REASONS FOR DECISION OF THE TRIBUNAL: MR C RAYMOND, State Administrative Tribunal. Commercial & Civil. 22nd February 2008

1 The applicant (the builder) 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 adjudicator had dismissed the application for adjudication on two grounds. Firstly, that it was not possible to fairly make a determination because of the complexity of the matter and, secondly, because the application had not been prepared and served within 28 days of the payment dispute arising. The adjudicator's reasons for decision were extremely brief and did not reveal the intellectual reasoning by which he had arrived at the above conclusion. The State Administrative Tribunal recognised that there was no need for detailed reasons particularly in relation to the determination of an adjudication application because there was no right of appeal. However, in the case of a dismissal without a consideration of the merits of the adjudication application, there is a right of review to the State Administrative Tribunal and reasons for decision must, therefore, be sufficient to enable a party to assess whether or not to apply for a review.

3 The State Administrative Tribunal concluded that on a proper construction of the legislation, the payment dispute arose on each occasion that a progress claim made under the relevant contract was rejected in part. An application in respect of each payment claim could only be made within 28 days of the payment dispute arising. The State Administrative Tribunal concluded that the builder was not entitled to include payment disputes in an application properly brought in respect of a payment dispute which had arisen within the prescribed 28 day period, and that the application in respect of each wrongly included payment dispute must be dismissed. The adjudicator had erred insofar as he had dismissed the entire application on this ground. The State Administrative Tribunal rejected the adjudicator's conclusion that the claim was too complex to be properly determined because the matter in dispute involved not only the quantum of variation claims, but a determination whether or not the contract had been varied. The State Administrative Tribunal considered that there was nothing unusual in a dispute of this nature. Further, once it was apparent that the wrongly included payment disputes need not be considered, it was a relatively simple matter to establish which variation claims had not been dealt with previously. That established that, at best, there was a negligible amount payable to the builder, and the claim was capable of easy determination.

4 The State Administrative Tribunal commented upon the need for adjudicators not to too readily form a view that a matter is too complex to be fairly determined. Further, that adjudication claimants ran a risk of adjudications being dismissed on this basis if applications were not provided a logical summary of claim cross-referenced to the relevant supporting documents.

5 The adjudicator's decision was set aside and reversed by substituting the decision of the State Administrative Tribunal that the application be dismissed only in respect of those payment disputes which arose outside the prescribed 28 day period for the bringing of the application.

The application and issues for determination

6 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).

7 The issues raised by the application are:

1. whether an adjudication application can include money claims previously rejected, with new money claims;
2. whether the application for adjudication could not be fairly determined by reason of complexity.

Background

8 The parties entered into a building contract, in terms of which the applicant (the builder) was contracted to construct a 12 storey apartment building for the respondent at 6 Winfield Avenue, Crawley. The terms of contract included the general conditions of contract in the standard form AS 2124-1992.

9 During the course of carrying out the works, and pursuant to the general conditions of contract, the builder submitted regular progress claims to the appointed superintendent under the contract. The administration of the contract was not conducted in a manner satisfactory to the builder and disputes have arisen concerning variations claimed by the builder. The variation claims were included in progress claims No 24 to No 31, in respect of the value of the alleged variation work carried out to the date of each claim. These claims were made during the period April to August 2007.

10 The format of each progress claim submitted comprised of:

1. A summary of claims, identifying the various cost categories, such as preliminaries, earthworks, painting and glazing;
2. The apportionment of the contract sum to each category;
3. The percentage value of each cost category last claimed;
4. The percentage value now claimed;
5. A column headed "total claim", reflecting the total value of the cost category said to have been completed to the date of claim;
6. A schedule breakdown, showing the amount being claimed in respect of the particular claim, headed "This Claim" under each cost category; and

 Crown Copyright reserved.

7. A variation report.

11 The variation report provided details of each variation claim showing, amongst other things, the amount previously claimed in respect of each variation and the amount of the current claim, under the heading "This Claim" in respect of each variation.

12 The effect of the above system is that although the superintendent may have previously allowed a smaller percentage of the total value applicable to a particular cost category, or variation, than that claimed by the builder, any amount disallowed was automatically reflected in the total claim as reflected in the summary.

