an appointed adjudicator must act informally and, if possible, make the determination on the basis of the application and its attachments, and, if the response had been prepared and served in accordance with s 27, the response and its attachments, and, is not bound by the rules of evidence and may inform himself or herself in any way he or she thinks fit. By subsection (2), in order to obtain sufficient information to make a determination, the adjudicator may request a party to make a further written submission or to provide information or documentation, may request the parties to attend a conference. There is also a right to inspect, arrange for testing of a thing and to engage an expert to investigate and report.

44 The CC Act does not prevent a party to a construction contract from instituting proceedings before an arbitrator or other person or court or other body in relation to a dispute or other matter arising under the contract. Doing so does not prevent the adjudication from proceeding, and evidence of anything said or done in the adjudication is not admissible in such proceedings under s 45.

45 There is only a limited right of review under s 46. The person who is aggrieved by a decision may, under s 31(2)(a), that is, a decision to dismiss without making a determination of the merits may apply to the State Administrative Tribunal for review of the decision (subsection 1).

46 If, on a review, a decision made under s 31(2)(a) is set aside and, under the SAT Act s 29(3)(c)(i) or s 29(3)(c)(ii), is reversed, the adjudicator is to make a determination under s 31(2)(b) within 14 days of the date on which the decision under s 31(2)(a) was reversed or any extension of that time consented to by the parties (subsection (2)).

47 xcept as provided by subsection (1), a decision or determination of an adjudicator on adjudication cannot be appealed or reviewed (subsection (3)).

The SAT Act

48 Section 5 provides that, if there is any inconsistency between the SAT Act and the enabling Act, the enabling Act prevails.

49 The review of the reviewable decision is by way of a hearing *de novo*, and is not confined to matters that were before the decision-maker, but may involve the consideration of new material, whether or not it existed at the time the decision was

made. The purpose of the review is to produce the correct and preferable decision at the time of the decision upon review (s 27).

50 Under s 29(3), the Tribunal may:

(a) affirm the decision that is being reviewed;

(b) vary the decision that is being reviewed; or

(c) set aside the decision that is being reviewed and

(i) substitute its own decision; or

(ii) send the matter back to the decision-maker for reconsideration in accordance with any direction or recommendation that the Tribunal considers appropriate,

and, in any case, may make any order the Tribunal considers appropriate.

The parties' submissions

51 The applicant's case was simply the Works Contract, as a construction contract, was entered into after the CC Act came into operation, and that a payment dispute arose when the amount claimed in progress payment claim no 11 was not paid in full on 6 July 2005 and the application for adjudication was made within 28 days thereafter, having been made on 28 July 2005.

52 The respondent raised two main issues. Firstly, it was submitted that cl 35 governing progress claims and payments made it a condition precedent to a claim being made that evidence be provided of a number of stipulated matters, including the GST exclusive value of work completed, the amount of GST relevant to the value of taxable supplies assessed, the value of matters valued which are not taxable supplies, retention monies and the amount included in the previous progress payments. Reference was made to subclause 35.3 which provides that, unless a progress claim was submitted on or before the due date for submission comprising the above information, the contractor acknowledged and agreed that it shall be deemed to have elected not to submit a progress claim. It was a further requirement that the progress claim should include the information required by cl 35.5 as a condition precedent to making each progress claim. Clause 35.5 referred to a statutory declaration and/or evidence to satisfy the respondent in relation to a range of matters, including that all secondary subcontractors had been paid all monies due and payable to them.

53 In a careful and well constructed argument, Mr Wilenski drew the Tribunal's attention to the decision of ***Beckhaus Civil Pty Ltd v Council of the Shire of Brewarrina*** unreported SCNSW 18 October 2002, BC 2002 06167 to support his submission that, if supporting documentation to a progress claim was required as a condition precedent, there was effectively no claim.

54 Consequently, it was submitted that, under s 6 of the CC Act, the time had not arrived when the amount claimed in a payment claim could be said to be due. Further, to the extent that a claim was made, it could not be said to fall within the definition of a payment claim because it was not a claim made under (my emphasis) a construction contract.

55 Further, there was no evidence from the applicant which would support any waiver of the above contractual requirements or an estoppel, preventing the respondent from relying on the strict terms of the contract. Reference was made to cl 44.4 of the Works Contract, which provided that none of the terms of the Works Contract shall be waived, discharged or released at law or in equity except with the prior written consent of the respondent in each instance. It was submitted that an estoppel could not be found because no representation or detriment could be identified on the documentation before the adjudicator. It was pointed out that there was no evidence of any prior handling of the progress claim.

