Southern Cross Electrical Engineering v Steve Magill Earthmoving [2018] NSWSC 1027 (5 July 2018)

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Supreme Court
New South Wales

Case Name:	Southern Cross Electrical Engineering v Steve Magill Earthmoving
Medium Neutral Citation:	[2018] NSWSC 1027
Hearing Date(s):	05/06/2018; further written submissions 21/06/2018
Date of Orders:	5 July 2018
Decision Date:	5 July 2018
Jurisdiction:	Equity - Technology and Construction List
Before:	McDougall J
Decision:	Summons dismissed with costs.
Catchwords:	BUILDING AND CONSTRUCTION – Building and Construction Industry Security of Payment Act 1999 (NSW) – application to quash adjudicator's determination – whether adjudicator imposed an onus of proof on plaintiff inconsistent with his statutory obligation to come to his own view on the material – whether adjudicator's determination regarding lineal metreage unreasonable – necessary to consider adjudicator's reasoning in light of statutory requirement to determine often difficult questions within tight timeframe – necessary to have regard to the statutory scheme which renders determination final as to payment claims but otherwise preserves all rights – impermissible to conduct merits inquiry under guise of jurisdictional reasonableness – fair reading of the adjudicator's reasons in context demonstrates no error with regards to onus – not shown that determination was unreasonable to the extent of invalidation – summons dismissed.
Legislation Cited:	Building and Construction Industry Security of Payment Act 1999 (NSW)
Cases Cited:	Agricultural and Rural Finance Pty Ltd v Gardiner [2008] HCA 57; (2008) 238 CLR 570 Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] EWCA Civ 1; [1948] 1 KB 223 Avopiling (NSW) Pty Ltd v Menard Bachy Pty Ltd [2012] NSWSC 1466 Bauen Constructions v Westwood Interiors [2010] NSWSC 1369 Cockram Construction Ltd v Fulton Hogan Construction Pty Ltd [2018] NSWCA 107 Dualcorp Pty Ltd v Remo Constructions Pty Ltd [2009] NSWCA 69; (2009) 74 NSWLR 190 Fulton Hogan Construction Pty Ltd v Cockram Construction Ltd [2018] NSWSC 264 Minister for Immigration and Citizenship v Li [2014] FCAFC 1; (2013) 249 CLR 332 Pinnacle Construction Group Pty Ltd v Dimension Joinery & Interiors Pty Ltd [2018] NSWSC 894 Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd [2018] HCA 4; (2018) 92 ALJR 248 Richard Crookes Construction Pty Ltd v CES Projects (Aust) Pty Ltd (No 2) [2016] NSWSC 1229 SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd [2015] VSC 631 SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd [2016] VSCA 119 Suprima Bakeries Pty Ltd v Australian Weighing Equipment Pty Ltd [2016] NSWSC 998
Category:	Principal judgment
Parties:	Southern Cross Electrical Engineering Limited (Plaintiff) Steve Magill Earthmoving Pty Limited (First Defendant) Adrian Ashman (Second Defendant) Adjudicate Today Pty Limited (Third Defendant)
Representation:	Counsel: S Robertson / M Keene (Plaintiff) D Hume (First Defendant) Solicitors: HWL Ebsworth Lawyers (Plaintiff) Moray & Agnew (First Defendant) King Lawyers (Second and Third Defendants, submitting save as to costs)
File Number(s):	2018/38597

JUDGMENT

1. **HIS HONOUR:** This is yet another dispute over a determination of an adjudicator made pursuant to s 22(1) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the *Security of Payment Act*).

Background

2. On about 23 May 2017, the plaintiff (Southern Cross) as contractor and the first defendant (Earthmoving) as subcontractor entered into a subcontract under which Earthmoving undertook to perform excavation and trenching works for Southern Cross in connection with what was called "the Parkes Project". There is no doubt that the subcontract was a construction contract for the purposes of the *Security of Payment Act*.
3. On about 5 December 2017, Earthmoving served a payment claim on Southern Cross. It claimed over $470,000, including in excess of $387,000 for trenching and backfilling works, said to be "supported by surveyors [sic] report dated 18/10/2017". On 19 December 2017, Southern Cross provided a payment schedule in which it disputed liability for the whole of the claim, and stated that there was an amount in excess of $473,000 owing to it.
4. On 10 January 2018, Earthmoving made an adjudication application to the third defendant (the nominating authority). The nominating authority referred the application to the second defendant (the adjudicator), who accepted the adjudication. Southern Cross submitted an adjudication response on 18 January 2018.
5. On 29 January 2018, the adjudicator provided his determination. He determined that there was $400,158, inclusive of GST, owing by Southern Cross to Earthmoving. He gave reasons for that determination.

