

## Article Information

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## Use it or lose it: Claimants must respond quickly if liquidated damages are levied against them

**The Victorian Building and Construction Industry Security of Payment Act 2002 (the Act) contains a unique regime whereby ‘excluded amounts’ cannot be taken into account when calculating the amount of a progress payment which a person is entitled to under a construction contract.**

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This regime was introduced to facilitate the fundamental purpose of the Act – keeping money flowing through construction projects by dealing with complex disputes at a later date. In *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd* [2011] VSC 183 the court found that liquidated damages levied by a principal in a payment schedule were an excluded amount. Seven years later, the decision has been considered and further clarified in *Shape Australia v The Nuance Group* [2018] VSC 808. Partner, Tim Coleman and Law Graduate, Emer Sheridan analyse the implications of these decisions for both claimants and respondents.

### **Liquidated damages are an excluded amount and cannot be set-off in a payment schedule**

In *Seabay Properties Pty Ltd v Galvin Construction Pty Ltd & Anor*,<sup>[1]</sup> the respondent issued a payment schedule of \$nil to the claimant as it asserted that it was entitled to set-off liquidated damages against the claimed amount.<sup>[2]</sup> The matter was subsequently brought to adjudication and the adjudicator found that the liquidated damages deducted by the respondent were an excluded amount under s 10B of the Act.<sup>[3]</sup> The respondent challenged the adjudicator’s finding in the Supreme Court of Victoria.

Justice Vickery affirmed that, under the Act, respondents must “pay now and argue later”.<sup>[4]</sup> As such, his Honour rejected a contention that the ‘excluded amounts’ regime can only apply to a payment claim. In order for the objects of the Act to be fulfilled, ‘excluded amounts’ must be properly interpreted as encompassing set-offs and counterclaims by the respondent.<sup>[5]</sup> Otherwise, his Honour states, ‘the operation of the Act ... could be seriously compromised’.<sup>[6]</sup> Furthermore, the narrow statutory powers and time-frames within which an adjudicator must act are incompatible with an ability to determine complex counterclaims which may be brought by a respondent.<sup>[7]</sup>

It is these policy considerations, according to Justice Vickery, which ‘override all of the textual arguments advanced by Seabay which point in the opposite direction’.<sup>[8]</sup>

Therefore, Justice Vickery found that a set-off of liquidated damages in a payment schedule is an excluded amount and must not be taken into account by an adjudicator. The decision has meant that, in Victoria, respondents must pay the amounts which are claimed regardless of the fact that they may be entitled to liquidated damages under the contract.

### **Further guidance: *Shape Australia Pty Ltd v The Nuance Group (Australia) Pty Ltd***

The correct application of *Seabay* was most recently considered by Digby J in *Shape Australia Pty Ltd v The Nuance Group (Australia) Pty Ltd*.<sup>[9]</sup> In this case, the claimant challenged a finding by the adjudicator that the payment claim was an attempt to recoup the respondent’s asserted contractual entitlement to liquidated damages and so was an excluded amount under the Act and could not be considered.<sup>[10]</sup>

Justice Digby reviewed the adjudicator’s findings and agreed that when the individual items of work in the payment claim

were 'adjusted and reconciled' the amount of the payment claim equated to the amount of the respondent's asserted entitlement to liquidated damages.<sup>[11]</sup> As no new work had been performed and all the other items in the payment claim had been paid for, his Honour found that 'in all probability' the nature of the claim was, in reality, to recoup the respondent's asserted entitlement to liquidated damages.<sup>[12]</sup> Therefore, it was found that the adjudicator correctly determined that the amounts in the payment claim should be treated as excluded amounts.

In its previous adjudication submissions the respondent noted that the liquidated damages had been set-off against several successive payment claims. It further noted that the claimant had not challenged any of these deductions except outside of the presently disputed payment claim.<sup>[13]</sup> It appears then, from this judgment, that if claimants wish to dispute the levying of liquidated damages, they should do so through an adjudication of the first payment claim in which they are levied. Once this opportunity has passed, and the deductions have gone unchallenged, they form part of the contract sum. Any attempt to claw back such deductions cannot be subsequently considered by an adjudicator, as the claim could thereafter not be characterised as challenging the levying of an excluded amount but as recouping an excluded amount.

### **Conclusion**

As set out in *Seabay*, liquidated damages are an excluded amount and cannot be set-off in a payment schedule against the claimed amount. The decision in *Shape Australia* has further found that a claimant cannot seek to recoup an entitlement to liquidated damages on a reconciliation basis where the items in the payment claim have already been paid for.

As such, claimants must challenge the levying of liquidated damages in the first instance. Once the liquidated damages have gone unchallenged any further attempt to recoup them in subsequent payment claims will be regarded as a claim for an excluded amount.

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<sup>[1]</sup> [2011] VSC 183.

<sup>[2]</sup> Ibid at [18].

<sup>[3]</sup> Ibid at [25].

<sup>[4]</sup> Ibid at [121]

<sup>[5]</sup> Ibid at [122].

<sup>[6]</sup> Ibid at [122].

<sup>[7]</sup> Ibid at [123]

<sup>[8]</sup> Ibid at [124].

<sup>[9]</sup> [2018] VSC 808.

<sup>[10]</sup> Ibid at [63].

<sup>[11]</sup> Ibid at [83].

<sup>[12]</sup> Ibid at [83].

<sup>[13]</sup> Ibid at [78].