

REASONS FOR DECISION OF THE TRIBUNAL: MR C RAYMOND (SENIOR MEMBER) STATE ADMINISTRATIVE TRIBUNAL COMMERCIAL & CIVIL WESTERN AUSTRALIA 21st JULY 2008

Summary of Tribunal's decision

- 1 The applicant applied to the State Administrative Tribunal for the review of the decision of an adjudicator pursuant to s 46(1) of the *Construction Contracts Act 2004* (WA).
- 2 The applicant contended that the adjudicator had wrongly dismissed part of two progress claims by not determining that the superintendent's failure to issue a progress claim certificate within the stipulated time limit resulted in a payment dispute which had arisen within 28 days of the making of the application for adjudication. Further, it was contended that a claim in respect of three variation orders included as part of the payment claims had in any event never been previously submitted and had therefore been made in time.
- 3 The State Administrative Tribunal concluded that the failure to certify a progress claim did not result in the amount of the claim becoming payable, unless the claim had been properly submitted with supporting evidence and such other information as might reasonably be required by the superintendent. It was therefore necessary to consider the particular claims in dispute.
- 4 In relation to a variation order for extra costs associated with the excavation of rock, the State Administrative Tribunal found that the claim had been incorporated in a previous progress claim and had been rejected by the superintendent. As no further evidence or information had been provided when the claim was repeated, no entitlement arose through the payment mechanism provisions of the contract. Although the adjudicator had purported to make the decision to dismiss as part of his consideration of the merits of the claim, after expressly deciding that the application did not fall to be dismissed under s 31(2)(a) of the *Construction Contracts Act 2004*, the State Administrative Tribunal concluded that it had to be properly characterised as a decision to dismiss on that basis. The decision in that respect was therefore a reviewable decision but it was concluded that the adjudicator was correct in arriving at his conclusion that the claim had been made out of time. Accordingly, the application had to be dismissed in respect of that aspect of the matter.
- 5 The State Administrative Tribunal concluded that the other three variations in dispute had not been the subject of a formal claim for a progress payment. However, it was concluded that the adjudicator had not dismissed these claims on that basis. The claims had been dismissed on the basis that there had been a lack of compliance with the requirements of the contract and a lack of any supporting information as would reasonably be required by the superintendent.
- 6 The State Administrative Tribunal concluded that the adjudicator was correct in dismissing the claims on this basis because it was readily apparent from correspondence between the parties that the superintendent rejected the underlying basis of the claims. Accordingly, unless new evidence was provided in support of the claims, it was self-evident that the superintendent would not be able to certify the claims for payment. Accordingly, the failure to certify did not give rise to an entitlement to payment of the amounts claimed. A decision to terminate on that basis was held to constitute a decision made under s 31(2)(b) of the *Construction Contracts Act 2004* which is not a reviewable decision. That aspect of the claim therefore also failed.
- 7 An order was made dismissing the application.

The application

- 8 This is an application for the review of the decision of an adjudicator, made pursuant to s 46(1) of the *Construction Contracts Act 2004* (WA) (CC Act). The dispute relates to Progress Claims 14 and 15 (PC 14 and 15) made under the construction contract entered into between the parties. Two separate applications were made for adjudication and the adjudicator having been appointed in respect of both matters, the parties consented to the adjudications effectively being treated as one.
- 9 In these reasons the applicant will be referred to as the builder and the respondent as the owner. All references to sections of legislation are references to sections of the CC Act, unless the context indicates to the contrary.

The issues raised

- 10 The issues raised by the application are as follows:
 1. Is the effect of cl 42 of the General Conditions of Contract (GC 42) in the standard form AS 2124-1992, which constitutes part of the construction contract, such that:
 - (a) the adjudicator should have regarded the full amounts of PC 14 and PC 15 as being payable because payment certificates were issued late;
 - (b) the adjudicator erred in considering the merits of the payment claims included within PC 14 and 15; and
 - (c) the adjudicator erred in dismissing any claims for which application had been made for adjudication within 28 days of the date of receipt of the progress claims by the superintendent?
 2. Was the adjudicator's decision to dismiss the rock claim VO 005 for \$716,620 a decision made under s 31(2)(a)(ii) of the CC Act which is therefore amenable to review under s 46?
 3. Was the adjudicator's decision to reject the claims for extensions of time (EOT) relating to VOs 84, 85 and 86 a decision made under s 31(2)(a) which is therefore amenable to review under s 46?
- 11 It is to be noted that in both the applicant's application and written submissions reference is made to VOs 84, 85 and 87. The adjudicator's determination refers to VOs 84, 85 and 87 (at [59]) but to VOs 84, 85 and 86 at [61].

