

January 6, 2023

The Termination or Abandonment of a Contract Does Not Mean It Has “Ceased to Exist”

Introduction

Last April, Joshua Strub and Jaspal Sangha released an article on the Divisional Court’s decision in *SOTA Dental Studio Inc. v. Andrid Group Ltd.*¹ to dismiss an application for judicial review of an adjudicator’s determination because of the applicant’s failure to comply with the adjudicator’s determination. While the Divisional Court’s decision was great for Andrid, and with respect to the enforceability of the new prompt payment provisions of the *Construction Act*² generally, the actual underlying merits of SOTA Dental Studio Inc.’s application were not addressed.

Specifically, the dismissal of SOTA’s application for judicial review meant that the Divisional Court did not provide an answer to the question – does the abandonment or termination of a contract or subcontract result in the contract or subcontract becoming invalid or ceasing to exist?

Fortunately, this question was recently addressed by the Superior Court of Justice’s decision in *Pasqualino v. MGW-Homes Design Inc.* to dismiss a motion for leave to bring an application for judicial review to set aside an adjudicator’s determination.³ The ramifications of this decision are important because it confirms that a party cannot just terminate or abandon a contract in order to avoid adjudication under the *Construction Act*.

Facts

The facts in *Pasqualino* are straight forward. MGW-Homes Design Inc. (“**MGW**”) is a contractor that was hired to complete renovations to the home of Domenic Pasqualino. In October 2021, a dispute arose between the parties which resulted in MGW registering a claim for lien on Mr. Pasqualino’s home in the amount of \$169,184.94. The lien was perfected and in November 2021, the lien was vacated by Mr. Pasqualino.

On December 15, 2021, a notice of adjudication was filed by MGW. Both parties participated in the adjudication. Mr. Pasqualino did not raise any issue with respect to the adjudicator’s jurisdiction before or throughout the adjudication. On January 18, 2022, the adjudicator determined that Mr. Pasqualino was to pay \$119,314.00 inclusive of HST to MGW. Mr. Pasqualino did not pay and so MGW took steps to enforce.

Mr. Pasqualino then brought a motion for leave to bring an application for judicial review to set aside the adjudicator’s determination.

Basis of Motion for Leave

¹ 2022 ONSC 2254. Also see <https://margiestrub.com/failure-of-applicant-to-comply-with-adjudicators-decision-results-in-divisional-court-dismissing-application-for-judicial-review/>

² R.S.O. 1990, c. C.30.

³ 2022 ONSC 5632.

Mr. Pasqualino relied on s. 13.18(5)2 and s. 13.18(5)3 of the *Construction Act* as the basis for his motion for leave to bring an application for judicial review.

First, Mr. Pasqualino, pursuant to s. 13.18(5)2 of the *Construction Act*, argued that the “*contract or subcontract is invalid or has ceased to exist*” because it was abandoned or terminated prior to the notice of adjudication.

Second, Mr. Pasqualino, pursuant to s. 13.18(5)3 of the *Construction Act* argued that 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*” because of two reasons:

- (1) the parties’ dispute could no longer be subject to adjudication because the adjudication process was commenced after MGW registered a claim for lien on the property, initiated an action, and the lien was vacated; and,
- (2) that he had a fairly arguable case that s. 13.18(5)(2) of the *Construction Act* does not apply after a lien is registered and bonded off.

Third, Mr. Pasqualino argued that the adjudicator made a palpable and overriding error by failing or erroneously stating or referring to an attachment to Mr. Pasqualino’s expert report.

Motions Judges Decision

First, Justice Ricchetti addressed Mr. Pasqualino’s submission that “*The Adjudicator did not consider whether the contract ceased to exist*”. Justice Ricchetti found that the Supreme Court of Canada decision in *Dell Computer Corp. v. Union des consommateurs*, which held that the issue of whether an arbitrator has the jurisdiction to determine the issue to be arbitrated, was equally applicable to an adjudication under the *Construction Act*.⁴ Therefore, the challenge to jurisdiction of the adjudicator should have been raised before the adjudicator.

Justice Ricchetti then confirmed that a construction contract does not cease to exist when it is abandoned or terminated, even if the termination or abandonment amounted to repudiation. Justice Ricchetti pointed to the important distinction between the performance of a contract being “*brought to an end*” versus a contract “*ceasing to exist*”. When a contract is terminated or abandoned, its performance is “*brought to an end.*” In this situation, the innocent party is excused from performing its obligations and can sue for damages for breach of contract while the guilty party generally loses its right to claim damages. As a result, abandoned or terminated contracts do not “*cease to exist*” because there are rights acquired during the performance of a contract that “*can and do survive a termination or abandonment of the contract.*”

Second, Justice Ricchetti addressed Mr. Pasqualino’s argument that the adjudication was not available because the adjudication process had been commenced after MGW had registered a claim for lien on the property, initiated an action, and the lien was vacated.

⁴ 2007 SCC 34.

This argument was rejected by Justice Ricchetti for the following reasons:

- (1) s. 13.5(5) of the *Construction Act* expressly provides that a party may refer a matter to adjudication even if the matter is the subject of a court action; and,
- (2) s. 44(5) of the *Construction Act* gives Mr. Pasqualino the right to seek a reduction of the amount of security posted to vacate the lien in order to avoid having to “pay twice”.

Finally, Justice Ricchetti rejected Mr. Pasqualino’s argument that the adjudicator did not make a palpable and overriding error by failing to refer to an attachment to Mr. Pasqualino’s expert report. Justice Ricchetti found that the expert report had in fact been reviewed by the adjudicator and in any event, the expert report was likely not material to the adjudicator’s determination. Interestingly, Justice Ricchetti did not mention that s. 13.18(5) of the *Construction Act* does not permit a determination to be set aside on judicial review as a result of a “palpable and overriding error”.

Justice Ricchetti did not determine what the appropriate test is for leave to bring a judicial review but nonetheless stated that if it had been “a reasonably arguable case” standard, as proposed by Mr. Pasqualino, Mr. Pasqualino had failed to demonstrate that there was a reasonably or fairly arguable case.

Unsurprisingly, Mr. Pasqualino’s motion was dismissed, and leave was not granted.



[Jaspal Sangha](#), Associate
T. 647-802-1991
jsangha@margiestrub.com



[Simren Sihota](#), Associate
T. 647-794-1564
ssihota@margiestrub.com