

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

Not Restricted

S ECI 2021 03457

LAL LAL WIND FARMS NOM CO PTY LTD (ACN 625 768 774)
AS AGENT FOR THE LAL LAL WIND FARMS PARTNERSHIP

Plaintiff

v

VESTAS – AUSTRALIAN WIND TECHNOLOGY PTY LTD
(ACN 089 653 878)

First Defendant

and

MAX TONKIN

Second Defendant

<u>JUDGE:</u>	Stynes J
<u>WHERE HELD:</u>	Melbourne
<u>DATE OF HEARING:</u>	8 November 2021
<u>DATE OF JUDGMENT:</u>	6 December 2021
<u>CASE MAY BE CITED AS:</u>	Lal Lal Wind Farms Nom Co Pty Ltd v Vestas – Australian Wind Technology Pty Ltd
<u>MEDIUM NEUTRAL CITATION:</u>	[2021] VSC 807

ADMINISTRATIVE LAW – Judicial review – Adjudication conducted under Part 3 Division 2 of the Act – Certiorari sought in relation to an adjudication determination – Whether it was agreed that the consideration payable under the contract is calculated otherwise than by reference to the value of the related goods and services supplied – Whether a reference date arose in respect of a payment claim – *Building and Construction Industry Security of Payment Act 2002* (Vic) ss 7(2)(c), 9, 10, 11, 12, 13 and 48, applied – *Biseja Pty Ltd v NSI Group Pty Ltd* [2006] NSWSC 835, applied – *Brian Leigh Smith v Coastivity Pty Ltd* [2008] NSWSC 313, distinguished – *Castle Constructions Pty Ltd v Ghossayn Group Pty Ltd* [2017] NSWSC 1317, applied – *Edelbrand Pty Ltd v HM Australia Holdings Pty Ltd* [2012] NSWCA 31, applied – *Maxcon Constructions Pty Ltd v Vadasz* (2018) 264 CLR 46, applied – *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, applied – *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266, applied – *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* (2016) 260 CLR 340, applied.

APPEARANCES:

Counsel

Solicitors

For the Plaintiff

David Batt QC with
Brian Mason

Herbert Smith Freehills

For the First Defendant

Nicholas Pane QC with
Fiona Cameron

Pinsent Masons

HER HONOUR:

A Introduction

1 The plaintiff (**Principal**) seeks to have the adjudication determination made by the second defendant (**Adjudicator**) on 17 September 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 issues that arise for determination are:

- (a) issue 1 – whether s 7(2)(c) prevents the application of the SOP Act to the relevant construction contract because it is agreed that the consideration payable for the services supplied under the contract is to be calculated otherwise than by reference to the value of the services; and
- (b) issue 2 – whether a reference date has arisen under s 9(2)(b) in respect of the payment claim the subject of this proceeding.

3 For the reasons that follow:

- (a) the SOP Act does apply to the relevant construction contract (ie the O&M Agreement) and is not excluded by operation of s 7(2)(c); and
- (b) a reference date has arisen under s 9(2)(b) in respect of the payment claim the subject of this proceeding.

B Contractual relationships

B.1 EPC Contract

4 On 27 April 2018, Lal Lal Wind Farms Asset Co Pty Ltd, as trustee for the Lal Lal Wind Farms Asset Trust (**Asset Co**) (as the principal) and the first defendant (**Vestas**) and Zenviron Pty Ltd (together referred to as the Contractor) entered into a contract for the engineering, procurement and construction of the wind

generation facility consisting of 60 wind turbine generators (**WTGs**) at the Lal Lal Wind Farm sites at Elaine and Yendon in Victoria (**Facility**), and certain related works and services (**EPC Contract**).

5 On around 15 June 2018, a deed of novation was entered into by parties, including the Principal and Vestas in respect of the EPC Contract, by which the Principal replaced Asset Co under the EPC Contract.

B.2 O&M Agreement

6 On around 27 April 2018, Asset Co and Vestas entered into a contract for the operation and maintenance of the Facility (**O&M Agreement**).

7 On around 15 June 2018, Asset Co, IRCP Lal Lal Wind Farms Pty Ltd, Northleaf Lal Lal (Australia) Pty Ltd as trustee for the Northleaf Lal Lal (Australia) Trust, the Principal and Vestas entered into a deed of novation in respect of the O&M Agreement (**Novation Deed**).

8 By cls 4.1(a) and 4.2 of the Novation Deed, the Principal replaced Asset Co under the O&M Agreement, and assumed all rights and obligations of Asset Co under the O&M Agreement.

C Payment Claim and Adjudication Determination

9 On 28 July 2021, Vestas served a payment claim on the Principal under the O&M Agreement (**Payment Claim**). By the Payment Claim, Vestas claimed \$6,313,734.49 (inclusive of GST) for works and services performed in respect of the period 27 May 2019 to 1 May 2021.

10 The Payment Claim indicated the claim was for:

- (a) 'O&M Services' in the amount of \$5,736,353.56 (exclusive of GST); and
- (b) 'Additional Services' carried out under Service Order 57955586 in the amount of \$3,405.07 (exclusive of GST).

- 11 The Payment Claim was endorsed as a payment claim for the purpose of the SOP Act.
- 12 On 11 August 2021, in response to the Payment Claim, the Principal served on Vestas a payment schedule under the O&M Agreement certifying the amount payable as nil (**Payment Schedule**).
- 13 The Payment Schedule set out the Principal's view that the O&M Agreement is excluded from the operation of the SOP Act by virtue of s 7(2)(c).
- 14 The Payment Claim was the subject of an adjudication under the SOP Act.
- 15 On 17 September, the Adjudicator issued the Adjudication Determination. The Adjudicator determined the amount payable to Vestas was \$6,303,933.45 (inclusive of GST).

D Issue 1 – Does s 7(2)(c) operate to preclude the application of the SOP Act to the O&M Agreement?