13 On 21 August 2007, the builder submitted progress claim No 32 in the same form as described above. Consequently, it incorporated, within the summary of contract and claims to 21 August 2007, amounts previously claimed and disallowed in part. In relation to the variations, the reason for disallowing the claims in part is summarised in the superintendent's response to each progress claim. Those reasons include that some variations are rejected (by which we understand that it is not accepted that there is any valid claim at all), differences in the superintendent's value of the work undertaken to the date of claim and that a claim for an extension of time had not been approved.

14 Consistent with the format of earlier claims, progress claim 32 specifically set out the amount of "This Claim" claimed in respect of each contract cost category item, and in respect of each variation. Further specific reference will be made to the variation report form later in these reasons.

15 The superintendent responded to progress claim 32 and issued a progress claim certificate dated 4 September 2007, for an amount of $85 010.11.

16 On 24 September 2007, the builder signed an application for adjudication pursuant to the CC Act which was served on the adjudicator and on the owner on 25 September 2007. The builder asserts in that application that progress claim 32 was submitted on 23 August 2007 for payment of the sum of $1 967 900.29 plus GST, which "*included amounts still outstanding from previous claim submissions*".

17 On 8 October 2007, the owner filed its response to the application in which it disputed that the builder could legitimately include, within the adjudication, claims that had previously been rejected by the superintendent by the issue of payment certificates No 24 to No 31, inclusive (each of which relates respectively to progress claims No 24 to No 31). In relation to the disputed variations, the owner provided a schedule relating to each variation, reflecting when the variation had been submitted, and where relevant, the date on which it had been rejected. The owner also asserted that the builder had not produced any evidence of compliance with the provisions of cl 40 of the general conditions of contract in that it had not produced any evidence of a direction by the superintendent under cl 40.1 or produced any evidence of compliance on its part of the provisions of cl 40.2, and had not produced any evidence of the value of the disputed variations. The owner sought that the application be dismissed with costs pursuant to s 32(2) of the CC Act.

18 On 11 October 2007, the adjudicator published a written decision dismissing the application for adjudication.

The decision under review

19 The reasons for decision are brief, comprising of five typed pages. The first four pages contain:

- a recital of defined terms;
- a statement that, for the reasons set out, the application is dismissed ordering the builder to pay the costs of the adjudication;
- reference to the process by which the adjudicator was appointed
- a statement that the adjudicator is not aware of any conflict of interest; and
- and a recital of the statutory requirements and basis upon which the contract meets the definition of a construction contract under the CC Act.

20 There is also a recital of the statutory provisions relating to the making of a payment claim and the facts upon which it is concluded that a payment dispute arose on 28 August 2007, with the conclusion that the application was made within 28 days after that date. References were made thereafter to the timeframe within which the application and the response thereto were served.

21 The actual reasons for the dismissal of the application are set out in less than one page, comprising four paragraphs. Because of the brevity of the reasons, it is convenient to set them out in full:

"Dismissal of application

24. The application consists of two substantial lever-arch files containing a large number of documents, and sets out arguments in support of a number of variations that are contested by the [r]espondent. Upon my reading of the documentation, I am satisfied that such contest goes not only to the quantum of any given variation claim, but also to the very principle of it.

25. In addition to the fact that the matters in issue are, in my opinion, so complex as to render impossible any fair determination without significant argument and evidence, it is evident that payment claim 32 deals with matters that have been the subject of previous payment claims and disputes, such that the application cannot be said to have been made within the time prescribed by [s] 26 of the Act.

26.I note that the [r]espondent's superintendent, in issuing payment certificate 32, notified the [a]pplicant that payment claim 32 dealt with matters that had been the subject of prior claims and disputes, and I agree with the [r]espondent's submission that this application is inappropriate and misconceived for the purposes of the Act. In my opinion, the disputes that are the subject of this application should properly be dealt with in accordance with the dispute resolution process stipulated in the contract.

27.I therefore dismiss the application, as I am required to do by [s] 31(2) of the Act and I agree with the Respondent that the Applicant should pay the costs of this dismissal as provided by [s] 34(2) of the Act."

22 The obligation to provide reasons for decision in relation to an adjudication application is dealt with in s 36 and s 37 of the CC Act. Section 36 provides that reasons for the determination must be given. That applies to an adjudication on the merits. Section 37 deals with applications which have been dismissed under s 31(2)(a), which appears to be the case in this instance. Although reference is only made in [27] above to s 31(2), the grounds relied upon are consistent only with s 31(2)(a). Section 37 provides that reasons must be given for dismissing the application.