The issues

6. By summons filed on 5 February 2018, Southern Cross seeks, among other relief, a declaration that the determination is void, alternatively an order in the nature of *certiorari* quashing it, and ancillary relief. The Technology and Construction List Statement that was filed with the summons was singularly unhelpful in identifying the legal and factual bases for the claimed relief. However, in both written and oral submissions, Southern Cross stated two grounds of complaint. It said that:
   (1) the adjudicator wrongly imposed an onus on Southern Cross to prove (to his satisfaction) that there had been no variation of or change to the scope of works required under the subcontract; and
   (2) the determination was "unreasonable", in the sense explained in *Minister for Immigration and Citizenship v Li*[3]. I shall return to this concept and the explanation of it given in *Li*.

The subcontract

7. The subcontract required Earthmoving to carry out trenching works including the excavation and backfilling of trenches, the compaction of the backfill, and other tasks, for a price of $21 per lineal metre. The scope of works was described in more detail in Appendix C, from which I extract the following:

   First trench section (DC)
   ...
   - Trench dimensions will vary between 400 x 700 to 900 x 700
   Second trench section (MV)
   ...
   - Trench will vary between 400 x 900 to 850 x 900
   Third Trench section (LV)
   ...
   - Trench average 450 x 700

8. Although nothing turns on it, the trenches were respectively for direct current, medium voltage (so called) and low voltage electrical cabling. The statement of dimensions in each case gives the width of the trench first (for example, for the DC section, ranging from 400 to 900mm) and the depth second (for the same section, a uniform depth of 700mm).
9. Clause 12.9 of the conditions of contract provided:

   12.9 Change Order requirement
   Without limiting clause 27.4, the Subcontractor acknowledges that, the Contractor is not liable for, or in connection with, any Claim by the Subcontractor (and the Subcontractor will not make any Claim) arising out of or in connection with any Change to the Works except where its is expressly directed pursuant to Change Order issued in writing by the Contractor pursuant to this clause 12.

The payment claim

10. So far as it is relevant, the payment claim sought payment for both "HV Trenching" (it is common ground that what was described as MV, or medium voltage, in Appendix C was in fact high voltage) and "LV/DC Trenching".
11. The claim for HV trenching was for a total of 6,948 lineal metres, made up of 6,750 lineal metres as measured and shown in a report prepared by Arndell Surveying, and a further 198 metres, described as "total length of extra width trenches over the quoted 900mm width", measured by Mr Steve Magill, the principal of Earthmoving.
12. For the LV/DC trenching, the total length claimed was 27,163 metres, made up of 22,590 metres measured by Arndell Surveying and 4,573 metres for extra width trenches measured by Mr Magill.
13. The payment schedule disputed the number of lineal metres claimed. It asserted that the Arndell Surveying lengths overstated the actual lengths by, respectively, 646 and 73 lineal metres. In addition, the payment schedule disputed the claim for extra width trenches, on the sole basis that Earthmoving had not complied with cl 12.9 of the conditions of contract. The payment schedule said, relevantly:

    If SME [Earthmoving] considered there was a Change, then the notice provisions within the Subcontract needed to be adhered to, specifically those detailed within Clause 12 of the Subcontract. For the avoidance of doubt, clause 12.9... states:
    [Clause 12.9 was then set out]
    A Change Order was not requested... and a Change Order was not issued... .