D.1 The SOP Act

- 16 Section 7(2) of the SOP Act provides instances when the legislation does not apply to a construction contract. Relevantly, sub-s (2)(c) states that:
- (2) This Act does not apply to –
 - ...
 - (c) a construction contract under which it is agreed that the consideration payable for construction work carried out under the contract, or for related goods and services supplied under the contract, is to be calculated otherwise than by reference to the value of the work carried out or the value of the goods and services supplied.
- 17 Section 11 of the SOP Act provides how construction work and related goods and services are to be valued. Relevantly, sub-s (2) states that:
- (2) Related goods and services supplied or undertaken to be supplied under a construction contract are to be valued –
 - (a) in accordance with the terms of the contract; or

- (b) if the contract makes no express provision with respect to the matter, having regard to—
 - (i) the contract price for the goods and services; and
 - (ii) any other rates or prices set out in the contract; and
 - (iii) if there is a claimable variation, any amount by which the contract price or other rate or price set out in the contract, is to be adjusted as a result of the variation; and
 - (iv) if any goods are defective, the estimated cost of rectifying the defect.

18 It is common ground that:

- (a) the O&M Agreement is a construction contract;
- (b) the services to be provided by Vestas under the O&M Agreement (**Services**) are related goods and services for the purpose of the SOP Act; and
- (c) clause 11.1(c) with Schedule 2 of the O&M Agreement provide for the calculation of the consideration payable for the Services.

D.2 Clause 11.1(c) and Schedule 2 of the O&M Agreement and the relevant definitions

19 Relevantly, cl 11.1(c) provides:

Within 5 business days after the last day of each quarter of each Operational Year during the Interim Services (Phase 1) Period and the Term, the O&M Provider is entitled to submit to the Principal a valid tax invoice which states the portion of the Interim Fees or O&M Fees (as applicable) payable by the Principal as set out in Schedule 2.

20 Interim Services (Phase 1) Period is defined as:

the period commencing on the date on which the reliability test run reaches 168 hours in respect of the first WTG and ending on the earlier of the Practical Completion Date — Elaine or Practical Completion Date — Yendon.

21 Operational Year is defined as:

each twelve Month period of the Term, the first such period commencing on the Commencement Date, and each subsequent period commencing upon each successive anniversary of the Commencement Date during the Term.

22 Commencement Date is defined as:

the date that is the earlier of the Practical Completion Date – Elaine or Practical Completion Date – Yendon.

23 Term is defined in cl 4.1 as:

The period for performance of the O&M Services:

- (a) commences on the Commencement Date; and
- (b) expires on the 30th anniversary of the Commencement Date, unless terminated earlier in accordance with clauses 19.5 or 30 or reduced in accordance with clause 4.2 (**Term**).

24 Schedule 2 provides that the Interim Fees are to be calculated in accordance with the following formula and payable in arrears in accordance with cl 11.1:

Interim Fees = the actual number of MWh produced by the Facility during the Interim Services (Phase 1 Period) measured at the Fiscal Meter x \$7.59/MWh.

25 The O&M Fees are defined as the Variable Fees and the Fixed Fees, being the aggregate price payable by the Principal to the O&M Provider for the performance of the Services as set out in Schedule 2 during the Term.

26 Part A of Schedule 2 describes Fixed Fees as follows:

The Fixed Fees are the fees calculated in accordance with the following formula, payable in advance in accordance with clause 11.1 of this Agreement:

$$\text{Fixed Fees} = \text{VFF} \times \text{P50} \times 0.6$$

27 VFF is the Variable Fee Factor and is set out in Annexure A to Schedule 2 as follows:

	1-5 yr	6-10 yr	11-15 yr	16-20 yr	21-25 yr	26-30 yr
Pricing (\$/MWh), measured at the Fiscal Meter	\$5.52	\$6.20	\$7.28	\$8.06	\$8.82	\$9.67

28 P50 is a fixed figure and is defined as equal to 704,200 MWh per annum.

29 Senior counsel for Vestas explained that P50 represents an estimate of the number of megawatt hours which will be generated by the turbines per annum.¹ That is, of the scenarios modelled, 50% of the estimates exceed the P50 estimate and 50% of the estimates are less than the P50 estimate. P50 is therefore considered to be a good middle estimate. Counsel for the Principal did not take issue with this explanation.

30 Part B of Schedule 2 describes the Variable Fees as follows:

The Variable Fees are the fees calculated in accordance with the following formula, payable in arrears in accordance with clause 11.1 of this Agreement:

Variable Fees = the amount equal to the difference of:

- the output obtained by multiplying the actual number of MWh produced by the Facility during the immediately preceding Operating Quarter measured at the Fiscal Meter by the VFF; *less*
- the quarterly instalment of the Fixed Fee in respect of the relevant Operating Quarter provided that under no circumstances shall the Variable Fee payable in any Operating Quarter be less than zero (\$0).

(the **Variable Fees**).

31 Further, Schedule 2 states:

For the avoidance of doubt, the O&M Provider shall always be entitled to be paid the Fixed Fee instalment in full for each quarter during the Term regardless of the actual number of MWh produced at the Fiscal Meter during the Term.

32 In short:

- (a) there are three components of the consideration that may be invoiced under cl 11.1(c) of the O&M Agreement:
 - (i) the Interim Fees which are variable and calculated by reference to output of electricity generated; and
 - (ii) the O&M Fees comprising:

¹ Transcript of Proceedings, *Lal Lal Wind Farms Nom Co Pty Ltd v Vestas – Australian Wind Technology Pty Ltd* (Supreme Court of Victoria, Stynes J, 8 November 2021) 81.2–82.12 (**Transcript**).

- (1) the Variable Fees which are calculated by reference to output of electricity generated; and
 - (2) the Fixed Fees;
- (b) the Fixed Fees component is dependent on fixed integers and could be calculated at the time the O&M Agreement was entered into. For example, for each of the first five years of the Term, Vestas is entitled to \$2,332,310 for the Fixed Fee element and for each of the next five years Vestas is entitled to \$2,619,624; and
- (c) the Fixed Fees component provides a minimum payment during the 30-year Term.