23 The adjudication system is designed to achieve a very quick, interim, determination of liability in respects of payment disputes arising under a construction contract. The adjudicator has only 14 days from the date on which the response is filed in which to hand down a determination. During that time, the adjudicator may have to analyse a great deal of documentation in relation to complex construction contracts. The speed with which the process has to be conducted militates strongly against having to provide detailed reasons. Once a determination has been made it is not appealable, although adjudications under similar statutory regimes in other States have been subjected to judicial review, in circumstances in which a jurisdictional error has occurred, or because of non-satisfaction of some precondition which the legislation makes essential for the existence of such a determination: see ***Brodyn Pty Ltd t/as Time Cost and Quality v Davenport [2004] NSWCA 394;*** [2004] 61 NSWLR 421 at 441; ***Transgrid v Siemens Ltd [2004] NSWCA 395;*** [2004] 61 NSWLR 521 at 539; ***Trysams Pty Ltd v Club Constructions (NSW) Pty Ltd*** [2007] NSWSC 941 (***Trysams***) at [30].

24 On the other hand, under the CC Act, there is an express right of review by application to this Tribunal in respect of a decision to dismiss without a consideration of the merits of the application. A decision on the merits is not subject to review (s 46 of the CC Act).

25 Part of the rationale, for the requirement to provide reasons for a decision, is so that the unsuccessful party can assess whether or not to appeal, or in the context of the CC Act, to apply for a review by this Tribunal. For that reason, the reasons must be sufficient to give effect to that right and must therefore disclose the intellectual process by which the relevant conclusions have been reached: see: ***Riley v the State of Western Australia*** [2005] WASCA 190.

26 In these circumstances, the reasons which must be provided in relation to a determination on the merits may not need to be as full as the reasons required in respect of an application to dismiss without having regard to the merits of the adjudication application. That is because, in the case of a determination on the merits, sufficient reasons will be required only to demonstrate whether or not there was a bona fide consideration of the issue said to give rise to jurisdictional error or the failure to meet a precondition: see ***Trysams*** above at [30]. On the other hand, where there has been a dismissal without consideration of the merits on any of the grounds set out in s 31(2)(a) of the CC Act there must be an examination of all relevant material to determine whether on the balance of probabilities the grounds relied upon are made out.

27 In this matter, as set out above, the adjudicator set out as a precursor to the provision of actual reasons for the dismissal of the application that a payment dispute arose on 28 August 2007 and that the builder made the application for adjudication within 28 days after that date. In the actual reasons for dismissal, all that the adjudicator said was that it was evident that payment claim 32 dealt with matters that had been the subject of previous payment claims and disputes "such that the application cannot be said to be made within the time prescribed by s 26 of the [CC Act]". There is no process of reasoning given. The statement is, in effect, no more than a conclusion.

28 In relation to the issue of complexity, the adjudicator does no more than refer to the application consisting of two substantial lever-arch files containing a large number of documents and to state that "I am satisfied that such contest goes not only to the quantum of any given variation claim, but also to the very principle of it". It cannot be understood why a contest that goes to whether or not a building contract has been varied, as opposed to a dispute simply as to the value or quantum of the variation claim, gives rise to any complexity. It is not unusual that there is a dispute as to whether or not the documentation relied upon reflects an agreement to vary a contract, or as to whether or not the documentation constitutes compliance with any contractual procedures which might be prescribed in order to effect a variation. There is nothing to indicate why a consideration of whether or not a variation has been agreed should be regarded as a complex inquiry.

29 We consider that the reasons given for the dismissal of the application are inadequate. In the context of this matter, and by reason of the conclusions which we have reached below, we do not consider that this has resulted in any prejudice in this case. However, we express the above views in order to give guidance to adjudicators in future because more adequate reasons for the dismissal of an application may avoid unnecessary applications for review being made to this Tribunal.

The statutory framework

The CC Act

30 The CC Act is intended to provide security of payment 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 Western Australia, *Parliamentary Debates*, Legislative Assembly, 31 March 2004, (Second Reading Speech).

31 A payment claim is defined to mean a claim under a construction contract by the contractor against the principal or vice versa relating to performance or non-performance by the contractor of its obligations, as the case may be. Section 6 of the CC Act provides:

"For the purposes of this Act, a payment dispute arises if -

(a) 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;

(b) by the time when any money retained by a party under the contract is due to be paid under the contract, the money has not been paid; or

(c) by the time when any security held by a party under the contract is due to be returned under the contract, the security has not been returned."

