

August 15, 2023

Vacating a Lien? Beware of Relying on an Adjudicator's Determination

Key Takeaways

If you're bringing a motion under s. 44(5) of the *Construction Act* to reduce or return security, an adjudicator's determination alone is unlikely to satisfy the evidentiary requirements to be met.

In the recent decision of *Arad Incorporated v Arejali et al.*¹, the court discussed the evidentiary use of an adjudicator's determination in the context of a s. 44(5) motion. In concluding that an adjudicator's determination alone was insufficient, the court discussed (1) the nature of the adjudicator's determination and (2) whether the test under s. 44 had been satisfied. In answer to the first question, the court was clear that adjudicator's determinations are not binding on the court and remain subject to judicial scrutiny. In answer to the second question, the court found that the moving party failed to meet the evidentiary requirements under s. 44(5). In *Arad*, the adjudicator's determination was the only evidence provided.

Background

In *Arad*, the plaintiff registered a lien. The defendant posted security into court thereby vacating the lien. Two adjudications were commenced under Part II.1 of the *Act*.

On January 4, 2023, the adjudicator found that the defendant was not liable to pay the plaintiff. The plaintiff did not seek to judicially review the determination or stay the determination.

Thereafter, the defendant brought a motion under s. 44(5) of the *Act* to reduce or return the security on the basis of the determination which concluded that the plaintiff was entitled to no money. The defendant sought a full reduction of the monies paid into court.

Lessons learned from *Arad*

Issue 1: What is the nature of the adjudicator's determination?

The following principles come out of the court's decision in respect of the nature of an adjudicator's determination:

- the court reiterated that determinations given by adjudicators are interim decisions²
- adjudication provides a quick, efficient determination which allows funds to keep flowing; but also allows the parties to continue litigating³
- determinations are not binding on the court⁴
- while an adjudicator's determination is evidence, it is like any other evidence that the court may consider in determining whether the test under s. 44(5) is satisfied⁵
- an adjudicator's conclusions are not determinative on the decision to reduce security⁶

Issue 2: Whether the security should be returned or reduced?

In respect of the second issue, the court's decision is clear that to succeed on a motion to reduce security, the requirements under s. 44(5) of the *Construction Act* must be satisfied. The applicable test under s. 44(5) is set out at paragraphs 21 to 23:

¹ *Arad Incorporated v Rejali et al*, 2023 ONSC 3949 [*Arad*]

² *Arad*, at paras 15 and 17

³ *Arad*, at para 17

⁴ *Arad*, at para 17

⁵ *Arad*, at para 17

⁶ *Arad*, at para 18

1. The assessment of evidence is to be approached much in the same way that the evidentiary record is approached on a motion for summary judgment
2. The material question is whether there is an amount that may attract the security afforded by proper preservation and perfection of a proper construction lien according to the *Construction Act*
3. The court must be satisfied that there is no reasonable prospect of the lien claimant proving that the lien claimed attracts the security required under s.44(1) or 44(2) of the *Construction Act*

In *Arad*, the court applying the above test to the evidentiary record before it, concluded that the determinations of the adjudicator *alone* did not meet the evidentiary threshold required for the court to conclude that the lien claim did not attract the need for security. The court noted that there was nothing wrong with the adjudicator's process.⁷ However, it is because the adjudicative process is intended to be quick and efficient that not all evidentiary rules may be adhered to.

Conclusion

It will be interesting to see how the case law develops. In *Arad*, the court identified various limitations in respect of the adjudicator's determination. For instance, the adjudicator's findings were based on his opinion as an engineer and were not subject to contestation by any of the parties. While it may be that another determination is treated differently, given the court's comments that it is contrary to the purpose of the *Construction Act* to reduce security based on an adjudicator's determinate alone, it seems unlikely.⁸



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⁷ *Arad*, at para 28

⁸ *Arad*, at para 26