

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
TECHNOLOGY, ENGINEERING AND CONSTRUCTION LIST

Not Restricted

S ECI 2021 01423

GOLDWIND AUSTRALIA PTY LTD (ACN 140 108 390)

Plaintiff

v

ALE HEAVYLIFT (AUSTRALIA) PTY LTD (ACN 131 060 074)

First Defendant

and

JOHN MCMULLAN

Second Defendant

and

RIALTO ADJUDICATIONS PTY LTD (ACN 118 640 789)

Third Defendant

JUDGE:

Stynes J

WHERE HELD:

Melbourne

DATE OF HEARING:

11 August 2021

DATE OF JUDGMENT:

28 September 2021

CASE MAY BE CITED AS:

Goldwind Australia Pty Ltd v ALE Heavylift (Australia) Pty Ltd

MEDIUM NEUTRAL CITATION:

[2021] VSC 625

ADMINISTRATIVE LAW – Judicial review – Adjudication conducted under Part 3 Division 2 of the Act – Certiorari sought in relation to an adjudication determination – Whether payment claim, properly characterised, is for construction work done or is an attempt to recoup previously deducted liquidated damages – *Building and Construction Industry Security of Payment Act 2002* (Vic) ss 1, 3, 9, 10B, 14 and 23, applied – *Seabay Properties Pty Ltd v Galvin Constructions Pty Ltd* [2011] VSC 183, applied – *Shape Australia Pty Ltd v Nuance Group (Aust) Pty Ltd* [2018] VSC 808, distinguished.

APPEARANCES:

Counsel

Solicitors

For the Plaintiff

Andrew Morrison

Holding Redlich

For the Defendant

Chris Young and William
Stephenson

HFW Australia

HER HONOUR:

A **Introduction**

1 The plaintiff (the **Head Contractor**) seeks to have the adjudication determination made by the second defendant (the **Adjudicator**) on 13 April 2021, corrected on 21 April 2021 (**Adjudication Determination**), quashed or otherwise declared void. The Adjudication Determination was delivered under the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**SOP Act**).

2 The issue for determination is whether the Adjudicator erred by taking into account an excluded amount (as defined in s 10B of the SOP Act).

3 Both parties submitted that the resolution of this proceeding depends on the answer to this question – does the fact that:

- (a) the Head Contractor purported to make a deduction in a payment schedule, which was not the subject of an adjudication; and
- (b) the first defendant (the **Subcontractor**), by a later payment claim, made a claim for work done ignoring the earlier deduction,

convert the Subcontractor’s claim from one for construction work done to a claim to recoup the deduction?

4 The Head Contractor contends that as the Subcontractor failed to challenge the earlier deduction, the subsequent payment claim including that amount must be considered an attempt to recoup the earlier deduction and should not have been taken into account by the Adjudicator.

5 The Subcontractor contends that the earlier deduction was unlawful and/or lacked a contractual basis and therefore was of no effect. As a consequence, the Subcontractor’s claim should be characterised as one for construction work done that has not been paid for.

6 For the reasons that follow I have determined that the Adjudicator did not err by
characterising the Subcontractor's claim for \$484,100.92 (exclusive of GST),
included in PC-13, as a claim for work done and consequently taking it into account
in determining the adjudication application.

B Background

7 The Head Contractor is a wind turbine technology provider, wind farm contractor
and operator.

8 The Subcontractor is a heavy lift and transport contractor.

9 The project is known as the Stockyard Hill Wind Farm (the **Project**) and is located
in Stockyard Hill, Victoria.

10 It involves the construction of 149 wind turbine generators (**WTGs**), four internal
33–132kV substations, 75km of overhead electricity transmission line as well as all
associated infrastructure.

11 On 7 January 2020, the Head Contractor engaged the Subcontractor under a
subcontract (the **Lifting Contract**) to use two specialised cranes (**Kroll Cranes**) to
erect the WTGs. The value of the Lifting Contract was \$11,200,000 plus a further
\$1,300,000 for mobilisation (exclusive of GST).

12 Clause 23.2(1)(b) of the Lifting Contract provided that the Head Contractor would
pay the contract price in accordance with schedule 3. Schedule 3 set out a
productivity adjustment formula that adjusted the monthly payments due to the
Subcontractor according to the Subcontractor's rate of progress in executing the
Lifting Contract.

