

CITATION: Feldt Electric Ltd. v. Gorbern Mechanical Contractors Limited, 2025 ONSC 4150
COURT FILE NO.: CV-23-705517
DATE: 2025 07 11

SUPERIOR COURT OF JUSTICE - ONTARIO

IN THE MATTER OF the *Construction Act*, RSO 1990, c C.30, as amended

RE: FELDT ELECTRIC LTD., *Plaintiff*

- and -

TORONTO DISTRICT SCHOOL BOARD, GORBERN MECHANICAL CONTRACTORS LIMITED and Rawlinson Community School, *Defendants*

BEFORE: Associate Justice Todd Robinson

COUNSEL: R. Prestayko, *for the defendant, Gorbern Mechanical Contractors Limited (moving party)*

A. O'Brien, *for the plaintiff*

HEARD: January 28, 2025 (by videoconference)

**REASONS FOR DECISION
(Motion to Discharge Lien or Stay Lien Action)**

[1] Gorbern Mechanical Contractors Limited (“Gorbern”) moves under s. 47 of the *Construction Act*, RSO 1990, c C.30 for an order discharging the liens of Feldt Electric Ltd. (“Feldt”), dismissing this action, and returning lien security previously posted into court. Alternatively, Gorbern seeks an order staying this action and returning the lien security.

[2] Gorbern’s motion arises from Feldt’s ongoing non-compliance with an adjudicator’s determination requiring Feldt to make payment to Gorbern. Feldt was subcontracted by Gorbern to perform electrical work as part of a heating and ventilation upgrade project at Rawlinson Community School. A dispute arose between Gorbern and Feldt over the scope of Feldt’s subcontract work, which ultimately led to Gorbern issuing notices of default, retaining another trade to complete the disputed work, and thereafter commencing an adjudication under the *Construction Act*. The adjudicator issued a determination requiring Feldt to pay \$94,017.20, plus interest and costs, for Gorbern’s costs of completing the work. There is no dispute that Feldt has not paid the adjudicator’s determination.

[3] My decision on this motion has taken much longer than I anticipated at the time of hearing the motion. The delay in rendering this decision is through no fault of the parties, but the result of

various other circumstances impacting my schedule and, to the credit of counsel, the capable written and oral submissions that have made deciding this motion more difficult.

[4] Ultimately, I have decided to dismiss Gorbern's motion. I am convinced that there are triable issues that cannot be resolved on this motion such that Feldt's lien should not be discharged. Feldt has failed to provide an adequate explanation for its ongoing non-compliance with its mandatory obligations under the adjudication provisions of the *Construction Act*, but I am convinced that Feldt's lien action should not be stayed. In my view, given my finding that there are triable issues with Gorbern's set-off claim and counterclaim and given the circumstances of the adjudication, it would be unjust and disproportionate to bar Feldt from proceeding to a trial on the merits of its lien claim solely by reason of non-payment of the adjudicator's interim determination. It would equally be unfair to return the security in court. Given Feldt's breach of its statutory obligations, though, I am denying it any costs of this motion.

ANALYSIS

[5] There are two central issues on this motion: (i) whether Feldt's lien should be discharged on the merits; and (ii) if not discharged, whether Feldt's lien action should be stayed for non-payment of the adjudicator's determination.

[6] My decision on this motion turns entirely on the facts and circumstances of this particular case. I accordingly think it helpful to briefly set out the pertinent facts and context outlined in the record before me before turning to the substantive relief.

Summary of key background facts

[7] As briefly noted already, this lien action and the parties' dispute arises from heating and ventilation work at the Rawlinson Community School in Toronto. Gorbern was contracted by Toronto District School Board ("TDSB") as general contractor for the work and subcontracted Feldt to perform electrical work for \$93,350, plus HST. The core dispute between the parties is whether certain electrical work formed part of Feldt's contractual scope. Feldt would not perform the work without a change order and further payment. It estimated another \$100,000 to complete it. In coordination with Gorbern, Feldt undertook preparing a proposal, plans, and cost estimates for the work. Gorbern submitted a proposed change order to TDSB through its consultant. TDSB rejected the change order.