56 The second ground of the respondent's opposition was based on the construction of the letter of intent and the Works Contract. It was submitted that there was a single contract which came into existence on 20 April 2004. Reference was made to the principles discussed in ***Masters v Cameron*** (1954) 91 CLR 353; ***GR Securities Pty Ltd v Baulkham Hills Private Hospital Pty Ltd*** (1986) 40 NSWLR 631 at 634.

57 The applicant submitted, by way of reply, that in dealing with the progress claim, without raising any difficulty, the respondent had waived compliance. Further, that by doing so, the respondent had represented that there was no need to comply with the relevant contract terms and should be estopped from asserting the contrary.

58 I have taken into account all of the above submissions, including additional written and oral submissions made during the hearing. In my view, it is a consideration of the above submissions, which are determinative of the application.

Considerations

The decision under review

59 Under s 31(2)(a) of the CC Act, the adjudicator may dismiss the application without making a determination of its merits if the contract concerned is not a construction contract, and on other specified grounds which are not relevant.

60 Otherwise, by subsection 31(2)(b), the adjudicator must determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment, or to return any security.

61 The manner in which the determination has been expressed does not make it clear that the adjudicator dismissed the application on any of the above grounds. This was not addressed by either of the parties, and the right to review the decision was not challenged. The right of review exists only in the event that the application is dismissed on one of the above grounds.

62 In my view, the dismissal can be characterised as having been made on the basis that the contract concerned is not a construction contract within the meaning of the CC Act. The term "construction contract" is given an extended meaning by the definition under the CC Act, which, in turn, is cut back by the exclusion of various categories of work from what would otherwise be construction work carried out under a construction contract. Thus, in my view, the legislature intends that an application may be dismissed because a contract is not a construction contract as defined. If the definition was not operable, it could not be said that contract was a construction contract in that sense, and therefore, by finding that the contract had been entered into prior to the CC Act coming into operation, I consider that the adjudicator has dismissed the adjudication application on the basis that the contract is not a construction contract, and that decision is reviewable by virtue of s 46(1) of the CC Act.

The nature of the review

63 The SAT Act provides that the review of a reviewable decision is to be by way of a hearing *de novo*, and is not confined to matters that were before the decisionmaker but may involve the consideration of new material, whether or not it existed at the

time the decision was made. By s 5 of the SAT Act, in the event of inconsistency with the enabling Act, the enabling Act prevails.

64 Section 18 of the *Interpretation Act 1984* (WA) provides that, in the interpretation of a provision of a written law, a construction that would promote the purpose or object underlying the written law shall be preferred to a construction that would not promote that purpose or object.

65 The CC Act, in addition to the provisions to which reference has been made above, prescribes that certain provisions in a construction contract are prohibited and other provisions are to be implied when not expressed in the construction contract. In general, the effect of these provisions is to ensure that a construction contract provides for regular progress payments based on either an agreed means of determining the amount for the obligations performed by the contractor, or otherwise, based on the value of that work. Reference has been made above to the scheme of the provisions relating to the determination by way of adjudication of disputed payment claims.

66 The adjudication process is clearly designed to be a rapid process which determines, if necessary, on an interim basis, whether the contractor is entitled to a disputed payment. As stated in the second reading speech, to which recourse may be had pursuant to s 19 of the *Interpretation Act 1984* (WA), its primary aim is to keep the money flowing in the contracting chain by enforcing timely payment and sidelining protracted or complex disputes. The object of the adjudication process is expressly stated in s 30 of the CC Act, that is, to determine the dispute fairly and as quickly, informally and inexpensively as possible.

67 For the purposes of making a determination, an adjudicator must act informally and, if possible, make the determination on the basis of the application and its attachments, and, if a response has been prepared and served, the response and its attachments. Only if it is not possible to make a determination on those documents may the adjudicator require further information (s 32).

68 By s 46 of the CC Act, if on review, a decision by the adjudicator dismissing for want of jurisdiction "is set aside and, under the State Administrative Tribunal Act 2004 section 29(3)(c)(i) or (ii), is reversed the adjudicator is to make a determination under section 31(2)(b) within 14 days after the date on which the decision was reversed or any extension of that time consented to by the parties". The reference to s 31(2)(b) is to the requirement to determine, on the balance of probabilities, whether any party to the payment dispute is liable to make payment.

69 In my view, the whole scheme of the CC Act, and the particular provisions to which reference has been made above, is inconsistent with the concept of a hearing *de novo* within the ordinary meaning of s 27(1) of the SAT Act. It is necessary to read s 27(1) down to the extent necessary to remove that inconsistency.