D.3 Adjudication Determination

- 33 Vestas submitted to the Adjudicator that the consideration payable for the Services under the O&M Agreement, including the Interim Fees, are calculated by reference to the value of work carried out. On that basis, it argued the O&M Agreement is not a contract that is excluded under s 7(2)(c) of the SOP Act. It relied on the statutory declaration of Ms Kulawiec (which I have addressed in more detail below) to establish a nexus between the consideration payable under the O&M Agreement and the value of the Services.
- 34 The Principal's primary submission was that the O&M Agreement provides that the Interim Fees are calculated pursuant to a formula, and that the formula has no relationship with the value of the Services. Therefore, it argued the Payment Claim which claims the Interim Fees does not constitute a valid payment claim under the SOP Act.
- 35 The Adjudicator determined that the SOP Act applied to the O&M Agreement and that s 7(2)(c) did not operate to exclude it. In reaching his decision he referred to and relied on the statutory declaration of Ms Kulawiec.

D.4 The parties' submissions

36 The Principal submits, in summary, that:

- (a) the consideration payable for the Services is calculated otherwise than by reference to the value of the Services because it is expressed to be calculated by reference to the output of the facility in megawatt hours;²
- (b) this form of remuneration incentivises Vestas to provide the Services in a way which maximises the electricity generated and enables the parties to share the proceeds realised from the Facility's operation and maintenance;
- (c) sharing the proceeds from the generation of electricity is inconsistent with the concept of 'value', or valuation, as used in the relevant provisions of the SOP Act;
- (d) the Services vary from time to time and there is a disconnect between the price to be invoiced for each quarter and the Services to be provided;
- (e) there is nothing to suggest that the Services have been thoroughly predicted and costed before the parties entered into the O&M Agreement,

and therefore s 7(2)(c) of the SOP Act operates to exclude the O&M Agreement.

37 Vestas submits, in summary, that:

- (a) relying on the decision of *Edelbrand Pty Ltd v HM Australia Holdings Pty Ltd*,³ s 7(2)(c) of the SOP Act only applies to exclude contracts where neither of the mechanisms for valuation of the construction work or related goods and services set out in sub-ss 11(1) and (2) can have application. That is, if the Services are capable of valuation in accordance with the terms of the O&M Agreement, then s 7(2)(c) has no operation;

² Ibid 12, 20.30–21.21, 27.

³ [2012] NSWCA 31 (Bathurst CJ, McColl JA and Tobias AJA).

- (b) clause 11.1(c) with Schedule 2 of the O&M Agreement provides a comprehensive mechanism for valuation of the Services;
- (c) relying on the statutory declaration of Ms Kulawiec, the Interim Fees formula was developed having regard to value of the Services;
- (d) while the scope of the Services may vary, they include both regular scheduled tasks, unscheduled maintenance and monthly reporting obligations so that, in the case of the Interim Services (Phase 1) Period, prolongation of the period in which those services are to be provided (and thus an increase in the amount of services to be provided) will be reflected in a greater period of generation and thus an increased Interim Fee;
- (e) the Principal's submission that the Interim Fees formula does not reflect the value of the Services is premised upon an unduly narrow conception of value which is not supported by the text of the SOP Act nor the O&M Agreement. A fee calculated by reference to output can be a fee determined by reference to value – those concepts are not mutually exclusive. The calculation of a fee by reference to output allows for averaging pricing, thereby avoiding the task of individually assessing the many tasks required to be performed over a 30-year period. Further it allows for the smoothing out of the costs of services in line with the measurable progress of the work in line with the earning of income; and
- (f) taken together the components of the consideration provided for in cl 11.1(c) point strongly towards the objective intention of the parties to compensate Vestas for the cost of providing the Services averaged over the Interim Services Period and then the Term of 30 years.

D.5 Is the statutory declaration of Ms Kulawiec relevant to this proceeding?

38 Vestas relies on the statutory declaration of Ms Kulawiec affirmed on 25 August 2021 in support of its submission that the Interim Fees formula was developed

having regard to the value of the Services.⁴

39 By that statutory declaration, Ms Kulawiec describes how, from the perspective of Vestas, the Interim Fees formula was developed. Specifically she declared that:

- (a) she was involved in the development of the cost base and pricing for the provision of Services by Vestas under the O&M Agreement over a 30-year period;
- (b) the Interim Fees formula was developed with reference to and constituted by the following key elements:
 - (i) the forecasted costs of providing the Services on a per WTG basis. With respect to these costs she described the nature of the costs anticipated to be incurred and asserted they were used to calculate an annual cost per WTG;
 - (ii) Vestas' margin;
 - (iii) the expected annual generation of the Facility; and
 - (iv) the Variable Fee Factor, which is a factor in the calculation of consideration under the O&M Agreement;
- (c) the price per MWh increases over the Term of the O&M Agreement to represent the increase in Services as the failure rates increase with the age of the WTGs; and
- (d) the anticipated costs of the services to be provided by Vestas were a key component in setting and calculating the Interim Fees formula.

40 The Principal objects to the reliance by Vestas on that evidence submitting that:⁵

⁴ Statutory declaration of Inna Kulawiec dated 25 October 2021 at 1349 of the Court Book.

⁵ David Batt QC and Brian Mason, 'Plaintiff's Outline of Submission', Submission in *Lal Lal Wind Farms Nom Co Pty Ltd v Vestas – Australian Wind Technology Pty Ltd*, S ECI 2021 03457, 8 October 2021, 4 [16]–[17].

There is no ambiguity in the O&M Agreement's relevant terms. Nor is extrinsic evidence required to ascertain the commercial purpose or objects the O&M Agreement was intended to secure. They can readily be ascertained from its express terms. Nor is there anything to suggest that Ms Kulawiec's evidence is relevant to the O&M Agreement's proper construction because it addresses events, circumstance or things known to both parties, or that the underlying facts are notorious such that knowledge of them can be presumed. ... at best Ms Kulawiec's statutory declaration is merely a reconstruction of Vestas' calculations, and evidence of Vestas' subjective intentions or expectations; that is the remuneration would see Vestas stand to earn a profit over the O&M Agreement's term.

- 41 In response Vestas submits that Ms Kulawiec's evidence is relevant to demonstrating (for the purpose of meeting the terms of the SOP Act) the nexus between the value of the O&M Services and the payment mechanisms under the O&M Agreement. Vestas does not seek to rely on it for the purpose of construing or interpreting the O&M Agreement which it agrees is unambiguous.⁶ As submitted by Vestas' senior counsel:⁷

We are not suggesting that's relevant to how you interpret [s] 7(2)(c) but when Your Honour needs to make a factual finding about whether or not the fee is referable to the value of the services in our submission Your Honour is entitled to take into account the evidence of the witness.