The VO's are referred to as claims for extensions of time. The schedule of variations annexed to both PC 14 and 15 reflect that VO 86 is an extension of time claim whereas VO 87 relates to a variation for modification of lighting. That claim was accepted and has never been in dispute. It is therefore evident that the references to VO 87 are in error.

The adjudication

- 12 Section 31(2)(a) provides that an adjudicator must dismiss an application for adjudication, without making a determination of its merits if particular conclusions are reached, one of which, relevant to these proceedings, is that the application has not been prepared and served in accordance with s 26. Section 26 prescribes that an application for adjudication of a payment dispute must be prepared and served within 28 days after the dispute arises.
- 13 The adjudicator, at [28] - [31] of his determination specifically considered each of the circumstances which, if they existed, would require the application to be dismissed under s 31(2)(a) and concluded that the applications did not fall to be dismissed so that he stated, correctly, that he was therefore obliged under s 31(2)(b) to determine on the balance of probabilities whether any party to the payment dispute is liable to make a payment.
- 14 Notwithstanding the above finding, it is apparent that the adjudicator regarded as part of the merits of the dispute, whether some of the payment claims were merely old rejected claims and whether in consequence he had no jurisdiction to deal with those claims. In taking that approach to the matter reliance was placed on the decision *Silent Vector Pty Ltd Trading as Sizer Builders and John Squarcini* [2008] WASAT 39 (*Silent Vector*), in which the Tribunal held that the 28 days for the making of an application for adjudication had expired when repeated claims had been first rejected and therefore the application in respect of the repeated claims was out of time and fell to be dismissed under s 31(2)(a).
- 15 As appears at [49] of the determination, the builder contended that the effect of GC 42 is that the failure of the superintendent to certify a progress claim in time resulted in the full amounts claimed in that progress claim becoming due and payable (referred to as a deemed certification). The builder contended that upon the owner not paying the amount becoming due under the deemed certification, there is a fresh payment dispute. It is common cause that if this argument is accepted the applications for adjudication were made in time.
- 16 GC 42.1 requires the contractor to deliver to the superintendent claims for payment supported by evidence of the amount due to the contractor and such information as the superintendent may reasonably require at the time for payment claims stated in the annexure to the general conditions and upon the issue of a Certificate of Practical Completion and the making of a final payment claim at the expiration of the defects liability period. Claims for payment "shall include the value of work carried out by the Contractor in the performance of the Contract to that time together with all amounts then due to the Contractor arising out of or in connection with the Contract or for any alleged breach thereof".
- 17 The clause further prescribes that the superintendent shall issue to the Principal and to the Contractor a payment certificate within 14 days after the receipt of a claim for payment stating the amount of the payment which, in the opinion of the superintendent is to be made by the Principal to the Contractor or by the Contractor to the Principal. The clause then continues:
"Subject to the provisions of the Contract, within 28 days after receipt by the Superintendent of a claim for payment or within 14 days of issue by the Superintendent of the Superintendent's payment certificate, whichever is the earlier, the Principal shall pay to the Contractor or the Contractor shall pay to the Principal, as the case may be an amount not less than the amount shown in the Certificate as due to the Contractor or to the Principal as the case may be, or if no payment certificate has been issued, the Principal shall pay the amount of the Contractor's claim."
- 18 The history of the claims is set out in the owner's response to the adjudication applications which includes the statutory declaration of Keshor Patel declared on 23 March 2008. Mr Patel describes himself a project manager "at Project Directors Australia Pty Ltd (PDA)". PDA is identified as being the superintendent referred to in the contract. Mr Patel referred specifically to the disputed claims which were dismissed by the adjudicator. The variations referred to by him have the designation VQ rather than VO which is consistent with the designation in the variation schedule. The parties and the adjudicator have used the more common designation for a variation order being VO and the Tribunal has accordingly done likewise.
- 19 The first disputed claim is VO 005R Rock claim - \$716,620. Mr Patel states that the claim was first made by the builder on 2 May 2007 and was rejected by him in a letter dated 3 May 2007. Notwithstanding that rejection in the correspondence the applicant included the claim in PC 6. Mr Patel rejected that particular payment claim and issued a progress certificate reflecting that rejection. The documentation attached to the payment certificate reflects that a nil valuation was attributed to the claim. The correspondence referred to identifies that the superintendent rejected the claim on the basis that rock removal was included in the contract sum.
- 20 The adjudicator, in reliance on the *Silent Vector* decision, held that any part of PC 14 and 15 that were previously rejected more than 28 days before the applications were made must be rejected ([54] of the determination). However, the adjudicator also went on to specifically address the part of the claim relating to a variation claim for rock excavation. The adjudicator held that it was not necessary for him to determine whether the claim lacked merit because the builder accepted the risk of rock, the claim had been rejected previously "and I have determined that the disputes in relation to those items are out of time with respect of section 26" ([55] of the determination). The adjudicator went on to say that if he had not decided that this part of the claim was time