32 Section 25 provides that if a payment dispute arises under a construction contract, any party to the contract may apply to have the dispute adjudicated (except in certain circumstances which are not relevant).

33 To apply to have a dispute adjudicated "a party to the contract, within 28 days after the dispute arises ... must - " prepare and serve a written application in the manner prescribed (s 26).

34 The objective of an adjudication of a payment dispute is to determine the dispute fairly and as quickly, informally and inexpensively as possible (s 30).

35 Section 31 prescribes the adjudicator's functions, and after defining that in this section, "prescribed time" means either 14 days after service of the response, or 14 days after the last date on which a response is required to be served, provides at s 31(2):

"(2) An appointed adjudicator must, within the prescribe time or any extension of it made under section 32(3)(a) -

(a) dismiss the application without making a determination of its merits if -

(i) the contract concerned is not a construction contract;

(ii) the application has not been prepared and served in accordance with section 26;

(iii) an arbitrator or other person or a court or other body dealing with a matter arising under a construction contract makes an order, judgment or other finding about the dispute that is the subject of the application; or

(iv) satisfied that it is not possible to fairly make a determination because of the complexity of the matter or the prescribed time or any extension of it is not sufficient for any other reason;

(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 on it under section 33; and

(ii) the date on or before which the amount is to be paid, or the security is to be returned, as the case requires."

36 Parties to a payment dispute are to bear their own costs, except that if an adjudicator is satisfied that a party to a payment dispute incurred costs of the adjudication because of frivolous or vexatious conduct on the part of, or unfounded submissions by, another party, the adjudicator may decide that the other party must pay some or all of those costs (s 34 of the CC Act).

37 Finally, under s 46 of the CC Act, a person who is aggrieved by a decision made under s 31(2)(a) may apply to this Tribunal for a review of the decision. If, on a review, a decision made under s 31(2)(a) is set aside and, under the *State Administrative Tribunal Act 2004* (WA) (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) of the CC Act within 14 days after the date on which the decision under s 31(2)(a) was reversed, or any extension of that time consented to by the parties. Except for the above review, a decision or determination of an adjudicator on an adjudication cannot be appealed or reviewed.

The SAT Act

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

39 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).

40 Section 29(3) provides:

"(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 directions or recommendations that the Tribunal considers appropriate,

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

The nature of the review

41 Not withstanding the above provisions of the SAT Act, the Tribunal has previously held, in ***Marine & Civil Bauer Joint Venture and Leighton Kumagai Joint Venture*** [2005] WASAT 269, that it would be inconsistent with the whole scheme of the CC Act for the Tribunal to consider any material, other than that which was before the adjudicator. That is primarily because, if the Tribunal substitutes its own decision and sends the matter back to the decision-maker as provided in s 29(3)(c)(i) and s 29(3)(c)(ii) of the SAT Act, the adjudicator remains obliged to determine the matter on the material upon which the decision to dismiss was made.

42 In this matter, the documentation provided to the Tribunal included the previous adjudication. It was apparently thought that the previous adjudication might be relevant because it was mentioned in the owner's response to the adjudication application. In the circumstances, the Tribunal has had no regard to the earlier adjudication application.

Issue 1: Inclusion of previously rejected claims

43 The builder's counsel, both in written and oral submissions, submitted that the determination of the superintendent under the contract could not break the chain between a payment claim, as defined, and the right to lodge an adjudication application. Counsel for the owner conceded that issue, and it appears to us that concession was rightly made. Consequently, argument centred upon the terms of the contract and the proper construction of the CC Act.

44 It was contended by the builder that it did not matter that previous claims had been rejected and that no adjudication application in respect of them had been lodged within 28 days. It was submitted that by making progress claim 32, and by the superintendent's rejection of it, there existed a payment claim, that a payment dispute had arisen, and that the payment dispute was the subject of the relevant adjudication application. Further, that the contract did not preclude a further claim being made in respect of claims previously rejected. Reference was made to the definition of "due" in the *Oxford English Dictionary*, Oxford University Press, Oxford, 1993, as being:

"expected, intended, or under engagement to arrive or appear, or to do something, at a specified time or absol. now; scheduled or in line for something at a specified time."