The adjudication application and response

14. The same issues were repeated in the adjudication application and the adjudication response. They were supported and supplemented by submissions and other material. In particular, Earthmoving's adjudication application attached a statutory declaration made by Mr Magill. Among other things, that statutory declaration:
    (1) stated in effect that Southern Cross and Earthmoving had administered the subcontract on an informal basis with respect to variations, and that Earthmoving had relied on this informal practice to its detriment by performing variations when so requested;
    (2) asserted that the widest trench that Earthmoving's machinery could excavate in one pass was 900mm, this being the width of its bucket. Accordingly, where wider trenches were required to be excavated, it was necessary to make several passes; and
    (3) noted that on this basis, Mr Magill assessed the lineal metres for the extra width trenches claim by measuring the lengths where more than one pass had been required; Earthmoving supplemented the statutory declaration with documents said to show, at least to the initiated, where the extra width trenching was located, and with photographs.
15. In its adjudication response, Southern Cross (apart from elaborating the cl 12.9 issue) said in substance that the methodology used to measure the additional amount of excavation was "both unjustified and unreasonable". The reason given was that "there is simply no basis to double the lineal metres in circumstances where the trench is slightly wider than anticipated; this does not reflect the value of the work performed". That basis of opposition had not been raised in the payment schedule.

The adjudicator's reasons

16. The adjudicator considered the trenching claim at [62] and following of his reasons. He started by dealing with the factual dispute between Southern Cross and Earthmoving as to the lineal metres of work carried out excluding the claim for extra width trenches. In essence, the adjudicator preferred the measurements of Arndell Surveying to those undertaken for Southern Cross. Southern Cross does not now challenge that part of the adjudicator's reasons.
17. The adjudicator then turned his attention to the extra width trenches claim. As I read his reasons starting at [68], he accepted Mr Magill's measurement ("calculation" might be a better word) of the numbers of lineal metres involved. The adjudicator dealt with the other issues as follows at [69], [70]:

    [69] In regard to the respondent's claim that the subcontract process was not used to establish this variation, the claimant draws attention to the respondent's acknowledgment that both the claimant and respondent agreed variations verbally. The respondent denies this. However, in section 4.1.7.1 of the payment schedule, the respondent writes, "The Parties reached a verbal agreement on site that the trenching of the MVPS, due to the width, would be calculated by multiplying the lineal metre rate by a factor of 3". While I recognise that this agreement does not confirm such a verbal agreement in the present matter, it does provide confirmation that the claimant and respondent used a process outside of the subcontract to vary the scope of work and, therefore, the value of the work. Given the nature and frequency of on-site decisions required when work is in progress, it is conceivable that a discussion took place and an agreement reached about work that constitutes a variation.
    [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 lineal metre.

First issue: onus

The parties' submissions

18. Mr Robertson of Counsel, who appeared for Southern Cross, submitted that the adjudicator had erred in [70] of his reasons by effectively imposing an onus on Southern Cross to convince him that there had been no variation and that the work had been over-claimed. Mr Robertson submitted that the adjudicator was bound to examine all the material for himself, and to come to a conclusion, based on that material, as to what amount (if any) is payable.
19. Mr Robertson referred to the decision of Vickery J in *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd*[4] at [101]. In that paragraph, after a detailed review of the authorities, Vickery J said:

    [101] Drawing the threads together, the following may be said of an adjudicator's assessment of a payment claim under the Act in Victoria:
    (a) The adjudicator is required to determine and apply what the adjudicator considers to be the true construction of the Act in the light of the current case law.
    (b) The adjudicator is required to determine and apply what the adjudicator considers to be the true construction of the construction contract.
    (c) In addition to the matters to be determined and considered under ss 23(1) and (2), and excluded under s 23(2A) of the Act, an adjudication requires, as a minimum, the following critical findings to be made (the "critical findings"):
    (i) a determination as to whether the construction work the subject of the claim has been performed (or whether the relevant goods and services have been supplied); and
    (ii) the value of the work performed (or the value of the goods and services supplied).
    (d) Construction work carried out or related goods and services supplied are to be valued in accordance with the terms of the construction contract (if the contract contains such terms) pursuant to ss 11(1)(a) and 11(2)(a).
    (e) In the absence of any express provision in the construction contract providing a mechanism for an adjudicator to undertake the assessment of value, the valuation assessment is to be undertaken in accordance with s 11(1)(b) (for work) and s 11(2)(b) (for goods and services), having regard to the matters set out in those sub-sections, namely:
    (i) the contract price for the work or the goods and services;
    (ii) any other rates set out in the contract;