13 If the Subcontractor lifted one or more WTGs per week it would receive a payment
greater than its monthly costs, whereas if it lifted less than one WTG per week its
monthly payment would be less than its monthly costs.

14 On around 4 May 2020, the Head Contractor added new WTGs to be lifted into the

scope of works under the Lifting Contract. Those WTGs were located in the northern part of the Project site. At the time the additional WTGs were added to the scope of works, the two Kroll Cranes operated by the Subcontractor were located in the southern part of the site. Therefore the Subcontractor needed to move the two Kroll Cranes from the south of the site to the north of the site to begin lifting the added WTGs. The distance between the southern and the northern parts of the site is approximately 40km.

15 The first Kroll Crane was moved by the Subcontractor from the south to the north of the site in 18 days.

16 The movement of the second Kroll Crane took 40 days.

C Payment claims

C.1 **Payment Claim 11**

17 The Subcontractor delivered Payment Claim 11 (**PC-11**) to the Head Contractor in September 2020. By PC-11, the Subcontractor claimed, amongst other things, \$1,467,312.03 under the Lifting Contract for work performed in September 2020.

18 PC-11 was not endorsed as a payment claim for the purpose of the SOP Act.

19 In response to PC-11, the Head Contractor provided Payment Schedule 11 (**PS-11**) on 14 October 2020. In relation to the claim of \$1,467,312.03 the Head Contractor approved only \$914,861.11. It deducted \$552,450.92 comprising:

- (a) a deduction of \$68,350, which is not relevant to this proceeding; and
- (b) a deduction of \$484,100.92 (exclusive of GST) (**Delay Deduction**), which is the subject of this proceeding.

20 In relation to the Delay Deduction the Head Contractor stated in PS-11 that:

The original 40 day relocation of Kroll 2 at the time was excessive and a compromise of 25 days is more inline [sic] with site movements, hence the 15 days deduction from the PA (40-15=25) (\$484,100.92).

21 The parties agree that the Delay Deduction is either a time-related cost or a claim
for damages for breach of contract.

C.2 Payment Claim 12

22 On 29 October 2020, the Subcontractor delivered to the Head Contractor, Payment
Claim 12 (**PC-12**). By PC-12, the Subcontractor ignored the Delay Deduction levied
in PS-11 and claimed, in relation to works done under the Lifting Agreement in
September 2020, the sum of \$552,450.92. That sum is equal to the sum the Head
Contractor purported to deduct in the previous accounting period.

23 PC-12 stated that it was a payment claim made under the SOP Act.

24 The Head Contractor responded to PC-12 with Payment Schedule 12 (**PS-12**) on 12
November 2020. Amongst other things, the Head Contractor again applied the
Delay Deduction against the sum claimed in PC-12 for works done in September
2020.

C.3 Payment Claim 13

25 On 18 February 2021, the Subcontractor issued Payment Claim 13 (**PC-13**). By PC-
13, the Subcontractor again:

- (a) ignored the Delay Deduction; and
- (b) claimed the sum of \$552,450.92, which had not been paid by the Head
Contractor. That claim included a claim of \$484,100.92 in relation to the
works done under the Lifting Agreement in September 2020 which is the
subject of this proceeding (the **September 2020 Claim**).

26 On 3 March 2021, the Head Contractor issued Payment Schedule 13 (**PS-13**)
responding to PC-13. The Head Contractor again applied the Delay Deduction.

27 The Subcontractor referred PC-13 to adjudication.

D The Adjudication Determination

28 On 18 March 2021, the Subcontractor issued an adjudication application in which it claimed \$1,701,753.23 (inclusive of GST), which included the September 2020 Claim.

29 On 25 March 2021, the Head Contractor issued its adjudication response.

30 Further submissions were made by the parties as follows:

- (a) on 31 March 2021 by the Subcontractor;
- (b) on 7 April 2021 by the Head Contractor; and
- (c) on 9 April 2021 by the Subcontractor.

31 In its submissions to the Adjudicator, the Subcontractor:

- (a) claimed a number of entitlements including \$552,450.92 in relation to works done under the Lifting Contract in September 2020.¹ The Subcontractor submitted to the Adjudicator that the amount claimed, amongst other things, included:²

amounts improperly deducted by [the Head Contractor] from earlier claims (i.e. the balance of the claims made between February and September 2020)

- (b) submitted that the Delay Deduction in PS-13 responding to PC-13 was an excluded amount and should not be taken into account by the Adjudicator in determining the adjudication application.³ It relied on the decision of Vickery J in *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd*.⁴ This case is addressed further below.