45 Clause 42 of the general conditions of contract deals with payment claims, certificates, calculations and time for payment. The scheme of the clause, read with the annexure to the general conditions, is that payment claims may be made every 14 days. Claims for payment should include the value of work carried out by the contractor in the performance of the contract to that time. Within 14 days of receipt of a claim for payment, the superintendent must issue to the principal, and to the contractor, certificates 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. Within 28 days after receipt by the superintendent of a claim for payment, or within 14 days of issue by the superintendent of a payment certificate, whichever is the earlier, the principal must pay to the contractor an amount not less than the amount shown on the certificate *as due* to the contractor, or if no payment certificate has been issued, the principal shall pay the amount of the contractor's claim. Further, cl 42 provides that a " *payment made pursuant to this Clause shall not prejudice the right of either party to dispute under Clause 47, whether the amount so paid is the amount properly due and payable ... "*.

46 Clause 47 of the general conditions of contract is a dispute resolution clause which provides a mechanism for any dispute ultimately being determined by arbitration.

47 We do not consider that the contract provisions support the builder's case in any way.

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 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, not withstanding that it was disallowed, however that can only be determined, under the contract, by applying cl 47. 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.

49 We also do not consider that it is possible to construe the legislation in the manner for which the builder contends.

50 Progress claim 32 is clearly a payment claim as defined, being a claim by the contractor to the principal for an amount in relation to the performance by the contractor of its obligations under the contract.

51 But, under 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.

53 One of the grounds upon which an adjudicator must dismiss the application without making a determination of its merits under s 31(2)(a) of the CC Act is if the application has not been prepared and served in accordance with s 26.

54 Pursuant to s 18 of the *Interpretation Act 1984* (WA) (Interpretation Act), a construction of the statute that would promote the purpose or object underlying the statute shall be preferred to a construction that would not promote that purpose or object. Under s 19 of the Interpretation Act, it is permissible to have regard to extrinsic material either to confirm that the meaning of the provision is the ordinary meaning, or to determine the meaning when the provision is ambiguous or obscure, or where the ordinary meaning would lead to a result that is manifestly absurd or is unreasonable.

55 There is only one correct date on which a payment claim is due under the contract provisions, as discussed above. A payment dispute in respect of such an amount arises when either the amount has not been paid in full, or the claim has been rejected, or wholly or partly disputed. Once that payment dispute has arisen, it can only be adjudicated if an application is made within 28 days after the dispute arises.

56 Consistent with the principles expressed in ***Project Blue Sky Inc & Anor v Australian Broadcasting Authority [1998] HCA 28;*** (1998) 194 CLR 355, we consider that the intent of the legislation is that failure to comply with that time limit compels an adjudicator to dismiss the application. Such an application is not in compliance with the CC Act and is not intended to have validity.

57 The intent of the legislation, as reflected in the very limited time permitted for the completion of the adjudication process, is that claims for progress payments under construction contracts must be dealt with promptly. Clearly, the purpose is to ensure that the party entitled to payment during the course of the carrying out of a construction contract should not be kept out of his money, while still being required to comply with contractual obligations to perform the works. In the second reading speech, to which we have already referred, the Hon Minister for Small Business stated:

"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... 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 rights 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 order under the more formal and precise process."

58 In our view, the purpose of the legislation would be defeated if a contractor could simply keep rolling over rejected claims from one month to the next, and then commence an adjudication application for his accumulated claims. If this were permissible, adjudication of all claims could be commenced after practical completion of works. If the legislation were to operate in that manner it would not achieve its objective in ensuring that payment is made in a timely manner during the carrying out of the works. There would be no benefit in having this imprecise and relatively arbitrary form of dispute resolution, if it could be used in this manner. We consider that this construction follows from the ordinary grammatical meaning of the legislation. The extrinsic material to which we have referred confirms that construction.

59 In this matter, there have, in effect, been an accumulation of payment disputes, all of which have been rolled up within the one application for adjudication.

60 We accept the submission made on behalf of the builder that the adjudicator's reasons reflect an internal inconsistency in the way in which this matter was dealt with. On the one hand, the adjudicator stated that there had been a compliance with the obligation to make an application within 28 days after the payment dispute arose, being a reference to the rejection in part of progress claim 32. Yet, the adjudicator then went on to dismiss the application on the grounds that previous claims had been included within payment claim 32 "such that the application cannot be said to have been made within the time prescribed by section 26 of the Act".