(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 the work or goods are defective, the estimated cost of rectifying the defect.
(f) If a construction contract contains a binding schedule of rates within the meaning of s 11(1)(b)(ii) (for work) and s 11(2)(b)(ii) (for goods and services), the adjudicator is required to have regard to the schedule in assessing value if s 11(1)(b) or s 11(2)(b) apply. Further, the adjudicator should state in the adjudication determination whether and how the schedule of rates was applied in the assessment of value, if it in fact was applied, or state why the schedule of rates was not applied.
(g) However, without measures, evidence or submissions being provided to the adjudicator in a coherent fashion in respect of defined categories of work (or goods and services) the subject of a contractual schedule of rates, in most cases it would not be possible for an adjudicator to safely apply the schedule in assessing the value of the claim. In such circumstances the adjudicator may have regard to a schedule of rates, but would not be remiss in not applying it.
(h) The adjudicator is obliged to make the critical findings on the whole of the evidence presented at the adjudication.
(i) The adjudicator, having decided that the respondent's submissions and material should be disregarded, cannot simply adopt the amount claimed by the claimant (for example, in the payment claim or in the adjudication application).
(j) The adjudicator must proceed to make the critical findings by:
(i) fairly assessing and weighing the whole of the evidence which is relevant to each issue arising for determination at the adjudication;
(ii) drawing any necessary inferences from the evidence, or from the absence of any controverting material provided by the respondent, including an inference that if there is no controverting material, no credible challenge can be made to the value of the claim advanced by the claimant. Such an inference may be considered in the context of the evidence as a whole;
(iii) arriving at a rational conclusion founded upon the evidence;
(iv) in so doing, is not called upon to act as an expert; and
(v) is not entitled to impose an onus on either party to establish a sufficient basis for payment or a sufficient basis for withholding payment.
(k) Pursuant to s 23(3) of the Act, the adjudicator must include in an adjudication determination both the reasons for the determination and the basis upon which any amount or date has been decided. In providing these reasons the adjudicator must summarise the central reasons for the making of the critical findings in the adjudication determination with as much completeness as the time permitted under the Act will allow.

20. Mr Robertson submitted, correctly, that in *Suprima Bakeries Pty Ltd v Australian Weighing Equipment Pty Ltd*[3], I had said at [40] that there was sufficient similarity between the legislation considered by Vickery J and the *Security of Payment Act* so as "to make his Honour's observations directly applicable" to the latter. Further, and again as Mr Robertson submitted, I had repeated that view in *Richard Crookes Construction Pty Ltd v CES Projects (Aust) Pty Ltd (No 2)*[4] at [24].
21. In this case, Mr Robertson submitted, the adjudicator had erred because he had imposed on Southern Cross an onus "to establish... a sufficient basis for withholding payment".
22. Mr Hume of Counsel, for Earthmoving, noted that the only ground of opposition taken in the payment schedule for denying liability for the claim for extra width trenches was the cl 12.9 issue. It was not clear whether Mr Hume intended to submit that it was not open to Southern Cross to rely on the measurement issue (as I shall call it). Accordingly, after the conclusion of the hearing, I invited the parties to address this issue in writing. I return to this at [26] below.
23. Mr Hume referred to Earthmoving's contention that the parties, by their conduct, had waived (whatever that may mean – see *Agricultural and Rural Finance Pty Ltd v Gardiner*[5] at [50] and following (Gummow, Hayne and Kiefel JJ)) the need for strict compliance with cl 12.9. He relied upon this contention as part of the context within which the adjudicator dealt with the claim.
24. Mr Hume noted that the adjudicator had identified the contentions actually raised by Southern Cross and had rejected them, for reasons he gave, and had then concluded that Earthmoving had "validated" this aspect of its claim. Mr Hume submitted that this meant, in effect, that the adjudicator concluded that Earthmoving had positively satisfied him that it was entitled to be paid for the work in question.
25. Mr Hume submitted that in those circumstances, the reference to Southern Cross' not having convinced him that no variation was agreed was no more than a reference to the fact that on this issue, which was raised in effect by way of exclusion by Southern Cross, its evidence did not defeat Mr Magill's evidence of waiver. Mr Hume submitted that on a fair reading, that was what the adjudicator meant; similarly, in relation to his observations about the amount of work for which the claim was made.
26. I return to the measurement issue. Mr Robertson submitted that the payment schedule had done enough to raise, as an issue, the proper measurement of the lengths excavated for which Earthmoving was entitled to be paid. He referred to the assertion that the claim had been overstated (see at [13] above). In any event, Mr Robertson submitted, because the way in which the claim for extra width trenches had been calculated was not spelled out in the payment claim, it was open to Southern Cross, having been apprised of that matter by the adjudication application, to respond in the way it did.
27. Mr Robertson submitted, further, that even if it had not been open to Southern Cross to raise the point in its adjudication response, that did not absolve the adjudicator from considering the claim on its merits and coming to a decision on a basis that was, objectively, reasonable.
28. Mr Hume submitted that the measurement issue had not been raised in the payment schedule. The only issue raised, he submitted, was the contractual one (relying on cl 12.9 of the subcontract – see at [13] above). In those circumstances, Mr Hume submitted, it was not open to Southern Cross to raise, in its adjudication response, the challenge that it did as to the rationality of the approach to measurement.
29. Thus, Mr Hume submitted, it was open to the adjudicator to consider the matter on the basis that there was no valid objection to the methodology of the claim (as opposed to its contractual merits). That, Mr Hume submitted, explained why the adjudicator had not dealt with the "double counting" issue.

