Supreme Court of NSW Enforces Adjudicator's Money Order Amid Ongoing Arbitration

October 25, 2024

The recent decision in *Martinus Rail Pty Ltd v Qube RE Services (No 2) Pty Ltd (No 2) [2024] NSWSC 1223* sheds light on the complex interplay between adjudication under the Building and Construction Industry Security of Payment Act 1999 ("SOPA") and arbitration clauses in construction contracts. This case underscores the importance of meticulously drafted dispute resolution clauses and the strategic considerations parties must weigh when disputes arise in large-scale infrastructure projects.

The dispute centered on two adjudications under SOPA arising from contracts between the head contractor, **Qube RE Services**, and the subcontractor, **Martinus Rail Pty Ltd**, for work on the **Moorebank Intermodal Terminal Project** in Western Sydney. The adjudications obligated Qube to pay Martinus a total of $71 million. While Martinus sought to enforce these payments, Qube aimed to set aside the adjudications or, alternatively, stay their enforcement pending the determination of the parties' rights through **arbitration**.

At the heart of the matter were significant **delays** in project completion. Martinus attributed these delays to Qube's late and inadequate provision of designs and failure to grant timely site access. Qube, on the other hand, did not accept these explanations and eventually terminated the contracts, citing both cause and convenience. The validity of the termination for cause remains contested.

The contracts contained elaborate **dispute resolution clauses**, mandating a multi-stage process that included negotiations, escalation to senior executives, and ultimately arbitration. Despite this, Martinus pursued adjudication under SOPA for payment claims, which resulted in favorable determinations totaling over $15 million in earlier proceedings and the substantial sums at issue in this case.

Qube challenged the adjudications on several grounds, alleging **jurisdictional errors** by the adjudicator, particularly in his failure to consider key submissions and arguments. One pivotal issue was whether the adjudicator went beyond his jurisdiction by addressing matters not properly before him, effectively nullifying previous court decisions, such as the earlier judgment by Rees J in December 2023.

Justice Parker, presiding over the case, found that **jurisdictional error** was established. He concluded that the adjudicator's award went beyond the scope of the adjudication proceedings, as it included matters not raised in Martinus's payment claims and did not adequately consider Qube's submissions. This led to the partial setting aside of the adjudication determinations and associated judgments, specifically those components affected by the errors.

An essential aspect of the judgment was the court's consideration of whether to grant a **stay of enforcement** of the adjudicated amounts pending arbitration. Qube argued that if the payments were enforced and they ultimately succeeded in arbitration, Martinus might be unable to repay the sums, causing irreparable prejudice. The court examined precedents such as *Grosvenor Constructions v Musico* and *Veolia Water Solutions v Kruger Engineering*, which acknowledge that while the SOPA regime is designed to be "pay now, argue later," there are circumstances where a stay is appropriate to prevent injustice.

However, Justice Parker refused the stay application,

emphasizing that granting a stay would undermine the legislative intent of SOPA to ensure prompt payment to contractors, thereby supporting their cash flow. The court noted that Martinus was trading profitably and that there was insufficient evidence to suggest a significant risk of insolvency that would prevent repayment if required. The decision reflects a cautious approach, balancing the need to uphold the statutory scheme against the potential for prejudice to the paying party.

This case illustrates the nuanced challenges that parties in construction contracts may face, particularly concerning dispute resolution mechanisms and financial considerations during litigation. The elaborate dispute resolution clauses in the contracts, which culminated in arbitration, highlight the necessity for clearly defined mechanisms to resolve disputes. Parties must be acutely aware of how these contractual provisions interact with statutory remedies like SOPA adjudication. Understanding this interplay is crucial, as it can significantly impact the strategies employed when a dispute arises.

Moreover, the case underscores the strategic use of adjudication and arbitration. While adjudication under SOPA offers a quicker route to payment, especially for contractors seeking to maintain cash flow, arbitration provides a comprehensive forum for resolving more complex disputes, including those involving substantial claims and counterclaims. Parties need to carefully consider which avenue is more appropriate for their situation, weighing factors such as the urgency of payment, the complexity of the dispute, and the potential for prolonged litigation.

The judgment also brings to light the jurisdictional limits of adjudicators. Adjudicators must operate strictly within the confines of the matters properly before them. In this instance, the adjudicator’s failure to consider key submissions and his inclusion of matters not raised in the

payment claims led to a finding of jurisdictional error. This serves as a reminder that both parties and adjudicators must ensure procedural compliance to avoid determinations being set aside.

Financial considerations, particularly the risk of insolvency, play a significant role in such disputes. When seeking a stay of enforcement, the applying party must provide compelling evidence of the other party’s inability to repay, going beyond mere speculation about financial difficulties. The court’s refusal to grant a stay in this case demonstrates the high threshold required to override the statutory intent of SOPA, which aims to protect contractors’ cash flow and ensure prompt payment.

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