61 On our reading of the adjudicator's reasons for decision, it is the whole of the application which he has dismissed because part of it includes claims which give rise to payment disputes more than 28 days before the application was served. In our view, it was not open to the adjudicator to do this.

62 Under s 26(1) of the CC Act, to "*apply for a (our emphasis) payment dispute*" to be adjudicated, a party must, within 28 days "*after the dispute arises*" prepare and serve a written application. It is this payment dispute which is referred to adjudication. The application referred to in s 31(2)(a) of the CC Act which must be dismissed is the application for the payment dispute.

63 It is necessary, therefore, to identify the payment dispute. On our construction of the CC Act, a payment dispute arises when a claim for an amount is due to be paid; it is not paid in full; or is rejected. At that moment, time begins to run for the lodging of an application for adjudication in respect of that particular payment dispute. Although the application for adjudication endeavoured to treat the accumulated payment disputes as one, the total claimed represents the aggregated payment disputes. It is the application for each of the disputed claims made outside the 28 day period which should have been dismissed.

64 Again, we consider our construction of s 26(1) and s 31(2)(a) to accord with the ordinary meaning of those sections read together and in the context of the CC Act as a whole. If it were to be considered that the reference to "this application" in s 31(2)(a) is ambiguous, our construction promotes the purpose of the CC Act. It would not advance the purposes of the CC Act to preclude an adjudication of a payment dispute made in good time, because other payment disputes are wrongly included in the same proceeding.

65 It follows that the adjudicator was wrong to have dismissed the entire application on the basis of earlier payment disputes being wrongly included.

66 There is another matter which we wish to raise. It was not canvassed with the parties, and therefore we do not rely upon this for our conclusion. However, we consider that it is relevant to raise the matter for the future guidance of those likely to be involved in making or dealing with payment claims under the CC Act using progress claim documents similar to those used in this matter. In our view, on a proper analysis of the progress claim forms, the form containing the summary of contract and claims should not be read as a claim for the total claims carried forward from previous claims. While it may be convenient to carry forward the total claim, it is in our view clear, under the contract provisions to which we have referred, that the only amount which can be claimed as a progress claim due under the contract is that amount which relates to the value of work done since the last progress claim. Once, pursuant to earlier payment certificates, the amounts due have been certified by the superintendent, the amounts disallowed could not be claimed as being due. The only right which the contractor has under the contract is to follow the dispute resolution mechanism under cl 47 in order to determine whether or not the amount disallowed was properly due.

67 We consider that, on a proper analysis of the progress claim document, the payment claim being disputed was the claim identified as "This Claim" under the schedule breakdown and variation report accompanying the progress claim/summary form. In each instance, these documents identify what was the then current claim, and it is only for the work done, or alleged to have been done since the previous claim. The result of this is that the payment dispute which arose by the superintendent rejecting the full progress claim 32 related only to the amounts which comprised "This Claim" which had been disallowed. On that basis, the application in respect of that payment dispute was made in compliance with s 26 of the CC Act.

Issue 2: Complexity

68 When the Tribunal first sighted the documentation included within the application and the response which was provided to the adjudicator, we were, as a first reaction, inclined towards the adjudicator's view that it was not possible to fairly make a determination because of the complexity of the matter.

69 That initial view was formed because the documents filed in support of the application ran into almost 900 pages, and there was no clear summary or statement of the claim cross-referenced to a particular document by which one could verify that an instruction was given by the superintendent, accepted by the contractor, and constituted a variation of the contract, or that the requirements that needed to be followed to constitute a variation had been met. Those requirements are set out in cl 40 of the general conditions. It is not necessary to set them out. Similarly, there was no cross-referencing which enabled the Tribunal to check whether the requirements of the contract had been followed under cl 35.5 to enable the contractor to claim an extension of time.

70 However, once the response was taken into account, it became clear that the initial defence was that the bulk of the claims referred to in the summary of progress claim 32 had been the subject of previous claims, and no application for adjudication had been made within the 28 day time limit of those claims being rejected. The response identified that the claims concerned had been incorporated within progress claims No 24 to No 31, inclusive.

71 As progress claim 31 had been assessed, and various claims rejected on 20 August 2007, more than 28 days prior to the adjudication application being served on 25 September 2007, it follows that it was only necessary to identify whether any of the variations, the subject of "This Claim" in the variation report for progress claim 32 had been reflected in progress claim 31. If so, it would be a simple matter to review the superintendent's assessment of the variation in respect of progress claim 31, as compared with the assessment of those carried through to progress claim 32. There is no complexity in that exercise. At this Tribunal's request, counsel for the owner was able to show that the value of all additional work done under the variation was allowed in the assessment of progress claim 32, except for an amount of $443.30 in respect of contract variation 50. Counsel for the builder accepted that to be the case.