- 42 Whether or not it is agreed that the consideration payable for the Services under the O&M Agreement is to be calculated otherwise than by reference to the value of the Services supplied depends on the proper construction of the O&M Agreement. The statutory declaration is irrelevant to the proper construction of cl 11.1(c) which both parties agree is unambiguous in its terms. For that reason I do not consider the evidence of Ms Kulawiec to be relevant and I have not had regard to it in relation to my determination of this proceeding.

D.6 The relevant case law

- 43 In relation to the construction and application of s 7(2)(c) of the SOP Act, I have been referred to and assisted by the following authorities:

⁶ Nicholas Pane QC and Fiona Cameron, 'First Defendant's Outline of Submission', Submission in *Lal Lal Wind Farms Nom Co Pty Ltd v Vestas – Australian Wind Technology Pty Ltd*, S ECI 2021 03457, 25 October 2021, 4 [13].

⁷ Transcript (n 1) 143.

- (a) *Biseja Pty Ltd v NSI Group Pty Ltd (Biseja)*;⁸
- (b) *Brian Leigh Smith v Coastivity Pty Ltd (Coastivity)*;⁹ and
- (c) *Edelbrand Pty Ltd v HM Australia Holdings Pty Ltd (Edelbrand)*.¹⁰

D.6.1 *Biseja*

44 NSI, a builder, agreed with Biseja, a property developer, to perform building work at cost and agreed separately to provide project management services for a fee of 10% of the cost of the building works. It was further agreed that the project management fee could be satisfied by the transfer of three units in the completed development.

45 The parties fell into dispute and NSI claimed for payment of the project management fee. NSI's claim was a payment claim for the purpose of the NSW security of payment legislation and it was referred to adjudication.

46 An issue that arose for determination by McDougall J was whether or not the agreement for the provision of project management services was a construction contract for the purpose of the NSW Act and whether it was excluded by operation of s 7(2)(c) of that Act.

47 McDougall J relevantly held that the three units were not the quantification of the fee but rather the discharge of a contractual obligation. The adjudicator was therefore correct in concluding that the agreement for the provision of project management services was not caught by s 7(2)(c) of the NSW Act. Specifically, McDougall J found that the parties agreed that the value of those project management services was 10% of the cost of the building works and it did not matter that this value could be paid in a particular way.

D.6.2 *Coastivity*

⁸ [2006] NSWSC 835 (McDougall J).

⁹ [2008] NSWSC 313 (McDougall J).

¹⁰ [2012] NSWCA 31 (Bathurst CJ, McColl JA and Tobias AJA).

48 The parties agreed to develop land at Tweed Heads, NSW. The project comprised the construction of six residential units. The owners agreed to contribute the land and Coastivity its skills as a developer. Profits or losses from the venture were to be shared in agreed proportions. The agreement was terminated and Coastivity sought payment for services provided by it prior to termination under the NSW security of payment regime.

49 McDougall J considered whether the contract was excluded by s 7(2)(c).¹¹ For the following reasons his Honour concluded that the consideration payable to Coastivity for any services was consideration calculated otherwise than by reference to the value of those services:¹²

Some indication of what the legislature had in mind when it referred to the concept of value is to be found in s10: specifically, as to related goods and services, in ss(2). Section 10 makes reference to the kinds of matters that one would ordinarily expect to be considered in valuing construction work (ss(1)) or related goods and services (ss(2)). Although s7 appears in Part 1 of the Act and s10 appears in Part 2, there is no reason to think that the legislature intended that value, for the purposes of s7, should be anything different to the concept of value described in s10. Section 10, after all, states how construction work and related goods and services are to be valued; and the value of construction work or related goods and services is one of the referents in s7(2)(c).

There are other problems confronting this part of Coastivity's submissions. The first is that it is necessary, for the purposes of those submissions, that the profit share mechanism is to be regarded as the contractual method for valuing (in this case) related goods and services supplied by Coastivity under the deed. In other words, for the purposes of s10(2)(a), the profit share arrangement constitutes "the terms of the contract" that provide how related goods and services are to be valued. Plainly enough, that process of valuation can only be conducted once the project has been brought to completion and final accounts can be taken. But if the deed is a construction contract, Coastivity would be entitled to progress payments on a monthly basis (s8(2)(b)). (Mr Scruby did not submit that this was a contract providing for only one reference date - namely, at the completion of the project and the taking of accounts. If I may say so, he was wise not to do so, since it would mean that the payment claim was hopelessly premature.)

Mr Scruby sought to counter this problem by saying that monthly progress

¹¹ McDougall J's comments in this case regarding the operation of s 7(2)(c) were obiter, his Honour having already concluded that the Act did not apply to the relevant contract because Coastivity did not undertake to carry out construction work or to supply related goods and services for another party.

¹² *Coastivity* (n 9), [59]-[64].

payments could be valued in accordance with s10(2)(b). But it is difficult to reconcile that with the proposition that it is necessarily inherent in his primary submission: namely, as I have said, that the profit share mechanism provides the contractual method for determination of the value of the services supplied by Coastivity.

I accept that the words “by reference to” are capable of indicating a broad relationship between the concepts, or things, that they connect. That is the point of the authorities upon which Mr Scruby relied. To my mind, the fact that those authorities deal with radically different statutory context does not necessarily invalidate the point, although it would be necessary to look at the particular context to see, as a matter of construction, whether a broad or a narrow concept of connectivity is imported by those words in a particular case. But that does not resolve the problem, which is that in my view the notion of an entitlement to share in profit is fundamentally inconsistent with the concept of value, or valuation, as it is used in the relevant sections of the Act.

Another problem is, as Mr Jennings submitted, that if the contractual mechanism for profit share is to be taken as defining the value of the services supplied by Coastivity, then those services will not necessarily have a positive value. If the project were carried through to completion and returned a loss, Coastivity would be obliged to bear 30% of the loss. On Mr Scruby’s argument, the value of its services would be whatever negative amount was returned by carrying out this calculation.

