

CONSTRUCTIVE VIEWS

ASSISTING CLIENTS IN THE BUILT ENVIRONMENT



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Staying the enforcement of an adjudicator's award: Will Ontario follow the U.K. test?

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Introduction

Since October 1, 2019, a party to a contract or subcontract to which the adjudication provisions in the *Construction Act* (“Act”) apply,¹ may refer certain matters in dispute to adjudication. These matters include the value of work supplied, and payment under the contract.²

Over the past year, many articles have been written about the availability of adjudication. One author aptly wrote that “the legislation does not specifically refer to the proper invoice as the foundation of adjudication ... as a result, the jurisdiction is arguably broader than originally envisioned [and] most common disputes arising on a construction project will likely fall within one or more of the listed matters, making adjudication widely available”.³

In the coming months and years, many disputes arising at Ontario construction projects will be referred to adjudication, and many adjudicator awards will be issued. Since Ontario courts may be closed for a number of months in 2020 due to the coronavirus pandemic, there may be more adjudications in 2021 and 2022 than were initially anticipated.

Recently, Ontario lawyers have begun to consider what happens *after* an adjudicator's determination, including how a successful party will seek to enforce an adjudicator's determination,⁴ and which grounds in the *Act* an unsuccessful party may invoke to try to set aside a determination.⁵ Notably, the *Act* provides that a judicial

¹ Section 87.3(1) to (3) of the *Construction Act*, R.S.O. 1990, c. C.30 contain the transitions provisions.

² Section 13.5(1) of the *Construction Act* provides in part, that “a party to a contract may refer to adjudication a dispute with the other party to the contract respecting: 1. The valuation of services or materials provided under the contract. 2. Payment under the contract, including in respect of a change order, whether approved or not ... 3. Disputes that are subject of a notice of non-payment. 4. Amounts retained under s. 12 (set-off by trustee)... 5. Payment of a holdback... 6. Non-payment of holdback... 7. Any other matter that the parties to the adjudication agree to, or that may be prescribed.”

³ Glenn Ackerley, “The Authority and Jurisdiction of Construction Adjudicators” (2020) 36:3 Construction Law Letter 4.

⁴ James Little and Andrew J. O'Brien “When you win: enforcing the adjudicator's decision” (2020) 36:3 Construction Law Letter 13.

⁵ R. Bruce Reynolds “The enforceability of the adjudicator's determination and the potential for judicial intervention: Quite a hill to climb” (2020) 36:3 Construction Law Letter 9.

review application to set aside an adjudicator's determination does not operate as a stay, unless the *Divisional Court orders otherwise*.⁶

This begs the question: What legal test will Ontario courts use to decide whether or not to stay an adjudicator's determination? This article explores that question, first by setting out the legal principles used in the U.K. to decide whether to grant a stay of an adjudicator's award, and then by discussing the legal test that Ontario courts may use.

The U.K. test for staying an adjudicator's award:

In the U.K., adjudication became available to parties to a construction contract in 1998.⁷

U.K. law relating to staying the execution of an adjudicator's award was summarized by the Technology and Construction Court ("TCC")⁸ in the 2005 decision in *Wimbledon Construction Company v. Derek Vago*.⁹ In that case, the adjudicator awarded the contractor, Wimbledon, £122,923. Vago refused to pay and commenced arbitration. Wimbledon sought summary judgment and Vago sought a stay on the basis of Wimbledon's financial position.¹⁰

The TCC denied Vago's request for a stay since Wimbledon's financial difficulties were due, at least in part, to Vago's own failure to pay the adjudicator's award. The TCC held that the following six (6) principles govern the court's discretion to grant a stay of an adjudicator's decision:

- a) Adjudication is designed to be a quick and inexpensive method of arriving at a temporary decision;
- b) Adjudicators' decisions are intended to be enforced summarily and the claimant (the successful party in the adjudication) should not be kept out of its money;
- c) In an application to stay the execution of summary judgment arising out of an adjudicator's decision, the court must exercise its discretion...with considerations a) and b) in mind;
- d) The probable inability of the claimant to repay the judgment sum (awarded by the adjudicator and enforced by way of summary judgment) at the end of the substantive trial, or arbitration hearing, may constitute special circumstances,¹¹ rendering it appropriate to grant a stay;
- e) If the claimant is in insolvent liquidation, or there is no dispute on the evidence that the claimant is insolvent, then a stay of execution will usually be granted; and
- f) Even if the evidence of the claimant's present financial position suggested that it is probable that it would be unable to repay the judgment sum, that would not usually justify the grant of a stay if:

6 section 13.18(7) of the *Construction Act*

7 The *Housing Grants, Construction and Regeneration Act 1996* came into force in 1998.

8 The Technology and Construction Court ("TCC") is a sub-division of the Queen's Bench Division, part of the High Court of Justice, which is one of the Senior Courts of England and Wales.

