

THE WEIGHT COURTS AFFORD TO ADJUDICATION DECISIONS – HOW HEAVY ARE THEY?

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In *Arad Incorporated v Rejali et al*,^[1] an owner moved for the return of security it posted for a construction lien solely on the basis of an adjudicator's determination that the owner was not liable to the lien claimant for any of the amount claimed. The Court dismissed the owner's motion and refused to return or reduce the security. In its decision, the Court provides guidance on the weight it will place on the determination of an adjudicator when assessing whether to grant relief under the *Construction Act*^[2] (the "**Act**").

The Adjudication

The plaintiff registered a construction lien and a certificate of action against property owned by the defendants (the "**owners**"). The owners vacated the lien and certificate from title by posting security into court pursuant to section 44 of the *Act*. The parties each commenced adjudications with the plaintiff seeking monies owed for work performed and the owners seeking the return of an overpayment.^[3] The adjudicator dismissed both claims.^[4]

The Motion for Return of Security Paid into Court

The owners accordingly brought a motion seeking the return of their security paid into court to vacate the plaintiff's lien. The owners relied solely on the adjudicator's determination that no further monies were owed to the plaintiff.^[5] If no further money was owed, the owners argued, there was no need for the security to remain in court.

The plaintiff argued in response that the adjudicator's determination was made on an interim basis and that the court should not return the security to the owners based on the adjudicator's decision alone.^[6]

The Court's Decision and Takeaways

The *Act* provides that an adjudicator's determination and reasons are admissible as evidence in court^[7].

The Court found that an adjudicator's conclusion is not determinative on the decision to reduce security paid into court to vacate a lien.^[8] While a court may accept the findings and conclusions of the adjudicator as

evidence, the determinations of an adjudicator are not binding.^[9]

The test to release security paid into court to vacate a lien requires an evidentiary record similar to that required on summary judgment. A court must be satisfied on the evidence that there is no reasonable prospect of the lien claimant proving that its lien claim attracts a need for security.^[10] The determinations of an adjudicator alone do not meet this evidentiary threshold.^[11] Among other things, the Court noted that the adjudicator made findings not based on admissible evidence and on his personal expertise as an engineer.^[12]

Adjudication is an interim measure to keep money flowing through the construction pyramid. This procedure does not determine legal rights on a final basis.^[13] The Court cautioned that solely relying on findings of an adjudicator to reduce or return security ought to be avoided as the typical procedural safeguards available in litigation or arbitration are not present.^[14]

[1] *Arad Incorporated v Rejali et al*, 2023 ONSC 3949 (“*Arad*”).

[2] *Construction Act*, RSO 1990, c C 30.

[3] *Arad*, at paras 5 to 7.

[4] *Arad*, at para 8.

[5] *Arad*, at para 11.

[6] *Arad*, at para 12.

[7] *Construction Act*, s. 13.13(7).

[8] *Arad*, at para 17.

[9] *Arad*, at para 17.

[10] *Arad*, at para 21 to 23.

[11] *Arad*, at para 24.

[12] *Arad*, at para 25.

[13] *Arad*, at para 26.

[14] *Arad*, at para 28.

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A Cautionary Note

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