70 Section 27 provides that the hearing may involve the consideration of new material, whether or not it existed at the time the decision was made. In my view, no new material should be permitted because, if the decision under review is reversed, and the matter referred back to the adjudicator, I consider that the adjudicator must remain bound to decide the matter on the material which was originally before the adjudicator in accordance with s 32 of the CC Act.

71 Accordingly, to the extent that any of the material provided to me was not before the adjudicator, I have had no regard to it. Of course, that does not include submissions on the law based on the material which was before the adjudicator.

The condition precedent argument

72 Clause 35 of the Works Contract clearly establishes that the information to be covered by a statutory declaration, and what I might refer to as the GST information, must be supplied with the claim for payment as a condition precedent to the making of the progress claim. This is not disputed by the applicant.

73 The applicant endeavours to meet this point by contending that a waiver or estoppel operates. The respondent says that there is no evidence before the adjudicator which would support an estoppel, and that cl 44 bars the waiver argument, there being no prior written consent of the respondent to each instance of waiver.

74 It was within the adjudicator's discretion under s 32 of the CC Act to request further information, if considered that it was not possible to make the adjudication without that further information. As it transpired, the adjudicator did request further information, but it did not go to this issue. The question that arises is, therefore, whether, on the information before the adjudicator, it is open to find in favour of the applicant on those issues.

75 While cl 44.4 does appear to be an answer to the waiver issue, I have some doubt as to the correctness of the respondent's position in relation to estoppel.

76 It may be considered that the Works Contract is silent as to the method of responding to the claim, and that, accordingly, the provisions in Sch 1 Div 5 to the CC Act apply. Section 7 to Sch 1 requires that a party who receives a payment claim who believes it should be rejected because the claim has not been made in accordance with the contract must, within 14 days after receiving the claim, give the claimant notice of dispute. There is no evidence that occurred.

77 Annexure 3 to the adjudication application is the respondent's response to the claim submitted. It shows that a payment of $433 473 was approved on 6 July 2005, and the document was forwarded and received by the applicant on 13 July 2005. Arguably, that could be considered a representation that the claim had been dealt with on its merits, and that reliance was not being placed on strict compliance with the requirements of cl 35. The detriment necessary to support an estoppel might be considered the delay resulting in pursuing the adjudication rather than including the claim in a properly supported progress claim.

78 In my view, it is not necessary for the Tribunal to decide this question. I consider that is a matter for the adjudicator to determine, upon the matter being referred back to him. The adjudicator will need to decide whether, on the face of the evidence of payment of the part claim, a waiver or estoppel applies. He may consider it necessary to request further information from the parties, but that is a matter entirely for him. I come to this conclusion for the following reasons.

79 The respondent submits that the definition of "payment claim" means that the claim must be made under a construction contract. That while a claim has been made, because it does not comply with the contract and the contractor is deemed, by cl 35.3, to have elected not to submit a progress claim if the conditions precedent are not met, no claim has been made under the construction contract.

80 In my view, the reference to a claim being made under a construction contact is intended to be descriptive only. The object of the adjudication is to determine whether the rejection of a payment claim, in whole or in part, is justified. The interpretation contended for leads to a circuitous inquiry. I consider that all that the legislature intended was to convey that the claim must be one which arises under a construction contract. It is a means to confine adjudication to construction contract claims. Indirectly related claims, which might arise under statute or, for instance, under a quantum merit, would not be included. If the elements of this claim are analysed, the claim is made under cl 35 of the Works Contract. When it is said that as the claim is unsupported in the manner required, so that, in effect, no claim has been made, the waiver/estoppel issue arises.

81 As a matter of ordinary language, I consider the claim, which may ultimately not be established when its merits are determined, is a claim made under a construction contract.

82 This view of the definition of payment claim is also consistent with the interpretation given to the same words in Div 5 of Sch 1, where "payment claim" is defined to mean a claim by the contractor to the principal for payment of an amount in relation to the performance by the contractor of its obligations under "this" contract. Here the emphasis is on payment claimed for performance of the obligations under the contract rather than the claim itself.

83 In addition, I have come to this conclusion, because the Tribunal's right of review relates only to a decision under s 31(2)(a) of the CC Act to dismiss the application without making a determination of the merits. The adjudicator dismissed the adjudication application for want of jurisdiction, solely on the ground that he considered that the construction contract had been entered into prior to 1 January 2005. The Adjudicator concluded the determination by stating that, on the basis of the above conclusion, the merits of the claim and response had not been considered further. In effect, therefore, the adjudicator has determined that he would have continued with and determined the merits of the dispute, including the condition precedent argument, but for the finding of lack of jurisdiction on the above basis.