Decision

30. I accept, as I have said above[6], that what Vickery J said in *SSC Plenty* at [101] is applicable to the work that an adjudicator must do pursuant to the *Security of Payment Act*. However, I have never said, nor do I now say, that the requirements identified by Vickery J must be applied serially and mechanically in every case to see if what purports to be a determination is in law capable of meeting that description. To the contrary, I would reject that proposition were it put.
31. What is required, in this case as in every other, is a consideration of the adjudicator's reasons in their context. That context includes, relevantly, the content of the dispute as established by the payment claim and the payment schedule, and the parties' elaboration of that dispute (to the extent that the elaboration does not travel beyond s 20(2B) and s 22(2)(c), (d) of the *Security of Payment Act*) in their submissions.
32. Whilst I accept that an adjudicator is required to consider all of the material, to satisfy himself or herself that (if it be the case) the claimant has made good its claim, nonetheless the extent of the work required to fulfil that task will vary from case to case, according to the way the parties have presented the dispute. It was for that reason, no doubt, that Vickery J said in *SSC Plenty* at [101(j)(ii)] that an adjudicator may draw inferences from the whole of the evidence, including the absence of controverting material provided by the respondent. As his Honour said, there may well be "an inference that if there is no controverting material, no credible challenge can be made to the value of the claim advanced by the claimant". Nonetheless, that inference (if drawn) must be considered, as Vickery J said in the same passage, "in the context of the evidence as a whole".
33. Another matter of relevant context is that the whole process of adjudication is subject to intense time pressures. The relevant time limits are too well-known to require detailed explanation. The salient point for present purposes is that, absent an extension of time (which the parties may, but are not bound, to allow), an adjudicator is required to determine the application within no more than 10 business days from the date of notification of acceptance of the application[7]. In many cases, the pressure of that time limit is exacerbated by the vast amount of material that the parties put before adjudicators.
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[8].
35. In part, as the cases make clear, that reflects the approach that the courts have taken to administrative decisions in other areas. In part, it reflects some of the constraints and pressures to which I have referred in the previous paragraph, and the object of the *Security of Payment Act* as stated in s 3:

3 Object of Act
(1) The object of this Act 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.
(2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments.
(3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves:
(a) the making of a payment claim by the person claiming payment, and
(b) the provision of a payment schedule by the person by whom the payment is payable, and
(c) the referral of any disputed claim to an adjudicator for determination, and
(d) the payment of the progress payment so determined.
(4) It is intended that this Act does not limit:
(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 any such other entitlement.