barred he would have "accepted the Superintendent's assessment on this issue under section 35(2)(b). I have insufficient information to freely make any judgment on this aspect of the Superintendent's assessment".

- 21 The adjudicator did not make a determination of the builder's submission that on a proper construction of GC 42 a new payment dispute had arisen. At [57] to [58] of the determination the adjudicator referred to some of the authorities relied on by the builder for its contentions on this question but stated that he felt "*fortunate not to have to express an opinion because the items concerned were resolved by the out of time issue*". It is to be noted that this discussion within the determination appears under a heading "Claim not Properly Made under Clause 21.1 of AS 2124-1992". GC 21.1 relates to the provision of proof that certain policies of insurance were in place. It is clear that the reference to GC 21.1 was in error and must be taken as a reference to GC 42.1.
- 22 Mr Patel also deals in his statutory declaration with VOs 84, 85 and 86. VO 84 is referred to as a rock EOT claim for \$374,710. VO 85 is referred to as a steel EOT claim for \$26,765. VO 86 is referred to as "Geotech" claim for \$149,884. In relation to all of these claims Mr Patel's declaration reflects that they had been rejected in correspondence. There is no suggestion that formal payment claims were incorporated in any progress claim prior to PCs 14 and 15. Indeed, the variation schedule with respect to those PCs reflects that there had been no prior formal rejection of a progress claim.
- 23 In relation to these claims the adjudicator held:
"The EOT CLAIMS in VOs 84, 85 & 87 [sic] are reliant on the underlying variation that was rejected by the Superintendent. These cannot be "fairly determined." ([59] of the determination.)
- 24 Mr Patel further declared in respect of each of these claims that from the time when the claims were first made there was no change in the circumstances of which he was aware which would give rise to any reason why the previously rejected claims should be accepted.
- 25 The adjudicator further stated at [61] of the determination:
"EOT CLAIMS IN VO 84, 85 & 86.
These claims are fundamentally connected to the rejected variation claims. This part of the claim must fail due to lack of compliance with the requirements of the contract and lack of any supporting information as would reasonably be required by the Superintendent."

Issue 1: The effect of GC 42.1

The contractual operation of GC 42.1

- 26 It is common cause that payment certificates were not issued in respect of PCs 14 and 15 within 14 days of receipt by the superintendent of the respective claims. Consequently, the builder submits that the payment dispute arose when the amount claimed in the payment claim was due to be paid under the contract but was not paid in full. The builder submits that payment claims which have been "deemed" due by way of default in certification have comprised variation claims which had been previously submitted and rejected, relying upon: *Daysea Pty Ltd v Watpac Australia Pty Ltd* [2001] QCA 49 (*Daysea*) at [7] - [8], *Devaugh Pty Ltd v Lamac Developments Pty Ltd* [1990] WASC 280 (*Devaugh*) at [63] and *Algons Engineering Pty Ltd v Abi Group* [1997] NSWSC 478 (*Algons*).
- 27 The builder contends that the circumstances are distinguishable from those in the *Silent Vector* decision because in that matter the superintendent rejected the payment claim within the time prescribed in the contract and issued a payment certificate in time so that the default certification issue did not arise.
- 28 The owner submits that default certification can only occur in relation to a progress claim which includes claims for matters that are properly the subject of a claim, relying on *Devaugh* at [134] and further, will not apply, unless a progress claim is supported by evidence of the amount due and such information as the superintendent may reasonably require, relying on *Brewarrina Shire Council v Beckhaus Civil Pty Ltd* (2003) 56 NSWLR 576 (*Brewarrina*), especially at 581, 585 and 586.
- 29 The *Daysea* and *Algons* decisions address the construction of GC 42.1 in relation to the deeming effect of the failure to certify in the context of applications made for summary judgment. They predated and do not address the principles discussed in *Brewarrina*.
- 30 In *Devaugh*, there had been 17 previous PCs, none of which had been certified and therefore the default certification permitted summary judgment to be granted. PC 18 repeated part of PC 17 and previous claims not allowed. It therefore stands as authority that contractually under AS 2124-1992 a repeated claim, previously disallowed becomes due if a progress claim certificate is not issued, however, that must be subject to the principles established in *Brewarrina*.
- 31 In *Brewarrina*, the New South Wales Court of Appeal found that the obligation to pay the amount of the contractor's claim when no payment certificate had been issued is, as expressed by the third paragraph of GC 42.1, "subject to the provisions of the contract". Consequently, the obligation to issue a payment certificate was subject to the condition precedent that the contractor support the claim with evidence of the amount due to it and with such information as the superintendent might reasonably have required. Unless the requisite evidence and information supported the claim, it was held that the superintendent was not obliged to issue a payment certificate in response to it. Consequently, the court ordered that the summary judgment which had been granted for the full amount of the payment claim, due to the superintendent's failure to issue a certificate, be set aside.