32 In its submissions to the Adjudicator, the Head Contractor noted that it first applied the Delay Deduction in response to PC-11. It submitted that a claim which

¹ First Defendant's Adjudication Application dated 18 March 2021 at 177 of the Court Book.

² Ibid 188.

³ Ibid 175.

⁴ [2011] VSC 183, [113] (Vickery J) (*Seabay*).

attempts to recoup an excluded amount that had been previously deducted was itself an excluded amount which the Adjudicator ought not to take into account. It relied on the dicta of Digby J in *Shape Australia Pty Ltd v The Nuance Group (Australia) Pty Ltd*.⁵ This case is addressed further below.

33 On 13 April 2021, the Adjudicator issued his initial adjudication determination. The Adjudicator determined the amount payable to the Subcontractor under PC-13 was \$1,094,545.40 (inclusive of GST), which included the sum of \$484,100.92 in respect of the September 2020 Claim.

34 On 21 April 2021, the Adjudicator issued a corrected determination, correcting an arithmetical error of approximately \$2,636 in his original determination. The parties agree the corrected determination is the appropriate document to refer to and it is accepted that the arithmetical error does not affect the matter in issue in this proceeding.

35 In relation to the Delay Deduction, the Adjudicator first determined that it was an excluded amount under s 10B of the SOP Act.⁶ This finding is not disputed by either party.

36 The Adjudicator then considered whether the September 2020 Claim was for work done under the Lifting Contract in the sum of \$484,100.92 or was a claim to recoup the Delay Deduction. He concluded it was a claim for work done.

E Parties' submissions

37 The Head Contractor, in summary:

- (a) conceded that the Delay Deduction, which was deducted from PC-11, PC-12 and again from PC-13 was an excluded amount;
- (b) submitted that on a proper reconciliation, the September 2020 Claim is a

⁵ [2018] VSC 808 (Digby J) (*Shape*).

⁶ Corrected Adjudication Determination dated 21 April 2021 at 732 of the Court Book.

claim to recoup the Delay Deduction and is therefore an excluded amount;
and

- (c) submitted that the Adjudicator erred in taking that excluded amount into account.

38 The Subcontractor submits, in summary, that:

- (a) properly characterised the September 2020 Claim in PC-13 was for lifting works performed in the month of September 2020 of which \$553,450.92 had been previously claimed but not paid;
- (b) by reason of s 14(9) of the SOP Act, the Subcontractor is not prevented from including in a payment claim an amount that has been the subject of a previous claim if the amount has not been paid;
- (c) in the absence of an adjudication or an adjustment to the contract price by reason of a contractual procedure, there is nothing to prevent the first defendant from seeking payment of the full sum outstanding in a fresh payment claim;⁷ and
- (d) the circumstances of the Delay Deduction do not convert the September 2020 Claim into a claim for an excluded amount because the Delay Deduction was unlawful under the SOP Act or had no contractual force and was therefore ineffective. As a consequence, there was nothing to reverse or recoup.⁸

F The SOP Act

39 Section 1 of the SOP Act sets out its main purpose being to provide for entitlements

⁷ *Building and Construction Industry Security of Payment Act 2002* (Vic) s 14(9); Transcript of Proceedings, *Goldwind Australia Pty Ltd v ALE Heavylift (Australia) Pty Ltd* (Supreme Court of Victoria, Stynes J, 11 August 2021) 81.3–21 (**Transcript**).

⁸ Transcript (n 7) 53–4, 74.28, 77–8, 81; Chris Young QC and William Stephenson, 'First Defendant's Outline of Submission', Submission in *Goldwind Australia Pty Ltd v ALE Heavylift (Australia) Pty Ltd*, S ECI 2021 01423, 13 July 2021, 5 [17].

to progress payments for persons who carry out construction work or who supply related goods and services under construction contracts.

40 Section 3 sets out the object of the SOP Act which is to ensure that any person who undertakes to carry out construction work or who undertakes to supply related goods and services under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.

41 The object is implemented by:⁹

- (a) the granting of a statutory entitlement to that payment under the SOP Act; and
- (b) the establishment of a procedure for the speedy determination of any disputed claim by an adjudicator.