I accept that the value of services may be fixed by reference to matters that do not fall strictly within s10(2)(b). Thus, in *Biseja v NSI Group* [2006] NSWSC 835, I held that a formula which valued project management services (agreed by the parties in that case to be related services) at a percentage of total construction costs did not attract the operation of s7 (2)(c). But although the determination of the value of those services in that case would always depend on a prior determination of the value of the construction work carried out, that value could be determined from month to month (by looking at the value of construction work performed in the month in question) and would always be a positive figure. That is a long way removed from the facts of this case.

D.6.3 *Edelbrand*

50 The parties had entered into an agreement in respect of a factory development in NSW. Under that agreement the appellant agreed to provide project management services in return for a fixed fee of \$130,000 (exclusive of GST) plus a bonus payment.

51 The bonus payment was to be calculated by reference to a target budget of \$3,450,000 (exclusive of GST). If the project was delivered for an amount lower than the target budget the saving was to be shared on a 50-50 basis between the

parties.

52 The primary judge concluded the agreement was not a construction contract as the services were not architectural services in relation to construction work. Further his Honour found that if it was a construction contract it would not be excluded by s 7(2)(c) of the NSW Act.

53 The first issue on appeal was whether or not the agreement was a construction contract. The second issue on appeal was whether the contract was excluded from the operation of the NSW Act by s 7(2)(c).

54 Bathurst CJ (with whom McColl JA and Tobias AJA agreed) observed that the legislation in question is remedial and should therefore be given a liberal interpretation, within the confines of the actual language employed and what is fairly open on the words used.¹³

55 In relation to the application of s 7(2)(c), Bathurst CJ reasoned:¹⁴

In my opinion s 7(2)(c) does not apply to the agreement. This is because the consideration is calculated by reference to the value of the services supplied.

Section 10(2) of the Act provides that related goods and services are to be valued in accordance with the terms of the contract or, if there is no express provision, in accordance with the mechanisms set out in s 10(2)(b). This provision appears in Pt 2 of the Act which deals with the rights to progress payments. Section 7(2)(c) applies to exclude contracts where that mechanism cannot have application; that is where the consideration cannot be determined by reference to the terms of the contract or the mechanisms in s 10(2)(b).

In the present case the agreement provided for a fixed payment of \$130,000. That payment was payable by six instalments of \$21,666.67 at the time set out in steps 1, 5, 6, 9, 10 and 11. The relevant reference date for those payments are the events specified in each of those steps. The amount payable is the amount calculated in accordance with the terms of the contract (see s 9(a)). For the purpose of s 7(2)(c) these amounts are not calculated other than by reference to the value of the services supplied as they are calculated in accordance with the contract price consistent with s 10(2)(b)(i).

Step 12 of the agreement provides that the bonus payment is payable within

¹³ *Edelbrand* (n 3) [30] (Bathurst CJ), citing *Khoury v Government Insurance Office (NSW)* (1984) 165 CLR 622, 638 (Mason, Brennan, Deane and Dawson JJ).

¹⁴ *Edelbrand* (n 3) [46]–[51] (Bathurst CJ).

seven days of an invoice after direct reconciliation following occupation and/or building completion. Thus, the reference date for the payment of the bonus can be ascertained in accordance with s 8(2)(a) of the Act.

Further, the bonus amount is calculated in accordance with the terms of the contract consistently with s 9(a). For the purposes of s 7(2)(c) and s 10(2)(a), the contract provides how the amount is to be valued, namely 50 percent of savings below at targeted budget.

Accordingly, s 7(2)(c) does not apply. As I have pointed out, the date of any payment due and its value can be determined in accordance with the contract as required by the Act. It is immaterial in my view that the amount of the bonus payment cannot be calculated until completion of the contract. What is of importance is that the contract provided the mechanism for its calculation at the reference date provided for by s 8(2)(a). The fact that no bonus may be payable when the reconciliation is done is immaterial. The contractor retains \$130,000 which has been paid. It simply does not get a bonus.

56 It was submitted by Vestas that paragraph [47] of *Edelbrand* should not be understood to establish or support that s 7(2)(c) of the SOP Act cannot be engaged merely because the consideration can be determined with reference to the contract's terms or because other arrangements apply by reason of s 11(2)(b). It was submitted that any such construction cannot be reconciled with the language used in s 7(2)(c) which looks to how the related goods and services are to be valued, and not to whether a mechanism exists to determine that value. It was submitted that paragraph [47] of *Edelbrand* must be considered in light of the analysis preceding that paragraph which quotes from *Coastivity*.¹⁵

57 McDougall J in *Coastivity* accepted that s 10 of the NSW Act (equivalent to s 11 of the SOP Act) provided some indication of what the legislature had in mind when it referred to the concept of value but did not state that those matters were determinative of value.¹⁶ Further his Honour found that s 7(2)(c) of the NSW Act was engaged, notwithstanding that the relevant contract included a mechanism for the calculation of consideration.

58 I agree that read in the context of the whole analysis, specifically the references made to *Coastivity* without criticism and the nature of the consideration being

¹⁵ Ibid [41] (Bathurst CJ), quoting *Coastivity* (n 9) [59]–[64] (McDougall J).

¹⁶ [2008] NSWSC 313, [59].

considered by the Court of Appeal in *Edelbrand*, it seems unlikely that *Edelbrand* stands for the proposition that the mere existence of a mechanism for the calculation of the consideration payable would have the effect of excluding the operation of s 7(2)(c). Such a proposition does not sit comfortably with the text of s 7(2)(c) which assumes that an agreement has been reached about how the consideration payable is to be calculated but still requires a determination of whether the calculation is 'otherwise than by reference to' value.

59 In any event, as set out in my analysis below, my determination of this matter does not rely on the existence of cl 11.1(c) of the O&M Agreement alone. It primarily relies on my analysis of whether the consideration payable is to be calculated otherwise than by reference to the value of the Services to be supplied.