36. Reading [70] of the adjudicator's reasons in context, I do not think that it is correct to say that he regarded Southern Cross as having borne, and failed to discharge, some evidentiary onus. The adjudicator had noted the competing arguments and the evidence in relation to variations. He recognised at [69] that there had been informal procedures followed in relation to other areas of trenching, and concluded that it was at least conceivable, as Mr Magill had said in his statutory declaration, that there were informal procedures followed in relation to the subject trenching also.
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 were 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.
38. Nor do I accept that the adjudicator had wrongly imposed on Southern Cross some onus of convincing him that Earthmoving had "over-claimed for the work" in question. In context, this is clearly intended to refer back to what the adjudicator said at [68], on the topic of measurement, to the effect that he did not accept the way that Southern Cross had gone about performing the measuring task. Thus, read in context, this passage of the reasons says no more than that the evidence adduced by Southern Cross had not, as it were, trumped inferences available from the evidence of measurement adduced for Earthmoving by Mr Magill.
39. I turn to the measurement issue: whether Southern Cross had been entitled to raise, in its payment schedule, the validity of the method used by Earthmoving to measure the number of metres that were the subject of its claim for extra width trenches. I do not accept Mr Robertson's submission that Southern Cross had raised this issue in the payment schedule.
40. The response (in the payment schedule) to the claim for payment for trenching falls into two parts. First, in paras 4.1.5.1 to 4.1.5.3, the payment schedule deals with the claim for 6,750 lineal metres of HV trenching and 22,590 lineal metres of LV/DC trenching. The only issue that was raised was one as to the accuracy of the measurements performed by Arndell Surveying.
41. The payment schedule then continued by responding, in para 4.1.5.4, to the claim for extra width trenches. The only issues there raised was as to Earthmoving's contractual entitlement.
42. Reading the whole of para 4.1.5, it is clear that it dealt separately with the two discrete elements of the payment claims, and raised one challenge to each. It is equally clear that the challenge to the discrete element of extra width trenches was limited to the contractual issue.
43. I do not agree that it was not until Southern Cross had received the adjudication application that it was apprised of sufficient material to enable it to understand, and attempt to rebut, the way in which the claim for extra width trenches had been measured. That is quite clear from para 72 of the adjudication response, under the heading "Double claiming". That paragraph, so far as it is relevant, reads:

> A review of SM Earthmoving's claims reveals that a factor contributing to SM Earthmoving's excess claim for lineal metres is "double claiming". That is, SM Earthmoving has claimed for the same lineal metre twice in respect of 4,771 lineal metres of trenching. This much is clear from the table at paragraph 64 of the Adjudication Application, which is partly extracted below...

44. The table "partly extracted" was taken directly from the table that was part of, and effectively particularised, the claim for trenching work (both standard width and extra width) in the payment claim.
45. Having set out the relevant part of that table, Southern Cross continued, in its adjudication response at para 74:

> What is clear from the above extracted table is that in circumstances where SM Earthmoving purport to have been required to excavate trenches with a width greater than the designed 900mm, SM Earthmoving has simply claimed for those lineal metres of trench work twice. Take "HV Trenching" for example – Arndell Surveyor has measured a total length of trench work at 6,750m, and, of that 6,750m, it has measured 198m of trench work as having a width greater than 900m. In calculating the total length of trench work now claimed, SM Earthmoving has added the total length (6,750m) and the length of the wider trenches (198m). In the case of HV Trenching this results in a double counting of 198m. The figure is 4,573m in respect of LV/DC Trenching.

46. It is quite clear from this paragraph that Southern Cross was able to understand, from the table in the payment claim, that there was a measurement issue – specifically, what it called a "double claiming" issue.
47. That being so, it had been open to Southern Cross to take the same point in its payment schedule. It did not.
48. This head of challenge fails, in each of the ways it was put.

