

Construction Alert

First series of cases on the SA Security of Payment Act

July 2013

The Building and Construction Industry Security of Payment Act 2009 (SA)

The *Building and Construction Industry Security of Payment Act 2009 (SA)* (**BCISP Act**), like its interstate counterparts, enables a person performing construction work (or supplying related goods and services) in South Australia under a construction contract to make use of a rapid adjudication process to recover progress payments for money owed under the contract in relation to work performed (or related goods and services supplied).

Accordingly, contractors and subcontractors using the BCISP Act can enforce payment of a validly adjudicated amount despite any arguments against payment raised by the principal or head contractor. This is a very effective method of maintaining cash flow for contractors and subcontractors performing work in the South Australian construction industry.

Two recent decisions in the South Australian Supreme Court have highlighted how the BCISP Act can be applied to ensure security of payment for construction contractors, and how determinations made under the BCISP Act can be held to be void in certain circumstances.

'Pay now, Argue Later' - Adelaide Interior Linings v Romaldi Constructions

The Supreme Court decision of *Adelaide Interior Linings Pty Ltd v Romaldi Constructions Pty Ltd* upheld the objective of the BCISP Act, being that cash flow for contractors and subcontractors is protected under a 'pay now, argue later' mechanism.

Facts

Romaldi Constructions (**Romaldi**) entered into a construction subcontract with Adelaide Interior Linings (**Adelaide Interior**) for the installation of lining at Burc College which was being constructed by Romaldi. Adelaide Interior did some work on site; however, a dispute arose with Romaldi in relation to the extent and the quality of the work. Adelaide Interior left the site and Romaldi subsequently engaged another subcontractor to finish the work.

Adelaide Interior issued invoices for work at Burc College and Romaldi refused to pay. In late 2012, Adelaide Interior issued a payment claim pursuant to the BCISP Act and applied for an adjudication of the same, which resulted in an adjudicated amount of \$51,219.83 in its favour (**Adjudicated Amount**). The adjudication determination required Romaldi to pay the Adjudicated

Amount within five business days; otherwise, Adelaide Interior was entitled to enforce payment by obtaining an adjudication certificate and filing it as a judgment debt pursuant to the BCISP Act.

Romaldi refused to pay the Adjudicated Amount and, instead, initiated proceedings in the District Court in relation to its underlying claims against Adelaide Interior and sought an injunction restraining it from enforcing the adjudication. In these proceedings, Romaldi did not challenge the validity of the adjudication, but claimed the cost of completing the work from Adelaide Interior. In a preliminary hearing in the District Court, Romaldi was successful in obtaining an injunction which prevented Adelaide Interior from enforcing payment of the Adjudicated Amount.

Decision

Adelaide Interior appealed against the interim decision of the District Court to the Supreme Court of South Australia where Justice Anderson upheld this appeal and allowed Adelaide Interior to seek to enforce payment of the Adjudicated Amount pursuant to the BCISP Act.

The Supreme Court held that the process contemplated by the BCISP Act involved Adelaide Interior enforcing payment of the adjudicated amount and that, by preventing this, the District Court had permitted Romaldi to circumvent the provisions of the BCISP Act.

In his decision, Justice Anderson also noted that the provisions of the BCISP Act establish a 'pay now, argue later' mechanism which creates a regime for the payment of amounts owing to subcontractors, and prevents a party such as Romaldi from delaying payment of adjudicated amounts.

Implications

South Australian construction companies should be aware of the provisions of the BCISP Act and its 'pay now, argue later' mechanism which allows contractors and subcontractors to be paid adjudicated amounts for construction work, regardless of any ongoing disputes relating to the performance of the contract.

The decision of Justice Anderson emphasises the importance of a party receiving a payment claim including in its payment schedule all amounts which may be claimed against the claimant, such as for the rectification of defective works, to seek to minimise the amount adjudicated in favour of the claimant.

Beware of Adjudication Pitfalls - *Built Environs v Tali Engineering*

The South Australian Supreme Court decision of Justice Blue in *Built Environs Pty Ltd v Tali Engineering Pty Ltd & Ors* declared an adjudication determination pursuant to the BCISP Act void, which meant that the adjudicated amount did not have to be paid to the contractor. This decision highlights the importance of both an adjudicator affording natural justice to both parties and both claimants and Authorised Nominating Authorities avoiding circumstances which could lead to a finding that there was a reasonable apprehension of bias in the adjudication process.

This Supreme Court decision also addressed matters relevant to the preparation of a valid payment claim under the BCISP Act and the limits to the jurisdiction of an adjudicator when making determinations.

Facts

As head contractor for the Woolworths Walkerville Shopping Centre, Built Environs Pty Ltd (**Built**) entered into a subcontract with Tali Engineering Pty Ltd (**Tali**) for the supply and erection of structural steelwork for the shopping centre. On 25 January 2013, Tali submitted a payment claim under the BCISP Act to Built claiming payment for an unpaid amount of \$581,986.30 under the contract. Built responded to this progress claim with a payment schedule which objected to payment and set-off amounts for liquidated damages.