D.6.4 *The applicable legal principles derived from these cases*

60 The relevant principles that can be derived from these cases can be summarised as follows:

- (a) there is no reason to think that the legislature intended that value, for the purposes of s 7(2)(c), should be anything different to the concept of value described in s 11, although the value of services may be fixed by reference to matters that do not fall strictly within s 11(2)(b);
- (b) the phrase 'by reference to', as it appears in s 7(2)(c), is capable of indicating a broad relationship between the concepts or things that it connects;
- (c) the notion of an entitlement to share in profit is fundamentally inconsistent with the concept of value, or valuation, as it is used in the relevant sections of the SOP Act;
- (d) a mechanism that may result in a negative amount is inconsistent with the concept of value; and
- (e) the SOP Act is remedial and should therefore be given a liberal

interpretation within the confines of the actual language employed and what is fairly open on the words used.

61 Further, I note that the onus of proof lies on the party seeking to rely on s 7(2)(c) to
62 exclude the SOP Act from applying, in this case the Principal.¹⁷

D.7 Analysis

62 I am required to determine whether, on the proper construction of the O&M Agreement, it is agreed that the consideration payable for the Services is to be calculated otherwise than by reference to the value of the Services supplied. If so, then the SOP Act does not apply to the O&M Agreement and the Adjudication Determination should be quashed.

63 The O&M Agreement is to be construed objectively, by reference to its text, context and purpose.¹⁸ In determining the meaning of the terms of a commercial contract, it is necessary to ask what a reasonable business person would have understood those terms to mean. That inquiry requires consideration of the language used by the parties in the contract, the circumstances addressed by the contract and the commercial purpose or objects to be secured by the contract.¹⁹

64 The O&M Agreement provides a detailed mechanism for the calculation of the consideration payable for the Services supplied. To determine whether it is agreed that the consideration is to be calculated otherwise than by reference to the value of the Services supplied, I am required to assess the consideration as a whole. There is nothing in the text of s 7(2)(c) of the SOP Act to suggest otherwise.

65 The Principal relies primarily on the text of the O&M Agreement to submit that s 7(2)(c) is engaged, specifically the fact that part of the consideration (the Interim Fees and Variable Fees), is expressed to be calculated by reference to output. The

¹⁷ *Walter Construction Group Ltd v CPL (Surry Hills) Pty Ltd* [2003] NSWSC 266, [76] (Nicholas J).

¹⁸ *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104, 116 [46] (French CJ, Nettle and Gordon JJ)

¹⁹ *Ibid* [47].

Principal would have me infer that consideration expressed to be calculated by reference to output cannot also be calculated by reference to value. I do not agree. Bearing in mind that the SOP Act is to be beneficially interpreted and that the phrase 'by reference to' is capable of indicating a broad relationship between the concepts or things it connects, there is no basis to suggest that just because consideration is expressed to be calculated by reference to output it cannot also be calculated by reference to value. Value and output are not mutually exclusive concepts particularly in circumstances like those before me where the parties were in possession of estimates of output at the time they entered into the O&M Agreement,²⁰ and therefore capable of assessing the value of the proposed consideration against the value of the Services to be provided.

66 In circumstances where consideration payable under a construction contract between commercial parties at arm's length is solely referable to the work to be performed or the goods and services to be supplied under that contract, the normal inference would be that the consideration payable is calculated by reference to the estimated value of the work to be done or goods and services to be provided.

67 I find no reason to depart from the normal inference in this case. The consideration payable under cl 11.1(c) and Schedule 2 was referable only to the Services (as specified in detail in Schedule 1 to the O&M Agreement). It was the price for the Services agreed between sophisticated commercial parties at arm's length.

68 Estimation of value (even with the benefit of a detailed specification) is not an exact science and often has to allow for uncertainties. Therefore, and contrary to the submissions of the Principal, I do not accept that the variability in the Services to be provided in any one quarter or the uncertainty around some elements of the Services to be provided (eg unscheduled maintenance) operate to disrupt the normal inference.

²⁰ The estimates are evidenced by the existence of the P50 figure referred to in Schedule 2 of the O&M Agreement.

69 This was not a profit sharing arrangement. This was not an arrangement whereby
proceeds from the generation of electricity were to be shared between the parties.
The purpose of cl 11.1(c) and Schedule 2 was to remunerate Vestas for the
provision of the Services. This case is readily distinguishable from *Coastivity*.

70 There was no evidence of any other matter that might operate to disrupt the
normal inference.

71 In my view the O&M Agreement, properly construed having regard to its text,
purpose and context, reveals an objective intention of the parties to account for the
value of the Services over the term of the O&M Agreement and that is how a
reasonable business person would have understood the consideration payable.

72 Therefore, I am not satisfied on the evidence before me that the consideration
payable for the Services supplied is to be calculated otherwise than by reference to
the value of the Services.

E Issue 2 – Does a reference date arise under s 9(2)(b) of the SOP Act?

73 The issue to be determined is whether a reference date, as required by s 9(1) of the
SOP Act, attaches to the Payment Claim.

74 A reference date is a jurisdictional fact, and a statutory precondition to the service
of a payment claim.²¹

75 The determination of this issue turns on whether a reference date is to be
determined under cl 11.1(c) of the O&M Agreement or s 9(2)(b) of the SOP Act.
More specifically it turns on whether or not cl 11.1(c) is:

- (a) of no effect under s 13 of the SOP Act; or
- (b) void under s 48 of the SOP Act.

²¹ *Southern Han Breakfast Point Pty Ltd (in liq) v Lewence Construction Pty Ltd* (2016) 260 CLR 340, 361 [61]
(Kiefel, Bell, Gageler, Keane and Gordon JJ).

76 If cl 11.1(c) is caught by either of those sections then it is common ground that the reference date is to be determined under s 9(2)(b) of the SOP Act and that the Adjudicator made no error in finding that a reference date attached to the Payment Claim.

E.1 The SOP Act

77 Section 9 of the SOP Act defines a reference date as follows:

Rights to progress payments

- (1) On and from each reference date under a construction contract, a person –
 - (a) who has undertaken to carry out construction work under the contract; or
 - (b) who has undertaken to supply related goods and services under the contract –

is entitled to a progress payment under this Act, calculated by reference to that date.