9 *Wimbledon Construction Company 2000 Limited v. Vago* [2005] EWHC 1086 (TCC) [*Vago*]

10 *Vago* at paragraph 2.

11 U.K. Civil Procedure Rules 1998, Order 47 - writ of fieri facias [execution]

Rule 1—(1) Where a judgment is given or an order made for the payment by any person of money, and the Court is satisfied, on an application made at the time of the judgment or order, or at any time thereafter, by the judgment debtor or other party liable to execution - (a) that there are special circumstances which render it inexpedient to enforce the judgment or order; or (b) that the applicant is unable from any cause to pay the money, then, notwithstanding anything in rule 2 or 3, the Court may by order stay the execution of the judgment or order by writ of fieri facias either absolutely or for such period and subject to such conditions as the Court thinks fit.

- i. the claimant's financial position is the same or similar to its financial position at the time that the relevant contract was made; or
- ii. the claimant's financial position is due, either wholly, or in significant part, to the defendant's failure to pay those sums which were awarded by the adjudicator.

More recently, in the 2018 decision in *Gosvenor v. Aygun Aluminium*¹² the TCC added a new seventh "principle (g)" to the six principles set out above, as follows:

(g) If the evidence demonstrates that there is a real risk that any judgment would go unsatisfied by reason of the claimant organising its financial affairs with the purpose of dissipating or disposing of the adjudication sum so that it would not be available to be repaid, then this would also justify the grant of a stay.¹³

In *Gosvenor*, the adjudicator awarded Gosvenor £553,958, who then brought a summary judgment application to enforce the award. Aygun applied for a stay on the basis that Gosvenor's invoices were fraudulent, and did not reflect the value of the work done. The TCC granted Gosvenor's application, but also granted a stay. The TCC found it was "extraordinary" that in the face of Aygun's fraud allegations, Gosvenor chose not to file any responding evidence; and furthermore, there was evidence that Gosvenor was setting itself up to dissipate the judgment sum.¹⁴

The TCC made a number of points regarding new principle (g) including: (1) it is only available in "exceptional factual circumstances", (2) a high test will be applied - the standard is broadly the same as the level of evidence necessary to grant a Freezing Order (formerly, *Mareva* relief), and (3) it is not designed to prevent the claimant from dealing with the adjudication sum in the ordinary course of business.¹⁵

Gosvenor appealed the stay, which was dismissed by the Court of Appeal for England and Wales.¹⁶ In doing so, the Court of Appeal stated that:

[32] ... If the court concludes that there is a real risk that any future judgment in favour of the paying party would go unsatisfied, by reason of the dissipation of the judgment sum in the meantime, the court may grant the stay, regardless of what happened (or what could have happened) in the adjudication.¹⁷

U.K. lawyers have written that as a result of *Gosvenor*, judges may stay an adjudicator's award if there is a real risk that assets will be dissipated before the substantive dispute between the parties is determined.¹⁸

Finally, in a 2018 decision entitled *Equitix ESI CHP (Wrexham) Ltd. v. Bester Generacion UK Ltd.*,¹⁹ the TCC took a more flexible approach to granting stays, and held that it was "not appropriate for a party to recover £10 million by way of an adjudication and then, in answer to legitimate concerns raised by the other side as to their financial position, effectively stonewall the requests until the last minute and beyond".²⁰

12 [2018] EWHC 227 (TCC)

13 *Ibid* at para. 60

14 *Ibid* at para. 20. The TCC found that Gosvenor's creditor accounts changed so significantly (from a positive figure of £27,455 to £581,290 owed to its creditors) as solid evidence that Gosvenor were setting itself up to dissipate the judgment sum.

15 *Ibid* at para. 40

16 [2018] EWCA Civ 2695

17 *Ibid* at para 32

18 Sally Wollaston, case comment, *Gosvenor London Ltd. v. Aygun Aluminium UK Ltd* [2018] EWCA Civ 2695 (December 2018), online: <<https://hardwicke.co.uk/gosvenor-london-ltd-v-aygun-aluminium-uk-ltd-2018-ewca-civ-2695/>>

19 [2018] EWHC 177 (TCC)

20 *Ibid* at para 78

In *Equitix*, the TCC granted summary judgment in the sum of £9.8 million plus interest, but held that “*it would do broad justice between the parties*” to require the defendant to pay to the claimant £4.5 million without qualification, to pay £1 million into court, and to stay the execution of the remaining sum (around £4.5 million).²¹

U.K. commentators have written that the *Equitix* decision indicates that the TCC may refuse to fully enforce adjudicator’s awards to protect a payor from an impecunious payee; and that it is now advisable for a payee to provide evidence of its financial standing, since that will be an issue during a summary judgment hearing.