Second issue: unreasonableness

49. From time to time, the legislature will confer a power or discretion on a subordinate tribunal or an external authority. Where the legislature does so, it is taken to have intended that the power or discretion will be exercised reasonably. See the plurality judgment (Hayne, Kiefel and Bell JJ) in *Minister for Immigration and Citizenship v Li*[9] at [63]. Thus, as their Honours said later in their reasons[10], when something is to be done within the discretion of an authority, it is to be done according to the rules of reason and justice; it is to be legal and regular, not arbitrary, vague or fanciful.
50. Earthmoving did not submit that the standard of reasonableness had no application to the determinations of adjudicators. I am content to proceed (without deciding) on the basis that it is[11].
51. The legal standard of reasonableness is not fixed, inflexible and universal. It is the standard indicated by or derived from the true construction of the statute that confers the power[12].
52. It is well-recognised in the authorities that a decision made pursuant to the conferral of a statutory power or discretion may be regarded as unreasonable if it is something that no reasonable person could have arrived at in all the relevant circumstances. That formulation is often associated with the judgment of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[13]. However, and again by reference to the plurality reasons in *Li*[14], that formulation is not exhaustive of the legal concept of unreasonableness.
53. In the present case (as in all cases involving the *Security of Payment Act* or cognate legislation), an understanding of the content of unreasonableness in relation to an adjudicator's determination must take into account the objects of the *Security of Payment Act* (set out at [35] above) and other relevant features of the statutory scheme. I have referred to some of those at [33]-[34] above, in connection with the first issue. They are equally relevant in relation to this issue. Other features of the legislation that must be taken into consideration include that:
    (1) adjudicators are not required to be, and frequently will not be, lawyers or persons with legal training; and
    (2) the determinations of adjudicators have limited effect. They are conclusive (unless quashed) as to the question of entitlement to a progress payment[15], but they do not affect, or purport to determine, final rights under the construction contract[16].
54. Another feature of the statutory scheme is the requirement that the adjudicator give reasons unless the parties agree otherwise. Again, the content or scope of that obligation, and what is to be done to comply with it, depend very much on the other relevant features of the statutory scheme[17].
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].

The parties' submissions

56. Mr Robertson submitted that it was self-evidently absurd, and therefore unreasonable, to take the number of lineal metres that had to be reworked (because the width of the trench exceeded the capacity of the excavator) and double them to produce the number of lineal metres for which Earthmoving was entitled to be paid. As he pointed out, if the extra width was 150 (or 450, or any other number significantly less than 900) mm, the excavator could travel further – excavate a greater lineal metreage – before it had reached its volumetric or weight capacity.
57. Mr Hume accepted that Mr Robertson's submission had merit at the level of fact. However, he submitted, the adjudicator was faced with a situation where he had to make a decision within a short time based on limited information. The adjudicator may have erred in simply doubling the relevant number of lineal meters, Mr Hume submitted, but that was at most an error of fact, not something that would justify the court in intervening.

Decision

58. For the reasons I have given, it was not open to Southern Cross to raise, in its adjudication response, an issue as to the method of calculation of the number of lineal metres the subject of the claim for extra width trenching. That forms part of the context within which the reasonableness of the adjudicator's decision falls to be assessed. I add that even if it had been open to him to consider that part of the adjudication response, it would have given him little help; the relevant paragraph did no more than assert that the approach to measurement "is both unjustified and unreasonable" and that "simply... to double the lineal metres... does not reflect the value of the work performed[20].
59. Southern Cross submitted, further, in its adjudication response that in the absence of measurements or survey data, there was no basis on which the claim could be assessed[21]. Thus, it submitted, Earthmoving had "no entitlement to payment for extra width trenches and certainly... no entitlement to an additional $21/LM for those extra widths"[22].
60. The first thing to note about that submission is that it confuses the issue of entitlement (which is one of the proper construction of the contract and its application to the relevant facts) with the issue of quantification. The second point to make is that, even if the submission could be regarded as one "duly made" in support of the payment schedule, it did nothing except put the adjudicator on notice that, within the time available, he had to make some assessment of the number of lineal metres for which Earthmoving was entitled to be paid in respect of extra width trenches.
61. I have considerable sympathy for the adjudicator. He was faced with a complex claim, and given very little assistance to help him to deal with it. He was required to deal with it within the tight time limits to which I have referred already. Once he had concluded that the claim for extra width trenches was justified in principle, he was left to work out for himself how to assess the lineal metreage involved. He was not given information as to the machine's bucket capacity, or as to the extent to which the trenches in question exceeded 900mm in width.
62. In those circumstances, the adjudicator chose to adopt, as a measure, or method of measurement, the approach of doubling the number of lineal metres involved. It is almost certain that this was overly generous to the claimant, Earthmoving. However, as I have said, the determination, to the extent that it was based on this approach, does not settle on a final basis the rights of either party.
63. No doubt, the adjudicator could have sought further evidence as to bucket capacity, rate of work, and the like. No doubt, he could have carried out complex calculations. No doubt, had he been given all the information he required and had all the time he needed, he could have arrived at a more accurate estimation. However, he had none of those luxuries.
64. The other point to bear in mind is the extent of the claim for extra width trenches. For standard width HV trenches, the total measured lineal metres, according to Arndell Surveying and as accepted by the adjudicator, were 6,750. The total length of extra width trenches, as measured by Mr Magill and as the adjudicator accepted, was 198 lineal metres. For the LV/DV trenches, the equivalent figures are 22,590 and 4,573 lineal metres.
65. Thus, the total allowed for extra width trenches was 4,771 lineal metres, and the total amount allowed was 34,111 meters. The claim for extra width trenches was approximately 14% of the total claim. Whilst it is self-evident that this represents a substantial amount of money at $21 per lineal metre, it is not, in context, the major part of the claim.
66. Factually, the adjudicator's approach may have been (and probably was) incorrect. It is no doubt something that could have been improved upon if the adjudicator had "world enough and time". But looking at his approach in the context of the adjudication application in particular and the statutory framework in general, I am far from persuaded that it was unreasonable to the extent that it must be taken to invalidate his determination.
67. This head of challenge also fails.