72 This highlights the dangers of an adjudicator too readily concluding that it is not possible to fairly make a determination because of the complexity of a matter. We consider that an adjudicator with appropriate experience in the building industry should have been able to realise that the matter could be dealt with easily. We suspect that the adjudicator had an initial reaction similar to that which the Tribunal experienced, but unfortunately that view was not expunged by a proper analysis and appreciation of the effect of the owner's response to the application. It also highlights the danger for claimants under the adjudication process if they do not put forward a logical summary of claim cross-referenced to the relevant documents.

73 Once the above had been identified as a possible outcome during the hearing of the application, the Tribunal raised with the owner's counsel what the owner's position would be if the Tribunal concluded that the adjudicator's decision had to be set aside, because it seemed futile to have to refer the matter back to the adjudicator when it was common cause that, in respect of contract variation 50, there was only an amount of $443.40 involved. Counsel for the owner responded by indicating that if that was the outcome, the Tribunal could be assured that the amount would be paid without delay to avoid the adjudicator having to revisit the matter.

74 Counsel for both parties also informed the Tribunal that the matters in dispute had been referred to arbitration, and the parties therefore did not press for any urgent decision, particularly as they considered the issues raised to be important.

Costs

75 The builder challenged the appropriateness of the cost order made by the adjudicator. To make the order which he did, it was necessary for the adjudicator to form the view that the application was vexatious or frivolous. The adjudicator must also be satisfied, under s 34(2) of the CC Act, that particular cost have been incurred, and must decide the amount of the costs and the date on which the costs are to be payable (s 34(3) of the CC Act), because if he fails to do so, as occurred in this matter, there is no machinery whereby the costs can later be taxed or fixed. The adjudicator's decision on costs is therefore ineffectual.

76 Strictly, we do not consider that a cost order is reviewable by the Tribunal and that the order would either stand or fall with the decision under review. In view of our above conclusions, the adjudicator's decision will be set aside and reversed by substituting a decision consistent with our above findings. The result is that the application is dismissed only in respect of the payment disputes which arose in relation to claims incorporated in progress claims prior to progress claim 32. The question of cost is therefore open for reconsideration. There is no authority to which the builder could refer in order to be guided in relation to this matter. We do not think it is correct to label the claim as vexatious or frivolous. It is true that the application was misconceived, but it was not obviously so, given that the legislation is relatively new and untested. The appropriate order which should be made in relation to the costs of the adjudication to date is that the parties should pay the costs of the adjudication in equal shares.

77 The position of the parties in relation to costs of the proceedings before the Tribunal is not clear. The issue was dealt with briefly in the builder's written submissions, in which reference was made to ***Aydogan and Town of Cambridge & Anor*** [2007] WASAT 19, which we understand was referred to in support of a proposition that each party should bear their own costs. It appears that the owner did not respond on the question of costs. In the circumstances, we will afford the parties a limited opportunity to make any application they might wish in relation to costs. If the application is not made within the time allowed, the matter will be regarded as finalised. 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.

Orders

78 For the above reasons, the Tribunal orders as follows:

1. The decision of the adjudicator dated 11 October 2007, dismissing the application under s 31(2)(a) of the *Construction Contracts Act 2004* (WA) is set aside.
2. The above decision is reversed, and the Tribunal's decision substituted, to the effect that the application is dismissed only in respect of those payment disputes which arose as a result of the rejection of payment claims incorporated in progress claims preceding progress claim 32.
3. Subject to any application for costs being filed and served within 14 days of the date of this order, the parties have liberty to so apply, detailing the costs claimed and setting out in writing submissions as to why such costs should be allowed.
4. The other party must, within 14 days of service of such costs application and submissions, file and serve any written submissions upon which it wishes to rely in opposition.
5. Unless the Tribunal orders otherwise, any application for costs shall be determined on the documents.

I certify that this and the preceding [78] paragraphs comprise the reasons for decision of the State Administrative Tribunal.

Applicant : Mr D Marsh instructed by Hotchkin Hanley
Respondent : Mr P Fyfe & Mr S Taylor instructed by Jackson MacDonald