What will the legal test in Ontario be to stay an adjudicator’s award?

In Ontario, s. 13.20 of the *Act* provides that after an adjudicator’s determination is made, the successful party has up to two years to file a certified copy with the court. Once filed, the determination becomes a court order, which may be enforced by writ of seizure and sale, or garnishment, or any other enforcement method permitted under Rule 60 of the *Rules of Civil Procedure*.

An unsuccessful party can try to set aside an adjudicator’s determination on a judicial review application to Divisional Court, but it must first obtain leave. Even if leave is granted, an adjudicator’s determination can only be set aside if a party establishes one of the seven enumerated grounds in s. 13.18(5) of the *Act*.²² These enumerated grounds set a very high bar for setting aside a determination.

Simply put, unless an adjudicator’s determination could not be the subject of an adjudication (ground 3), or the adjudicator did not follow proper procedures *and* that failure prejudiced a party’s right to a fair adjudication (ground 5), it is unlikely that a determination will be set aside.

An unsuccessful party’s only strategy to avoid payment of an adjudicator’s award in the near term, well may be to raise fairness and fundamental justice objections, and immediately seek a stay of enforcement until the parties’ substantive rights are finally determined by litigation or arbitration, and to commence that litigation or arbitration, immediately, or before its stay application is heard.

Since the *Act* provides that leave is required to seek to set aside an adjudicator’s determination, the test for staying an adjudicator’s determination will likely be similar to the test for ordering a stay pending an appeal under Rule 63.02. That is the high threshold test for an interim interlocutory injunction, as set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*,²³ as follows, particularly because the legislation already provides adjudicator awards are intended to be “interim binding”:

1. Is there a serious issue to be tried?
2. Would compliance with the order under appeal cause irreparable harm? and
3. What is the balance of convenience?

The Ontario Court of Appeal has held that the three above noted *RJR* requirements are not to be considered as separate hurdles, but as interrelated considerations, and that the “overarching consideration is whether the interests of justice call for a stay”.²⁴

21 *Ibid* at para 80

22 1. The applicant participated in the adjudication while under a legal incapacity. 2. The contract or subcontract is invalid or has ceased to exist. 3. The determination was of a matter that may not be the subject of adjudication under this Part, or of a matter entirely unrelated to the subject of the adjudication. 4. The adjudication was conducted by someone other than an adjudicator. 5. The procedures followed in the adjudication did not accord with the procedures to which the adjudication was subject under this Part, and the failure to accord prejudiced the applicant’s right to a fair adjudication. 6. There is a reasonable apprehension of bias on the part of the adjudicator. 7. The determination was made as a result of fraud.

23 [1994] 1 SCR 311 (SCC)

24 *Longley v. Canada (Attorney General)* 2007 ONCA 149 at para 15.

Hence, after an adjudicator's determination is made, particularly if the award is significant, the losing party may seek to stay the execution of all, or a portion of the amount awarded, due to, among other reasons:

- i. the successful party is likely to be impecunious, and it won't provide evidence of its financial position, or evidence that it will be able to repay the award following litigation/arbitration, if the interim award is later overturned;
- ii. the balance of convenience strongly favours a stay, particularly if a party can show that the adjudication was unfair, or it was prejudiced by not being able to submit all of its relevant evidence in time, or if the winning party's evidence was sparse – i.e. the losing party satisfies ground 5 of s. 13.18(5) of the *Act*.

It remains to be seen whether Ontario courts will use a “flexible approach” to the enforcement of adjudicators' awards, and whether the court will grant a stay of execution if the winning party's financial position is such that it likely won't be able to repay the award at a later date. Ultimately, Ontario courts may find that it *would do broad justice between the parties* to stay the execution of an adjudicator's award, if the award were paid into court, pending litigation or arbitration.

One of the unintended consequences of the new adjudication regime, may well become that the amounts awarded by adjudicators may be ordered to be paid into court, with the parties left to litigate or arbitrate entitlement to that amount, at a later date. Admittedly, this would defeat the policy goal of adjudication, which is to resolve payment disputes quickly, so that money can actually flow without delay. That said, Divisional Court judges may decide that if a party was treated manifestly unfairly at an adjudication, the appropriate remedy is to pay some or all of the award into court. This shows the tension between the purposes of an injunction to maintain the *status quo* and the purposes of prompt payment which appear indicate a legislative policy to resolve the *status quo* in favour interim payment.

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