

Southern Cross Electrical Engineering v Steve Magill Earthmoving [2018] NSWSC 1027

FACTS

Southern Cross Electrical Engineering (**the Plaintiff**) and Steve Magill Earthmoving (**the Defendant**) entered into a Subcontract whereby the Defendant would perform excavation and trenching works (**the Works**). The Subcontract was a construction contract for the purposes of *the Building and Construction Industry Security of Payment Act 1999* (NSW) (the Security of Payment Act).

The adjudicator provided his determination, finding that there was \$400,158 inclusive of GST owing to the Defendant.

In reaching his determination, the adjudicator dealt with the factual dispute between the parties and assessed the relevant evidence and held:

At [70] *'Based upon the information provided to me, the respondent has not convinced me that no variation was agreed or that the claimant has over-claimed for the work that is the subject of the respondent's challenge. I determine that the amount sought by the claimant in its payment claim for this issue is validated, that is, 6,948 linear metres for the HV item including the extra width lengths, and 27,163 linear metres including the extra width lengths. Together this amounts to \$716,331 based on \$21 per linear metre'*.

The Plaintiff filed a summons, seeking a declaration that the determination is void on the basis that the adjudicator erred in expecting the Plaintiff to disprove the variations and that the determination was unreasonable.

ISSUES

- i. Whether the adjudicator's determination is void by the adjudicator 'wrongly imposing an onus on the Plaintiff to prove (to his satisfaction) that there had been no 'variation or change to the scope of works' required under the subcontract; and
- ii. Whether the adjudicator's determination was so unreasonable that it did not comply with the requirements for validity under the *Security of Payment Act*.

FINDING

In assessing the first issue of onus, McDougall J considered that the full requirements set out by Vickery J in *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd*, were not required in each and every case but rather, each case is to be assessed by 'the adjudicator looking at all of the material presented by the parties and making a determination by being satisfied that the claimant has made good its claim'.

In assessing the second issue of unreasonableness, McDougall J found that adjudicators have significant discretion when reaching a determination.

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McDougall J noted that adjudicators are not necessarily legally trained and the courts must not exceed their supervisory role by intervening in an adjudicator's decision, unless it is found that there is a jurisdictional error or that the decision made is one that no reasonable person could have made.

QUOTE

McDougall J held that:

[34] Another point to bear in mind is that the reasons given by adjudicators for their determinations are not to be analysed closely and parsed pedantically, with a predisposition to discerning error. That has been said, in substance at least, on many occasions

[37] When the adjudicator said at [70] that Southern Cross had not convinced him that no variation had been agreed, that should be read, in my view, as saying no more than that Southern Cross had not adduced evidence to counter the inferences that, quite clearly, the adjudicator thought was otherwise available, as he put it, "upon the information provided to [him]". The choice of words in [70] may be a little unfortunate, but I do not think that the adjudicator's reasons on this point should be read as saying, in substance, that Earthmoving was entitled to succeed simply because Southern Cross had failed to convince him that this should not happen. To read that part of the reasons in that way is to ignore its context, both within the reasons themselves and within the framework of the whole dispute and the material that the adjudicator was required to consider.

[55] The court must not use the concept of reasonableness to disguise an inquiry into the merits of the decision. As Hayne, Kiefel and Bell JJ put it in Li [18], there is an area (denoted by the concept of reasonableness) within which the decision maker has a genuinely free discretion. The courts must not exceed their supervisory role by intervening within that area. In the context of the Security of Payment Act, that principle finds expression in, or helps to justify, the proposition that mere error of law, not resulting in or associated with jurisdictional error, does not entitle the court to intervene [19].

IMPACT

This case highlights that in assessing an adjudication determination under *the Security of Payment Act*, the Courts may take a more lenient approach to the rigor which must be demonstrated in a valid adjudication, but contract managers should ensure that each aspect of the claim is well supported in any adjudication application.

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