- (2) In this section, “reference date”, in relation to a construction contract, means –
 - (a) a date determined by or in accordance with the terms of the contract as –
 - (i) a date on which a claim for a progress payment may be made; or
 - (ii) a date by reference to which the amount of a progress payment is to be calculated –

in relation to a specific item of construction work carried out or to be carried out or a specific item of related goods and services supplied or to be supplied under the contract; or
 - (b) subject to paragraphs (c) and (d), if the contract makes no express provision to the matter, the date occurring 20 business days after the previous reference date or (in the case of the first reference date) the date occurring 20 business days after –
 - (i) construction work was first carried out under the contract; or
 - (ii) related goods and services were first supplied under the contract;

78 Section 9(2)(a) preserves the parties' freedom to contract in relation to dates on which a claim for a progress payment may be made. If the contract makes no express provision with respect to the matter then s 9(2)(b) sets out a default position.

79 Section 13 addresses 'pay when paid' provisions and states that:

Effect of pay when paid provisions

- (1) A pay when paid provisions of a construction contract has no effect in relation to any payment for –
 - (a) construction work carried out or undertaken to be carried out under the contract; or
 - (b) related goods and services supplied or undertaken to be supplied under the contract.
- (2) In this section –

“money owing”, in relation to a construction contract, means money owing for –

 - (a) construction work carried out under the contract; or
 - (b) related goods and services supplied under the contract;

“pay when paid provision” of a construction contract means a provision of the contract –

 - (a) that makes the liability of one party (the *first party*) to pay money owing to another party (the *second party*) contingent on payment to the first party by a further party (the *third party*) of the whole or any part of that money; or
 - (b) that makes the due date for payment of money owing by the first party to the second party dependent on the date on which payment of the whole or any part of that money is made to the first party by the third party; or
 - (c) that otherwise makes the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract.

80 Section 48 provides that:

No contracting out

- (1) The provisions of this Act have effect despite any provision to the contrary in any contract.

- (2) A provision of any agreement, whether in writing or not –
 - (a) under which the operation of this Act is, or is purported to be, excluded, modified, or restricted, or that has the effect of excluding, modifying or restricting the operation of this Act; or
 - (b) that may reasonably be construed as an attempt to deter a person from taking action under this Act –

is void.

E.2 Adjudication Determination

81 The Adjudicator:

- (a) determined that Vestas had performed the Services for 27 months and had been unable to make a claim for a progress payment in that period. That was an inordinate delay which was contrary to the object of the SOP Act and therefore cl 11.1(c) was void under s 48;
- (b) rejected the Principal's contention that the delay was insignificant when viewed in the context of the term of the O&M Agreement. The Adjudicator stated that the period of 27 months plus the remaining time until the first reference date under cl 11.1(c) was a long period to have to provide Services under the O&M Agreement without a contractual entitlement to claim a progress payment;
- (c) further determined that:
 - (i) under cl 11.1(c), the first Operational Year will commence on the Commencement Date, which is the earlier of the Practical Completion Date – Elaine and the Practical Completion Date – Yendon;
 - (ii) both of those Practical Completion dates are governed by, or dependent upon the operation of the EPC Contract which is another contract;
 - (iii) therefore, cl 11.1(c) provides that a date on which a claim for money owing (a payment claim) can be made is dependent on the operation

of another contract; and

- (iv) as the due date for payment of money owing is dependent on the date on which the payment claim can be made, he was satisfied that cl 11.1(c) is a provision that makes the due date for payment of money owing dependent on the operation of another contract and therefore cl 11.1(c) falls within s 13(2)(c) of the SOP Act and is of no effect; and

- (d) therefore, a reference date arose under s 9(2)(b) of the SOP Act.

E.3 The parties' submissions

82 The Principal submits, in summary, that:

- (a) under cl 11.1(c) of the O&M Agreement a precondition to a reference date is the achievement of Practical Completion – Elaine or Practical Completion – Yendon, whichever is earlier. The achievement of this milestone engages the commencement of the O&M Agreement's 30-year Term. The scheme of the SOP Act supports the nomination of a contractual milestone as a precondition of a reference date pursuant to s 9(2)(a);
- (b) the finding of inordinate delay contradicts the scheme of the SOP Act, because it would render contractual milestone dates redundant for the purpose of s 9(2)(b) despite the SOP Act expressly incorporating them into its arrangements;
- (c) by their very nature, milestones have the potential to be delayed for an extended period. Therefore, the mere nomination of a milestone date would purport to exclude, modify or restrict the SOP Act's operation such that it is automatically void by reason of s 48. Parliament cannot have intended to attach significance to the parties' contractually agreed milestone dates under s 9(2)(a) only to render them redundant via s 48;
- (d) further, any finding of inordinate delay must consider the circumstances in

which the delay might arise. If not, then a contractor stands to be rewarded for its default. The Adjudicator was therefore incorrect to accept that the delays in question were inordinate while eschewing any analysis of their underlying cause and the relevant context of the O&M Agreement's 30-year Term; and

- (e) in relation to the application of s 13 of the SOP Act, cl 11.1(c) cannot be characterised as a pay when paid provision because:
 - (i) there is no 'money owing' when cl 11.1(c) is engaged. That clause merely determines when Vestas may issue an invoice. Clause 11.1(b) then crystallises Vestas' entitlement to payment;
 - (ii) the EPC Contract, to which the Principal and Vestas are both parties is not 'another contract' for the purpose of s 13(2)(c). The provision does not expressly specify who the parties to another contract might comprise but its meaning is informed by reading the entire provision. The other two limbs of the definition of a 'pay when paid provision' each refer to payment by a 'first party' to a 'second party' being contingent or dependent on the 'first party' receiving payment from a 'third party'. The Principal submits that this clearly conveys that 'another contract' for the purposes of s 13(2)(c) is to have different parties than the construction contract between the 'first party' and the 'second party'; and
 - (iii) to find otherwise results in a triumph of form over substance, because contracting parties could readily avoid the operation of s 13(2)(c). For example, rather than entering into separate contracts for the different phases of the Lal Lal Wind Farm project, the Principal and Vestas could have agreed to a single contract.

