

CONSTRUCTION | OCTOBER 2021

CLARITY GIVEN TO EXCLUDED PAYMENTS UNDER THE SOP ACT IN VICTORIA

The Supreme Court of Victoria has provided some clarity of the concept of 'excluded amounts' following the decision in *Goldwind Australia Pty Ltd v ALE Heavylift (Australia) Pty Ltd*. The decision makes it clear that:

- failure to adjudicate an earlier payment claim for work done does not prevent a claimant from recovering such work in a later progress payment; and
- a subsequent payment claim seeking payment for work done, which may include amounts previously deducted for delay, does not alter the character of such a claim to be an 'excluded amount' under s 10B of SOP Act.

Background facts

ALE Heavylift (Australia) Pty Ltd (**ALE**) was a heavylift contractor engaged by Goldwind Australia Pty Ltd (**Goldwind**) to erect wind turbines at the Stockyard Hill Wind Farm in Victoria.

ALE submitted a payment claim for works carried out in September 2020. Goldwind deducted \$484,100.92 in its payment schedule on account of alleged delay, which deduction had been included in prior payment certificates under the contract.

In a judgment handed down in favour of ALE, Her Honour Justice Stynes of the Supreme Court of Victoria found that the absence of any challenge by ALE to the earlier deduction did not alter the character of ALE's claim from a claim for work done to a claim to recoup the deduction.

Significance of this decision

Goldwind Australia Pty Ltd v ALE Heavylift (Australia) Pty Ltd provides some clarity on the concept of 'excluded amounts' as defined in s 10B of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**SOP Act**).

The position was quite clear following the decision of His Honour Justice Vickery in *Seabay Properties Pty Ltd v Galvin Constructions* until the later decision of His Honour Justice Digby in *Shape Australia Pty Ltd v Nuance Group (Aust) Ltd* which found (albeit in obiter so as not to be binding) that an endeavour by a claimant to recover previously deducted liquidated damages resulted in such sums being 'excluded amounts' for the purpose of s 10B.

Justice Digby's obiter comments in *Shape v Nuance* received widespread attention as the decision provided very little guidance as to circumstances which alter a claim for payment permitted by the SOP Act to a claim for 'Excluded Amounts' prohibited by the SOP Act.

It had been suggested that where a claimant failed to refer a prior deduction to adjudication, the payment schedule (or certificate) creates a 'baseline' against which the next payment claim may be assessed.

This notion has been firmly rejected by Justice Stynes in *Goldwind v ALE*. The two clear points to arise from this decision are that:

- failure to adjudicate an earlier payment claim for work done does not prevent a claimant from recovering such work in a later progress payment; and
- a subsequent payment claim seeking payment for work done, which may include amounts previously deducted for delay, does not alter the character of such a claim to an 'excluded amount' under s 10B of SOP Act.

The case does not, however, shed much light on precisely how Justice Digby's obiter comments may be reconciled with the decision of His Honour Justice Vickery in *Seabay*. Seeking to identify circumstances which do not require separate and potentially contested evidentiary issues to be heard in a judicial review application is a fraught business. It is suggested that later cases will further restrict the ambit of those comments.

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