42 However, the SOP Act is not intended to limit:¹⁰

- (a) any other entitlement that a claimant may have under a construction contract; or
- (b) any other remedy that a claimant may have for recovering that other entitlement.

43 Consequently, there are two regimes for the making of payment claims for progress payments: one under the relevant construction contract and the other under the SOP Act. Different rules may apply under each regime as to what is claimable and what may be deducted.¹¹

44 Section 9 of the SOP Act sets out the entitlement to progress payments. The entitlement to a progress payment is to be calculated by reference to a reference

⁹ SOP Act (n 7) s 3(3).

¹⁰ Ibid s 3(4).

¹¹ *Seabay* (n 4) [14].

date, which is defined in s 9(2). The entitlement extends to a progress payment for work done up to and including the relevant reference date whether or not it had been performed since the preceding reference date or prior to it.¹²

45 Section 14 of the SOP Act sets out the requirements with respect to payment claims. Section 14(3)(b) provides that a claimed amount must not include any excluded amount.

46 The rationale for excluding claims, defined as 'excluded amounts', is that they are often complex and time consuming disputes and have the potential to hinder the objective of the SOP Act for the speedy interim resolution of payment disputes.¹³

47 Section 14(8) of the SOP Act provides that a 'claimant cannot serve more than one payment claim in respect of each reference date under the construction contract'. However, s 14(9) preserves the entitlement of a claimant to include in a payment claim an amount that has been the subject of a previous payment claim if the amount has not yet been paid.

48 Section 23 of the SOP Act requires the appointed adjudicator to determine the amount of the progress payment, after considering the matters referred to in that section. In relation to excluded amounts it states:

(2A) In determining an adjudication application, the adjudicator must not take into account –

(a) any part of the claimed amount that is an excluded amount; or

...

(2B) An adjudicator's determination is void –

...

(b) if it takes into account any amount or matter referred to in subsection (2A), to the extent that the determination is based on that amount or matter.

¹² *Ian Street Developer Pty Ltd v Arrow International Pty Ltd* (2018) 54 VR 721, 752 [111]–[112] (Riordan J), quoting *Commercial Industrial Construction Group Pty Ltd v King Construction Group Pty Ltd* [2015] VSC 426, [101]–[102] (Vickery J).

¹³ *Seabay* (n 4) [120], [122].

49 Section 10B of the SOP Act defines 'excluded amounts' as follows:

- (1) This section sets out the classes of amounts (*excluded amounts*) that must not be taken into account in calculating the amount of a progress payment to which a person is entitled under a construction contract.
- (2) The excluded amounts are –
 - (a) any amount that relates to a variation of the construction contract that is not a claimable variation;
 - (b) any amount (other than a claimable variation) claimed under the construction contract for compensation due to the happening of an event including any amount relating to –
 - (i) latent conditions; and
 - (ii) time-related costs; and
 - (iii) changes in regulatory requirements;
 - (c) any amount claimed for damages for breach of the construction contract or for any other claim for damages arising under or in connection with the contract;

G The key authorities

50 The two authorities addressed by the parties in some detail were the decisions of *Seabay* and *Shape*.

G.1 **Seabay**

51 The issue that arose for determination by Vickery J in *Seabay*, relevant to the determination of this case, was whether liquidated damages claimed by a respondent was an excluded amount for the purpose of s 10B of the SOP Act.

52 A payment claim (PC-28) was made under the relevant contract and also concurrently and separately under the SOP Act. The claimant did not make any claim for delay costs under the SOP Act, although it did in its payment claim under the contract.

53 The superintendent assessed PC-28 and provided its payment certificate. The assessment included a deduction for liquidated damages in the sum of \$540,150. The claimant did not serve any notice of dispute under the contract challenging the

superintendent's certification of the liquidated damages as due and owing.

54 In responding to PC-28 served under the SOP Act, the principal did not rely on the superintendent's assessment. Instead it provided a payment schedule which contained significant differences including a deduction for liquidated damages of \$770,250.

55 The claimant commenced an adjudication challenging the deduction of liquidated damages.

56 The central substantive question put to the adjudicator, as formulated by the parties, was whether the principal's claim for liquidated damages should have been excluded from the calculation as to what was due and payable to the claimant under PC-28.