84 Consequently, the way in which the respondent has raised this argument before the Tribunal is tantamount to an attempt to review a decision to proceed with the adjudication in relation to the merits, including this issue. That, in my view, is not a reviewable decision.

Was the contract entered into before 1 January 2005?

85 I accept that the letter of intent falls within the socalled fourth ***Masters v Cameron*** (*supra*) category, identified in ***GR Securities v Baulkham Hills Private Hospital*** (*supra*). It is clear that the letter of intent was intended to create a contractual relationship which would be immediately binding. But it is just as clear that the intention was that, subject to one qualification, the letter of intent would cease to have any future operation and that the Works Contract would govern the relationship between the parties once it was entered into.

86 The one qualification is that cl 5 of the letter of intent expressly provided that payment would be made once the formal Works Contract had been signed, at the time of payment of the first progress claim made under that contract.

87 The rights and obligations of the parties under the letter of intent were different in one significant respect. Under the letter of intent, the respondent had the right to decide that it no longer required the applicant to carry out the works or to give notice that the Works Contract would not be signed. In that respect, once the Works Contract had been entered into, the applicant's position was very different, because that created a right, subject to the terms of the Works Contract, to complete the works. Prior to that, the applicant had a right only to payment for such works as the respondent directed it to carry out under the letter of intent.

88 It is in my view plain, that once the Works Contract was entered into subject to the qualification expressed above, the letter of intent had no application. As pointed out in the respondent's letter of 17 August 2005 to the adjudicator, if a dispute arose about work for which payment was claimed under the letter of intent, the order of precedence provision set out in cl 17 of that letter would cause the Works Contract terms to apply.

89 Importantly, there is no suggestion that the works for which payment is claimed were carried out under the letter of intent. If that was the case, it could be contended that the payment claim was a claim made under a construction contract, being the letter of intent, for the payment of an amount in relation to the performance by the contractor of its obligations under that contract. In that event, clearly, the contract would not be a construction contract which was entered into prior to 1 January 2005.

90 But, that is not the case. The Works Contract was entered into on 16 February 2005, as appears on the face of the formal Works Contract instrument signed by the parties, and payment is claimed for the performance of obligations under the Works Contract.

91 It is not significant that the progress claim reflected line items for work done earlier and paid for in accordance with the letter of intent. The progress claim had to reflect totals payable for particular items, and the value previously claimed and paid. The current claims for which payment was sought was only in respect of entitlements alleged to have accrued after entry into the Works Contract.

92 With respect to the adjudicator, the conclusion that there does not appear to be an end to the contract formed by the letter of intent and the commencement of a new contract upon the signing of the Works Contract, is contrary to the clear language of both documents. The contractual relationship that existed under the letter of intent fell away and was superseded by a new relationship under the Works Contract.

93 For the above reasons, I conclude that the adjudicator erred in determining that the construction contract, the subject of the payment dispute, was entered into before the CC Act came into operation on 1 January 2005. It is necessary for that decision to be reversed. The matter will, by operation of s 46(2) of the CC Act, have to be referred back to the adjudicator to make a decision under s 31(2)(b) of the CC Act within 14 days of the date of this decision, or any extension of that time consented to by the parties.

94 Neither party raised the question of the costs of the proceedings before the Tribunal. The applicant, who has been the successful party, was not legally represented, and it therefore appears unlikely that there would be any entitlement to costs other than out of pocket expenses. In the circumstances, I will make an order granting liberty

to apply for costs, but the parties should be aware that, pursuant to s 87 of the SAT Act the starting point is that each party should bear its own costs so that the Tribunal will need to be persuaded to make any costs order.

Order

95 It is ordered that:

1. The decision of the adjudicator dated 20 August 2005 that the adjudication application does not comply with s 7 of the *Construction Contracts Act 2004* (WA) in that the construction contract, the subject of the payment dispute, was entered into before the *Construction Contracts Act 2004* (WA) came into operation on 1 January 2005, is set aside;
2. The above decision is reversed, and it is determined that the construction contract, the subject of the payment dispute, was entered into subsequent to the *Construction Contracts Act 2004* (WA) coming into operation on 1 January 2005;
3. The parties have liberty to apply within 14 days in the event that any application is to be made in respect of costs.

I certify that this and the preceding [95] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

Counsel: Applicant : Mr A Riley *Solicitors:* Applicant : As Agent
Counsel: Respondent : Mr R Wilenski of Counsel *Solicitors:* Respondent : Self-represented