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**Failure of Applicant to Comply with Adjudicator's Decision Results in Divisional Court Dismissing
Application for Judicial Review**

Our firm was recently successful in having an application for judicial review dismissed as a result of the applicant's failure to comply with the underlying adjudicator's determination.

The applicant had failed to make payment to our client (a contractor) on two proper invoices despite providing no notice of non-payment. As a result, our firm commenced an adjudication on behalf of our client to enforce the strict prompt payment provisions of the *Construction Act*. At adjudication, we were successful in persuading the adjudicator to enforce section 6.4(1) of the *Construction Act* and require the owner to pay the proper invoices without regard to the owner's alleged reasons for non-payment.

The applicant sought and was granted leave to bring an application for judicial review of that determination. Pursuant to section 13.18(7) of the *Construction Act*, the granting of leave did not have the effect of staying the adjudicator's determination, despite the applicant seeking such stay in its motion materials. After leave was granted, the application did not bring any further stay motion.

Despite numerous requests, the applicant failed to pay amounts required by the adjudicator's determination, an issue raised in our factum – where we argued that the applicant should not be afforded the right to set aside the determination while violating the underlying determination and the *Construction Act* itself. Following receipt of our factum, the Divisional Court required parties to make submissions regarding this issue at the outset of the hearing of the application, following which the application was summarily dismissed.

In its brief decision, the Divisional Court makes the following principles clear:

- Prompt payment is an integral to the scheme of the *Construction Act* and failure to pay a proper invoice in accordance with the prompt payment requirements of the *Construction Act* may result in the Divisional Court refusing leave.
- If leave is granted, an applicant must obtain a stay of the adjudicator's determination or must make payment, failing which the Divisional Court may dismiss the application for judicial review.

Finally, during its argument, the applicant advised, for the first time, that "there was no money" to pay the adjudicator's determination. The applicant filed no evidence to establish this point. For the purposes of its decision the Divisional Court accepted this argument to reinforce the Divisional Court's view that if an owner is insolvent, it should not be permitted to run up costs and delays through litigation while failing to comply with an adjudicator's determination and the prompt payment provisions of the *Construction Act*.

As a result of the Divisional Court's dismissal, the Divisional Court did not opine on the merits of the applicant's judicial review application. However, stay tuned as we will write a subsequent article on the merits of the application on our arguments against setting aside the determination.

The full decision from the Divisional Court can be found [here](#).



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