- 32 It follows, that to comply with the principles expressed in *Brewarrina* the builder would need to demonstrate that the rejected claims were supported by evidence of the amount due and such information as the superintendent might reasonably require. It is self-evident that if either no additional evidence is provided in respect of claims previously rejected, or no evidence is provided to support any claims included in a progress claim for the first time, that the superintendent has insufficient information on which to certify the claims. In that event the consequences of default certification do not arise.

Interaction between GC 42.1 and the CC Act in default of certification

- 33 In *Silent Vector*, which also dealt with the operation of GC 42.1, the Tribunal stated:

"[48] The only amount which is payable under the contract is the amount certified by the superintendent (or the full amount of the claim if the superintendent fails to issue a certificate). Once an amount less than the claim, but in accordance with any superintendent's certificate has been paid, it [the balance] is no longer payable until otherwise agreed or determined through the cl 47 procedures. It may be that it will ultimately be established that an amount disallowed by the superintendent was in fact due at the time when the progress claim was made. In that sense, it is potentially correct to say that a disputed amount is due, notwithstanding that it was disallowed, however that can only be determined, under the contract, by applying cl 47 [the dispute resolution provision]. We do not consider that under the contract the builder can simply repeat an earlier payment claim and require that the superintendent assess it. Once the earlier claim was disallowed, the contractual right provided is to determine, by applying cl 47, whether the amount was properly due and payable at the time when it was disallowed. There is nothing to suggest that there can be more than one due date for the same claim. It may subsequently be established at arbitration that the payment was due when first claimed.

...

51. ... [U]nder s 6 of the CC Act, 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.
52. When the builder first made any of the earlier claims included in progress claim 32, it did so on the basis that it contended that it had carried out work to that value and was entitled to payment, with that payment becoming due within 14 days of certification by the superintendent, or 28 days of the making of the claim, whichever was the earlier. In each case, the disputed portion of the respective variation claim was rejected when first made. That is when a payment dispute arose. Under s 25, read with s 26, of the CC Act, if a payment dispute arises, a party may apply for adjudication, but the application must be made within 28 days after the dispute arises." (Parentheses added.)
- 34 The statement in [48] above that the Tribunal did not consider that under the contract the builder can simply repeat an earlier payment claim and require that the superintendent assess it is entirely consistent with the *Brewarrina* decision.
- 35 Depending on the circumstances of the case, it may well be that, a claim can be repeated if it is supported with sufficient additional evidence, or information required by the superintendent, as might reasonably permit the superintendent to come to a different conclusion to that previously made to reject the claim. In a sense, such a claim could be described as a "new" claim. The distinction may have significance in assessing the date from which any entitlement to interest might arise. But, in the absence of more evidence or information, as held in *Silent Vector*, the rejected portion of the earlier claim cannot be regarded as due under the contract for the purposes of payment claims under GC 42.1. As recognised in *Silent Vector*, arbitration might subsequently determine that the payment was due when first claimed but there is no entitlement to payment, and payment is therefore not due under the payment mechanism under the contract, other than if successfully pursued through the GC 47 dispute resolution mechanism.
- 36 If a claim can be properly characterised as a "new" claim in this way, it may arguably give rise to a new payment dispute under the CC Act capable of being adjudicated. But the mere repetition of a claim, for the reasons given above, cannot give rise to a new payment dispute amenable to adjudication, whether or not a progress claim certificate was issued.
- 37 It follows that the adjudicator could not have found that the true construction of GC 42.1 obliged him to regard the amounts claimed in PCs 14 and 15 as being due. It was necessary to determine whether, on an application of the principles expressed in *Brewarrina*, the default of certification provision applied. This, the adjudicator failed to do. At [57] and [58] of the determination, the adjudicator referred to *Brewarrina* and the argument that only matters properly the subject of a claim and supported by evidence could result in default certification, and concluded that he was fortunate not to have to express an opinion as the items concerned were resolved "by the out of time issue". In the circumstances, whether the adjudicator's failure to consider the effect of the principles expressed in *Brewarrina* has any consequences, depends on a consideration of the particular disputed claims.