57 The adjudicator found that the deduction for liquidated damages was an excluded amount.

58 Vickery J agreed with the adjudicator. His Honour found that the amount sought to be deducted fell squarely within the concept of an excluded amount. He did accept that a number of provisions of the SOP Act pointed in favour of the principal's contention that the excluded amounts referred to in s 10B(2) applied only to amounts claimed by the claimant and not to any amount claimed by the respondent. However his Honour noted that s 10B(2) must also be considered in the context of the overall purpose of the SOP Act and the manner in which that purpose is put into effect by the legislative machinery.¹⁴

59 In that regard his Honour noted the intention of the SOP Act that an adjudicator determine adjudication applications as expeditiously as possible and observed that classes of claims falling within 'excluded amounts' regularly arise in construction disputes and are often attended with considerable complexity and thereby defeat

¹⁴ Ibid [118].

the prospect of a speedy resolution.¹⁵

60 His Honour also observed that if excluded amounts were only to apply to claims made by the claimant and not to any set-off or counterclaim raised by the respondent to a payment claim, then the operation of the SOP Act in a number of cases could be seriously compromised.¹⁶

61 For these reasons Vickery J held that, on the proper construction of s 10B of the SOP Act, excluded amounts applies not only to the statutory payment claim served by the claimant but also to amounts claimed by the respondent.¹⁷

62 The Subcontractor submitted that the facts in *Seabay* are analogous to the facts in this case. Specifically, the Subcontractor submitted that having regard to PC-13 and the responding payment schedule, it is apparent that the Head Contractor is purporting to deduct an excluded amount.

G.2 Shape

63 In *Shape*, a payment claim (**PC-13**) had been the subject of an adjudication determination which was later quashed by Digby J on the basis that the adjudicator failed to perform his basic and essential function as required under the SOP Act.

64 The next payment claim (**PC-14**) was then served by Shape on Nuance and included items that had previously been claimed in PC-13.

65 PC-14 became subject of an adjudication. The adjudicator determined that he did not have jurisdiction to hear the application and in any event determined that a nil amount was payable by Nuance to Shape. The matter came back before Digby J.

66 An issue that arose for consideration by the Court was whether a claim for reimbursement of liquidated damages in PC-14 was an excluded amount and therefore should not be taken into account by an adjudicator. By way of

¹⁵ Ibid [120].

¹⁶ Ibid [122].

¹⁷ Ibid [124].

background, Nuance had levied liquidated damages over time and deducted them from sums otherwise due to Shape. Until PC-14, Shape had not pursued any adjudication process or otherwise sought to challenge the deduction of liquidated damages. It is not possible to discern from the decision itself the existence of, or Nuance's compliance with, a contractual basis for its asserted deductions of liquidated damages.

67 Having determined the application on other grounds, it was not necessary for Digby J to go on to consider this issue. Nevertheless, his Honour addressed it because of its potential relevance to Shape's claim for remitter and the exercise of his discretion on those applications.

68 Digby J addressed this issue in two stages. First, he considered whether the claim was properly characterised as a claim to recoup liquidated damages.¹⁸ He then considered whether a claim to recoup liquidated damages is excluded under s 10B(2) of the SOP Act.

69 It was critical to his Honour's reasoning that the claim was characterised as a claim to recoup liquidated damages. Relevant to this characterisation were the undisputed facts that:

- (a) liquidated damages had been levied over the course of the construction project; and
- (b) other claims comprising the adjusted contract sum on PC-14 had been determined or paid through earlier payment claims.

70 Further, Digby J observed that when the individual items of work in PC-14 were adjusted and reconciled, PC-14 equated to the amount of the asserted entitlement to liquidated damages and could be explained on no other basis given no new work had been performed. His Honour determined that the PC-14 claims were in substance in the nature of a claim to recoup Nuance's asserted entitlement to

¹⁸ *Shape* (n 5) [76].

liquidated damages.

71 Having made that determination, his Honour held that the adjudicator was correct to find that:

- (a) *Seabay* supported his conclusion that claims to recoup liquidated damages that had been earlier levied were to be excluded;¹⁹ and
- (b) the language of sub-ss 10B(1) and (2) of the SOP Act is broad enough to support that conclusion.²⁰

72 The Head Contractor relies on *Shape* in support of its case.

73 The Subcontractor, by its counsel, expressly reserved its position as to whether or not the reasoning in *Shape* was correct and did not go on to identify any error in the reasoning.

74 Instead, the Subcontractor sought to distinguish the decision in *Shape*. The points of distinction raised are not relevant to my consideration of this matter and therefore I have not addressed them further.