83 Vestas submits, in summary, that:

- (a) clause 11.1(c) of the O&M Agreement has the effect of inordinately delaying or effectively preventing a reference date from arising and is therefore void pursuant to s 48 of the SOP Act. It is conceivable that a reference date may never arise if no Practical Completion Date is realised under the terms of the EPC Contract, and the Principal elects not to terminate the O&M Agreement; and
- (b) Vestas' entitlement to payment under cl 11.1(c) depends upon practical completion being achieved under another contract. Therefore, cl 11.1(c) is a 'pay when paid provision' pursuant to s 13(2)(c) of the SOP Act because it makes the due date for payment of money owing dependent on the operation of another contract.

E.4 Analysis

E.4.1 *Is cl 11.1(c) a pay when paid provision under s 13(2)(c)?*

84 Section 13(2)(c) of the SOP Act defines a "pay when paid provision" of a construction contract [to include] a provision of the contract ... that otherwise makes the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract'.

85 The equivalent provision under the South Australian security of payment legislation was considered by the High Court in *Maxcon Constructions Pty Ltd v Vadasz*.²² At [27] of that decision, the High Court stated:²³

As the preceding analysis demonstrates, s 12(2)(c) [in the same terms as s 13(2)(c) of the SOP Act] focuses on a provision of a contract and asks whether, on its proper construction, the provision "makes liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract".

86 Under cl 11.1(c) of the O&M Agreement, Vestas' entitlement to submit to the Principal a tax invoice, the precondition to the Principal's liability to pay money

²² (2018) 264 CLR 46 (Kiefel CJ, Bell, Gageler, Keane, Nettle, Gordon and Edelman JJ).

²³ Ibid 57 [27] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

owing, is contingent on practical completion of one of the wind farms being achieved under the EPC Contract. That is the event that signals the commencement of an Operational Year. The process of certifying practical completion for the wind farms is entirely governed by the EPC Contract.

87 The EPC Contract and the O&M Agreement are separate contracts. The parties to them differ. The parties to the EPC Contract are:

- (a) Vestas and Zenviron, together the Contractor; and
- (b) the Principal.

88 The parties to the O&M Agreement are Vestas and the Principal.

89 The purpose of the contracts differ. The EPC Contract is directed to the design, engineering, procurement, supply, construction and commissioning of the work required for the establishment of the wind farms. The O&M Agreement is directed to the operation and maintenance of those wind farms.

90 Whether or not the obligations could have been merged into a single agreement is not a matter that I need to consider nor would it be appropriate, in my view, to expect an adjudicator or the court to step behind the contractual arrangements in place and determine the possibility or utility of a single agreement.

91 On a plain reading of the text of s 13 of the SOP Act it applies to the facts before me to render cl 11.1(c) of the O&M Agreement of no effect in relation to any payment for the Services.

92 Further, I reject the suggestion that s 13(2)(c) of the SOP Act has no application on the basis that there is no liability to pay money owing. A provision which makes the entitlement to issue an invoice and thereby the existence of liability to pay money owing (and the due date for payment of money owing), contingent on the operation of *another contract* is captured by s 13(2)(c).

E.4.2 Is cl 11.1(c) void under s 48 of the SOP Act?

93 Having made that finding it is not necessary to consider the further arguments of whether or not cl 11.1(c):

- (a) had the effect of inordinately delaying the occurrence of a reference date; or
- (b) had the effect of creating a reference date that was illusory.

94 However, in case it becomes important I will address them in short compass.

95 In *Castle Constructions Pty Ltd v Ghossayn Group Pty Ltd*,²⁴ Stevenson J noted that the s 48 equivalent in the NSW Act (specifically, s 34) may invalidate any provision which goes beyond fixing a reference date and which:²⁵

- (a) imposes conditions on the occurrence of a reference date;
- (b) modifies or restricts the circumstances in which a contractor is entitled to a progress claim;
- (c) inordinately delays or effectively prevents a reference date from arising;
- (d) unjustifiably impeaches the making of a payment claim or renders the statutory entitlement practically illusory;
- (e) imposes onerous conditions which make a reference date more of a theoretical possibility than an actuality; or
- (f) does not facilitate a statutory entitlement to a progress payment.

96 There was no dispute that a provision which inordinately delays or effectively prevents a reference date from arising would be contrary to the SOP Act's objective of conferring a statutory entitlement to a progress payment on and from a reference date.

97 For the following reasons I find that cl 11.1(c) of the O&M Agreement does not

²⁴ [2017] NSWSC 1317.

²⁵ Ibid [51].

have the effect of inordinately delaying the occurrence of a reference date (assuming for this purpose that it is not otherwise of no effect under s 13(1)):

- (a) in this case a precondition to a reference date is the achievement of Practical Completion – Elaine or Practical Completion – Yendon whichever is earlier, because it is that milestone that gives rise to the first Operational Year; and
- (b) the attachment of a reference date to a milestone does not of itself have the effect of inordinately delaying the occurrence of a reference date. As submitted by the Principal, by their very nature, milestones have the potential to be delayed for an extended period. It makes no sense for the nomination of a milestone date (which the SOP Act expressly provides for under the definition for ‘progress payment’ in s 4) to be rendered redundant via s 48. I am not satisfied that the provision inordinately delays a reference date so as to enable me to conclude that s 48 operates to void that provision. A consequence of concluding otherwise would invite a challenge every time a milestone is missed or delayed.

98 At first blush, cl 11.1(c) of the O&M Agreement does seem to render a reference date, during the Interim Services (Phase 1) Period, illusory. That is, there is an expressed intention in cl 11.1 that Vestas will be entitled to submit an invoice shortly after each quarter of each Operational Year ‘during the Interim Services (Phase 1) Period and the Term’. However, as the Interim Services (Phase 1) Period ends as the first Operational Year commences, I queried whether the reference date for the Interim Services (Phase 1) Period is illusory. Senior counsel for the Principal explained, and I accept, as the Interim Services Period ends on the same day as the Operational Year commences, there will always be one quarter of an Operational Year that overlaps the Interim Services Period. In short, it is not the case that there will never be a quarter of an Operational Year during the Interim Services Period.

F Conclusion

99 I propose to order that the proceeding be dismissed.

100 I will hear from the parties as to the form of orders.