Issue 2: The decision rejecting the rock claim VO 005R and whether that decision is reviewable

- 38 The rock claim was first made in May 2007 and is one of the claims incorporated in PC 6. It was rejected. The claim was repeated in PC 14 and 15. There is no fresh material accompanying, or referred to, in the documentation comprising either PC. Accordingly, on the *Brewarrina* principles, there was no consequence flowing from the superintendent's failure to issue a progress claim certificate in time.

- 39 The adjudicator determined that the application for the adjudication of the rock claim was not made within 28 days as required by s 26 and it was therefore dismissed.
- 40 The adjudicator expressly found that the applications for adjudication did not fall to be dismissed under s 31(2)(a) and that he was therefore required to make a decision on the merits of the dispute ([29] and [32] of the determination). Yet, once entering into a consideration of the merits, the adjudicator found that the rock claim had been previously rejected and that the disputes in relation to those items were out of time under s 26 ([55] of the adjudication). It is clear that the adjudicator regarded the claim as time barred and that but for that finding he would have accepted the superintendent's assessment on this issue ([56] of the adjudication).
- 41 The Tribunal considers that the true characterisation of the adjudicator's decision is therefore that the decision was a decision to dismiss under s 31(2)(a)(ii) of the CC Act. It follows that the decision is reviewable under s 46 of the CC Act. Section 46 permits a review only if a decision to dismiss is made under s 31(2)(a). A decision on the merits of the dispute is not reviewable: see *Diploma Construction Pty Ltd v Esslemont Nominees Pty Ltd* [2006] WASAT 350.
- 42 Although the decision in relation to the rock claim is a reviewable decision, on the above findings, the conclusions of the adjudicator were correct and the application for the adjudication of the payment claim was properly dismissed because the adjudication application was not brought within the required time period.

Issue 3: VOs 84, 85, 86 and whether the decision rejecting the payment claims in respect thereof is reviewable

- 43 These claims were not rejected as having been referred to adjudication outside the prescribed 28 day time limit. The claims to an entitlement to a variation was in each case disputed in correspondence. No formal claims for payment were made by incorporation in a progress claim made under GC 42.1 until PCs 14 and 15 were made.
- 44 However, the prior rejection of the claims through correspondence, and reference to notices of dispute having been issued in the variation schedule attached to PCs 14 and 15, is a clear indication that some additional evidence would be required to justify a positive assessment by the superintendent.
- 45 No additional, or any reference to additional material, was referred to in either PC 14 or 15. Therefore, on an application of the *Brewarrina* principles, the failure to certify in time did not result in the claims becoming due. Indeed before the payment claims could have been assessed, the further evidence required, would have had to disclose that an application for an extension of time had been granted under GC 35.5. Only if an extension of time has been granted under GC 35.5 does a contractor have an entitlement to claim such extra costs as are necessarily incurred by reason of the delay under GC 36. The adjudicator dismissed the claims due to "lack of compliance with the requirements of the contract and lack of any supporting information as would reasonably required by the superintendent" ([61] of the determination). The additional reason given at [59] of the determination that the claims could not be fairly determined must be seen in that context. That can not be read as meaning that the matters could not be fairly determined because of complexity, which is a ground for dismissal under s 31(2)(a).
- 46 The proper characterisation of the decision was a decision to dismiss made under s 31(2)(b). Such a decision is not reviewable and the application on this aspect must also fail.

Order

- 47 For the above reasons, the Tribunal orders that:
1. The application for the review of the adjudication decision dated 15 April 2008 is dismissed.

Applicant : Mr S Taylor instructed by Jackson McDonald
Respondent : Mr R Shaw instructed by Lavan