H Consideration

75 It falls to me to determine whether or not the Adjudicator erred by characterising the September 2020 Claim as a claim for work done and consequently taking it into account in determining the adjudication application.

76 More specifically, I am required to determine whether the fact that the Subcontractor failed to challenge the Delay Deduction when it was first applied had the effect of changing the character of the September 2020 Claim from a claim for work done to a claim to recoup the Delay Deduction.

77 The Head Contractor relies on the obiter of Digby J in *Shape* to submit that a

¹⁹ Ibid [97].

²⁰ Ibid [95].

claimant is not permitted to recoup an excluded amount that had been deducted in a prior payment schedule.

78 The practical effect of the Head Contractor's submission and reliance on *Shape* is that if a claimant fails to challenge an excluded amount in a payment schedule, it will not be able to recoup that amount in a subsequent payment claim. To put it another way, and as submitted by the Head Contractor, if a claimant does not refer the dispute about a deduction to adjudication, then the payment schedule creates a baseline against which the next payment claim will be assessed.

79 I am not bound by the obiter in *Shape* and I do not propose to apply it. In my view, the application of it to the facts of this case would operate to preclude the Subcontractor from recovering progress payments in relation to work performed in a manner contrary to the text and purpose of the legislation.

80 The obiter in *Shape* was reasoned on the basis that determining whether a party is entitled to liquidated damages or, juxtaposed to such an entitlement, whether a party is entitled to damages in relation to events causing compensable delay and time related costs, is a complex, time-consuming exercise that is inconsistent with the application of the SOP Act.

81 However, I find that in the circumstances of this case, the Subcontractor's decision to issue a subsequent payment claim for unpaid work previously done does not attract these concerns. In other words, the mischief sought to be addressed by s 10B of the SOP Act does not arise in relation to the September 2020 Claim. The Adjudicator was only required to determine the value of the work done and what remained unpaid.

82 As set out above, the primary purpose of the SOP Act is to ensure that any person who carries out construction work or provides related goods or services is able to promptly recover progress payments.

83 There are no provisions in the SOP Act that preclude a claimant from seeking to

recover a progress payment because of a failure to adjudicate a payment dispute arising in relation to an earlier payment claim.

84 To the contrary:

- (a) the decision to adjudicate a dispute arising in relation to a particular payment claim is optional;
- (b) s 9 permits a claimant to claim for all work done up to and including the relevant reference date regardless of whether or not the work had been performed since the preceding reference date or prior to it; and
- (c) s 14(9) preserves a claimant's entitlement to include in a payment claim an amount that has been the subject of a previous claim if the amount has not been paid.

85 The suggestion that if the claimant fails to adjudicate a dispute about a payment claim:

- (a) the disputed payment schedule will operate to shift the baseline against which subsequent payment claims are to be assessed; and
- (b) therefore the claimant's subsequent claim for work done will be re-characterised as a claim to recoup the unchallenged deductions,

is entirely inconsistent with these provisions and the purpose of the legislation to ensure that persons who carry out construction work are entitled to receive progress payments in relation to it.

86 For the reasons set out above, I reject the submission that the September 2020 Claim is a claim to recoup the Delay Deduction. Properly understood, the September 2020 Claim is a claim for work done which remains unpaid. Against that claim the Head Contractor asserts an entitlement to the Delay Deduction.

87 The issue remains whether the Delay Deduction should be taken into account for

the purpose of determining the amount of the progress payment to be paid under PC-13.

88 There was no dispute that:

- (a) applying *Seabay*, the Delay Deduction was an excluded amount; and
- (b) if the September 2020 Claim is to be characterised as a claim for work done, the Delay Deduction should not be taken into account.

89 In any event, and putting to one side the decision of *Seabay*, I query whether the Delay Deduction has any relevance to the Adjudicator's task of determining the amount and timing of a progress payment because the SOP Act does not provide for deductions of that type to be accounted for in the valuation of the construction work carried out. However, as this matter was not identified or addressed in the submissions, I do not propose to take it further.

H.1 Did the Adjudicator err in taking the September 2020 Claim into account?

90 For the reasons set out above, I find that the Adjudicator did not err in characterising the September 2020 Claim in PC-13 as a claim for work done.

I Orders

91 Accordingly, I order that the Head Contractor's Originating Motion be dismissed.

I will hear the parties in relation to the form of order and costs.