On 22 February 2013, Tali filed an adjudication application with Nominator Pty Ltd (an Authorised Nominating Authority under the BCISP Act), which nominated an adjudicator to make an adjudication determination with respect to the payment claim served by Tali. On 15 March 2013, the adjudicator determined that Tali was entitled to payment of \$579,420.90.

Following this decision, Built brought judicial review proceedings in the Supreme Court of South Australia seeking a declaration that the adjudicator's decision was void on a number of grounds including:

- (a) Tali's payment claim did not comply with the BCISP Act.
- (b) The adjudicator exceeded his jurisdiction.
- (c) There was a denial of natural justice as the adjudicator did not invite further submissions or

evidence from the parties in relation to specific issues.

- (d) There was a denial of natural justice as there was a reasonable apprehension of bias of Nominator and/or the adjudicator.

Decision

In his decision, Justice Blue rejected Built's claims at (a) and (b), but he agreed with Built's claims at (c) and (d) and held that the adjudicator had not provided Built with natural justice and accordingly, the adjudication determination was declared void.

Payment Claim

The adjudicator's jurisdiction under the BCISP Act is conditional upon Tali having served a valid payment claim, which requires it to identify the construction work to which the claim relates. Justice Blue held that the determination of a valid payment claim, as well as the resulting jurisdiction of the adjudicator and validity of the determination was an issue for the Court to determine.

Built alleged that the payment claim provided was invalid as Tali had failed to meet the requirement to 'identify the construction work' in the payment claim, which it submitted contained errors and inconsistencies and had not identified the construction work performed since the prior payment claim. Tali's payment claim was calculated by claiming the work which it had completed under the contract by reference to percentages of different categories of work and variations and, then by deducting previously certified amounts to calculate a net amount.

Justice Blue considered Built's submissions in regard to Tali's payment claim and rejected them both as:

- (a) the errors and inconsistencies were identified by Built, which was able to prepare a payment schedule in response; and
- (b) the subcontract provided for a cumulative approach to the calculation of a progress claim (as had been adopted by Tali) and the BCISP Act provides that the amount of a progress claim to which a person is entitled under the Act is to be calculated and valued in accordance with the terms of the contract.

Scope of Jurisdiction of Adjudication

The adjudicator's jurisdiction is also limited to consider certain matters only under the BCISP Act, and if an adjudicator exceeds this jurisdiction then the whole decision may be found to be void.

Justice Blue rejected arguments by Built that the adjudicator had entertained a claim for unliquidated damages, and/or assumed the jurisdiction of the subcontract superintendant, and therefore had exceeded his jurisdiction.

Further, he rejected Built's contention that Tali was not entitled to raise the prevention principle in its adjudication application when it had not raised this issue in its payment claim. The prevention principle is a legal principle that a party cannot rely upon non-fulfilment of a contractual condition, the performance of which has been prevented by that party's own breach of contract. This argument was rejected on the basis that this principle had been raised by Tali in response to Built's payment schedule, and it was not making a new claim in the adjudication application which had not been included in the payment claim.

Natural Justice

In exercising their function under the BCISP Act, adjudicators have a duty to observe fair procedures, which includes affording parties whose interests are liable to be affected notice of relevant matters as well as a reasonable opportunity to present their case. Justice Blue held that the adjudicator had failed to provide natural justice to Built on two grounds, both of which rendered the adjudication void.

The Court held that neither parties' submissions addressed whether Built had breached the contract, and if this breach entitled Tali to rely on the prevention principle. Despite this, the adjudicator had determined that the principle applied, which had the effect of denying Built from claiming an offset of liquidated damages under the contract. Justice Blue held that before making a determination on this basis, it was necessary that the adjudicator request submissions or responses from the parties on this essential element of the prevention principle in order to afford them natural justice.

The second issue of natural justice addressed by the Court was that, as a consultant, the manager of Nominator Pty Ltd had been advising Tali concerning its dispute with Built and this gave rise to a reasonable apprehension of bias on the part of Nominator in selecting an adjudicator who

may be more favourable towards Tali. Although the manager of Nominator had not been the individual who selected the adjudicator, and no claim was made that the decision was affected by actual bias, the Court held that this apprehension of bias was enough to deny Built natural justice.

Implications

This is the first South Australian decision declaring an adjudication under the BCISP Act void. All members of the construction industry in South Australia who use or are contemplating using the BCISP Act should take into account the matters addressed by Justice Blue as referred to above in relation to the requirements for payment claims and the jurisdictional limits of the adjudicator in determining adjudication applications. An adjudication determination which fails to comply with these requirements may be declared void by the South Australian Supreme Court.

Further, Parties involved in adjudications under the BCISP Act should:

- be aware that an adjudicator is required to afford both parties the opportunity to provide submissions and provide evidence on matters relevant to a determination; and
- be aware of and avoid, potential issues of apprehended bias with respect to Authorised Nominating Authorities and adjudicators.

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