

July 5, 2024

Missed Providing Notice After Filing an Adjudicator's Determination? It's Enforceable

Key Takeaway

Section 13.20(3) of the *Construction Act* (the "Act") requires a party filing an adjudicator's determination to notify the other party of filing within 10 days. However, a recent decision of the Divisional Court has found that the failure to provide 10 days notice will not bar a party from enforcing an adjudicator's determination.

The consequences of failing to provide notice will depend on various factors. In determining the appropriate remedy, the Court will consider the extent of the non-compliance, any explanation for the non-compliance, any prejudice – or absence of prejudice – to the payor arising from the failure to give notice, and any other relevant circumstances in the overall context of the dispute and the breach by the payor of its statutory obligation to make prompt payment under the *Act*.

The Background

In October 2021, MGW Homes Design Inc. ("MGW"), a contractor, sought an interim payment order against a homeowner, Domenic Pasqualino ("Pasqualino"), pursuant to the provisions of the *Act*.

On January 18, 2022, an adjudicator released his determination, which required Pasqualino to pay MGW \$119,314. Pasqualino failed to pay.

On February 14, 2022, the adjudicator's determination was filed with the court. Pursuant to section 13.20(1) of the *Act*, once filed an adjudicator's determination is enforceable as if it were a court order. Under section 13.20(3), a party filing a determination must also notify the other party of the filing within 10 days. MGW did not give Pasqualino notice of filing within the 10 days as required.

On June 17, 2022, a writ of enforcement was issued.

The Lower Court Decision

Pasqualino brought a motion before the Ontario Superior Court of Justice to vacate the writ of enforcement. In other words, he sought to prevent MGW from collecting on the adjudicator's determination.

The motion judge agreed with Pasqualino, and ordered not only that the enforcement steps taken pursuant to the order were void.

Most significantly, however the court went even further, and ordered that MGW could take no future steps to enforce the adjudicator's decision.¹

¹ *MGW Homes Design Inc. v Pasqualino*, 2023 ONSC 411 [MGW 2023].

The result of this decision was to render MGW's non-compliance with a notice requirement "fatal" to its ability to enforce the adjudicator's decision. MGW appealed this second aspect of the motion's judge's order.

The Appeal Decision

On appeal, the Divisional Court held that the motion judge erred in finding that the non-compliance with the *Act* was fatal to the writ of enforcement.

While finding that the appropriate consequences of non-compliance are within the discretion of the court, the Divisional Court emphasized the importance of interpreting the notice requirement within the wider context of the *Act* in general, and the prompt payment and adjudication provisions in particular.

In arriving at its conclusion, the Court made the following observations:

1. **The Enforcement of a Determination by Court Order is not an Extraordinary Power:** A controlling principle is not "prompt process" but "prompt payment". There is a positive obligation to make payment within 10 days after the determination is communicated to the parties (s. 13.19(2)). The enforcing party does not need to bring a motion on notice. There is no option for a disappointed party to oppose enforcement. The adjudicator's determination may be taken to the court office, filed, and thereupon enforced, all without notice to the other side. Pursuant to s. 13.20(3) – the provision at issue in this case – the order is enforceable *on filing* and accordingly on the plain language of the provision enforcement may begin *before* notice is given. Consequently, the enforcement procedures are a necessary feature of the adjudication process.
2. **Enforcement of A Determination is Not Analogous to the Strict Compliance Requirements or Lien Claims:** A claim for lien initiates a claim and secures the claim against the land. Various stakeholders are entitled to rely on the state of the land's title (e.g., mortgage advances). Therefore, the strict timelines prescribed are necessary. In contrast, the prompt payment provisions have the goal as a swift interim decision to allow funds to flow down the construction pyramid.
3. **Non-Compliance Does Not Void the Writ:** While statutory requirements are not suggestions, there is nothing in the *Act* that provides that writ would become void if notice is not given in accordance with the *Act*. To preclude a party from ever enforcing an adjudicator's determination where there is non-compliance would be inconsistent with the general policy of the *Act*. Importantly, procedural formalism should not overwhelm the clear intent of the Legislature that prompt payment decisions should be followed without delay and without additional formal processes.

In addition, the court emphasized the positive obligation on the payor to make payment, and, importantly, that a need to file the determination with the court arises only when a party has breached its obligation to make payment in accordance with a determination.

Conclusion & Test Established by The Court to Determine Appropriate Sanctions

The Divisional Court concluded that rather than a strict precondition to enforcement of an adjudicator's determination, the notice requirement was more properly characterized as a "statutorily required courtesy."² However, that does not mean that the failure to comply has no consequence. Simply that, there is no automatic consequence, and the appropriate sanction falls within the discretion of the Court.

Justice Corbett, writing for a unanimous panel, provided helpful guidance on what those sanctions might be in future cases:

[30] For the benefit of motion judges called upon to consider this issue in future, however, I would add that setting aside enforcement steps is not a minimum or required sanction. The court should consider the extent of the non-compliance, any explanation for the non-compliance, any prejudice – or absence of prejudice – to the payor arising from the failure to give notice, and any other relevant circumstances, and then should place these matters in the overall context of the dispute and the breach by the payor of its statutory obligation to make prompt payment in accordance with the *Act*. If it appears to the court that the non-compliance was an oversight, in circumstances where it ought to have been clear that enforcement steps would be taken, and where there is no evidence of prejudice arising from the non-compliance, the court might well conclude that a simple declaration of non-compliance might be a sufficient remedy. Where there is evidence of actual prejudice, where there is no reasonable explanation for the failure to give notice, or where there are other circumstances that commend a more significant sanction, the court could consider voiding pre-notice enforcement steps, suspending interest for the period of non-compliance, an order for costs, or other sanctions that are proportional to the harm resulting from the failure to comply with the notice requirement. It is difficult to imagine any circumstance that would justify an order so draconian as to disentitle a party to ever enforce an adjudicator's payment determination as a consequence for failure to respect the statutorily required courtesy of notice of the order after it has been obtained and after it has become enforceable.

In this case, the Court found that the motion's judge's order precluding enforcement of the adjudicator's determination was disproportionate to MGW's failure to provide notice within the prescribed 10-day timeframe.

The Divisional Court allowed the appeal and set aside the provision of the motion judge's order barring future enforcement steps.

Pasqualino has sought leave to appeal to the Court of Appeal.

² *Ibid* at para 24.



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