Conclusions and orders

68. Each challenge to the determination fails. I make the following orders:
    (1) order that the summons be dismissed.
    (2) Order the plaintiff to pay the first defendant's costs.
    (3) Order the plaintiff to pay the second and third defendants' costs of their submitting appearances.
    (4) Order that the exhibits be returned.

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[1] [2014] FCAFC 1; (2013) 249 CLR 332.
[2] [2015] VSC 631; an appeal from his Honour's decision was dismissed: SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd [2016] VSCA 119.
[3] [2016] NSWSC 998.
[4] [2016] NSWSC 1229.
[5] [2008] HCA 57; (2008) 238 CLR 570.
[6] See at [20].
[7] Section 21(3)(a) of the Security of Payment Act. Note however that the effective time will be less, because of the time afforded to a respondent, having being served with an adjudication application, to lodge an adjudication response (s 20(1)).
[8] See, eg, Cockram Construction Ltd v Fulton Hogan Construction Pty Ltd [2018] NSWCA 107 at [17] (Basten JA); Avopiling (NSW) Pty Ltd v Menard Bachy Pty Ltd [2012] NSWSC 1466 at [38]; Bauen Constructions v Westwood Interiors [2010] NSWSC 1359 at [23]; Waterways Authority v Fitzgibbons [2005] HCA 57; (2005) 79 ALJR 1816 at [129]- [130] (Hayne J, McHugh and Gummow JJ agreeing); Fulton Hogan Construction Pty Ltd v Cockram Construction Ltd [2018] NSWSC 264 at [21].
[9] [2014] FCAFC 1; (2013) 249 CLR 332.
[10] At [65].
[11] See also Pinnacle Construction Group Pty Ltd v Dimension Joinery & Interiors Pty Ltd [2018] NSWSC 894 at [87]- [91] where Stevenson J appears to have proceeded on the same basis.
[12] See Hayne, Kiefel and Bell JJ in Li at [67].
[13] [1947] EWCA Civ 1; [1948] 1 KB 223.
[14] At [68]; compare Gageler J, who agreed in the result, at [105]-[113].
[15] Dualcorp Pty Ltd v Remo Constructions Pty Ltd [2009] NSWCA 69; (2009) 74 NSWLR 190 at [60] (Macfarlan JA, Allsop P and Handley AJA agreeing).
[16] Security of Payment Act, s 32.
[17] Fulton Hogan Construction Pty Ltd v Cockram Construction Ltd [2018] NSWSC 264 at [21]; SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd [2015] VSC 631 at [107].
[18] At [66] and see Gageler J at [105], [106].
[19] Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd [2018] HCA 4; (2018) 92 ALJR 248 at [35] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), at [55] (Gageler J), at [105] (Edelman J).
[20] Adjudication response at [76].
[21] Adjudication response at [78].
[22] Adjudication response at [79].