

Divisional Court Reviews Construction Adjudicator's Determination on Jurisdiction

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In reasons released July 15, 2024, the Ontario Divisional Court in *Jamrik v. 2688126 Ontario Inc.*, 2024 ONSC 2854, provided further guidance on jurisdictional issues arising in *Construction Act* adjudications. It is also an example of the Court quashing an adjudicator's determination on the grounds of procedural fairness on a judicial review application.

The underlying dispute between the Respondent/contractor, 2681126 Ontario Inc. o/a Turnkey Construction and the Applicant/owner, Stephen Jamrik, appears to have been determined based on the proper invoice/no notice of non-payment scenario (known as the "smash and grab" in the UK adjudication context), with the owner ultimately being ordered to pay \$564,812.87.

The substantive issues were not the subject of the judicial review application; the Divisional Court was asked to review the Adjudicator's findings on an interim jurisdictional issue in which the Adjudicator found that the contract at issue had not been completed, and accordingly the dispute did not run afoul of subsection [13.5\(3\)](#) of the *Construction Act*, which provides that "an adjudication may not be commenced if the notice of adjudication is given after the date a contract or subcontract is completed, unless the parties to the adjudication agree otherwise".

In a brief one-page decision, the Adjudicator concluded that he had jurisdiction to decide the issues referred to adjudication based on a finding that the contract was not "completed" within the meaning of the *Act*. The Adjudicator correctly identified that subsection [2\(3\)](#) of the *Construction Act* was in play, which, generally speaking, deems a contract complete where the price of completion (among other things) is not more than the lesser of, 1% of the contract price and \$5,000.

The Adjudicator determined that the contract was not "completed" because more than 1% of the contract price was owing and unpaid. The Arbitrator did not cite any legal authority for his interpretation of "contract completion", and the parties did not make submissions on this

interpretation of subsection 2(3); the parties' argument appears to have been focused on whether certain work was included in the contract and, if so, the value of that outstanding work to determine if the contract was completed.

The Divisional Court granted the owner leave to apply for judicial review of the determination on September 25, 2023 [[2023 ONSC 5362](#)], and the application was heard before a panel of three judges on December 14, 2023. The Divisional Court's reasons are dated July 15, 2024.

On the judicial review application, the Court found that the Adjudicator was not correct, in law, on the jurisdictional issue because he "misconstrued the plain meaning of the *Construction Act*" and "failed to apply settled and longstanding jurisdiction on the meaning of deemed 'contract completion' under the *Act*". To summarize: it is clear from the Act and the cases that when determining if a contract is complete, a decision maker is to look only to the "status of performance of contract work, and not the state of accounts between contracting parties." (emphasis in original).

Ultimately, the Court quashed the Adjudicator's decision and remitted the matter back for adjudication before a different adjudicator on all contested issues. In doing so, the Court noted that: (i) it was not in a position to dispose of the jurisdictional issue on a final basis because the Adjudicator did not make factual findings on the two key issues argued before him (whether certain work was included in the contract, and the value of the contract), and (ii) the Adjudicator did not notify or give the parties an opportunity to address his concerns regarding jurisdiction.

On the first point, the Court noted that while "it is a matter of discretion" whether an adjudicator should address alternative theories of a point under decision, there is a clear preference for an adjudicator making findings on the alternative issues so that a reviewing court will have the necessary factual findings to make the appropriate decision on review.

The second point is a reiteration of the principle articulated earlier this year in the [*Ledore Investments v Dixin Construction*](#) case – if an adjudicator is going to decide a point on a basis not raised by the parties, as a matter of procedural fairness and to ensure the adjudicator has the benefit of the parties' submissions on material points, the adjudicator should give notice to the parties of the concerns, and provide an opportunity to address them.

The Court also provided some guidance on how it will address allegations of errors in determinations going forward. The Court noted that "[a]n adjudicator must be correct, in law, on jurisdictional issues, but will be afforded deference on findings of fact related to their jurisdictional analysis." In the circumstances, it would appear that, had the Adjudicator correctly identified that the issue of whether the contract was "complete" was dependent only on the value of work remaining, but then made a factual error in determining the value of the work, the matter may have survived the judicial review application.

In any event, the Divisional Court's decision again highlights the importance of procedural rights and is instructive to both adjudicators and parties on how to deal with jurisdictional issues in the adjudication process, especially the issue of when a contract is "complete".

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