[8] Following TDSB's rejection, Gorbern took the position that Feldt was contractually required to perform the disputed work as part of Feldt's base subcontract scope. Feldt maintained that it would not perform the work without a commitment to payment. Gorbern ultimately issued notices of default and terminated Feldt's right to perform the disputed work, which Feldt disagreed was part of its scope in any event. Gorbern then contracted another trade to complete the work at a cost of \$94,017.20.

[9] Gorbern commenced an adjudication under the *Construction Act* with respect to whether Feldt was liable to pay the \$94,017.20. An adjudicator was assigned to the dispute. He found that he had jurisdiction to decide it and reached a determination in Gorbern's favour. Feldt was directed

to pay Gorbern the sum of \$94,017.20, plus interest and costs of the adjudication. Feldt did not seek and has not sought leave for judicial review of the adjudicator's determination. The determination remains unpaid.

Issue #1: Should the lien be discharged on the merits?

[10] Gorbern's primary position is that there is no triable issue on its set-off claim and counterclaim, which exceeds the aggregate of Feldt's liens. Accordingly, even if Feldt proves its claim in full at trial, Gorbern submits that Feldt will still recover nothing and that its liens should thereby be discharged with lien security returned. Gorbern does not seek judgment for any excess amounts that may be owing to it, so also seeks an order that the action be dismissed in its entirety.

(i) Relevant legal framework

[11] Gorbern moves under s. 47(1) of the *Construction Act*. It provides that the court may, on motion, order the discharge of a lien on the basis that the claim for the lien is frivolous, vexatious or an abuse of process, or on any other proper ground.

[12] There are currently several leading Divisional Court decisions on how to properly apply s. 47 of the *Construction Act*. None of them were cited by the parties. Instead, the parties put forward summary judgment case law under rule 20 of the *Rules of Civil Procedure*, RRO 1990, c C.30 (the "*Rules*"). Prior to commencing oral argument, I afforded counsel an opportunity to review and consider the Divisional Court's three decisions in *Maplequest (Vaughan) Developments Inc. v. 2603774 Ontario Inc.*, 2020 ONSC 4308 (Div Ct), *R&V Construction Management Inc. v. Baradaran*, 2020 ONSC 3111 (Div Ct), and *Infinite Construction Development Ltd. v. Chen*, 2023 ONSC 2627 (Div Ct). They collectively set out the framework that I must apply in deciding Gorbern's primary relief.

[13] Whether to grant relief under s. 47 is a discretionary decision. Discharging a lien is a serious remedy. Because of that, when discharging a lien is sought on the merits of a case, as here, the applicable analysis has been held to be analogous to a summary judgment motion. Specifically, the Divisional Court has confirmed that the correct test to apply is whether there is a triable issue in respect to any of the bases on which discharge of the lien is sought. However, a motion under s. 47 of the *Construction Act* and a motion for summary judgment under rule 20 of the *Rules* are "procedurally different things": *Maplequest, supra* at para. 25.

[14] Nevertheless, although procedurally different, one important analogous aspect to both a s. 47 motion and a rule 20 motion is that both parties have a "best foot forward" evidentiary onus: *GTA Restoration Group Inc. v. Baillie*, 2020 ONSC 5190 at paras. 42-45, leave to appeal ref'd 2021 ONSC 1250 (Div Ct) at paras. 52 and 56. In this case, although Gorbern has the primary evidentiary onus, each of Gorbern and Feldt are expected to have put forward their best evidence on the substantive issues argued by Gorbern to support discharge of Feldt's lien.

[15] Also relevant is s. 50(3) of the *Construction Act*, which provides that "[t]he procedure in an action shall be as far as possible of a summary character, having regard to the amount and nature of the liens in question." The Divisional Court has observed that the provision "guides the

interpretation and application of motions under s. 47”, noting that proportionality is a core principle in proceedings under the *Construction Act*. What amounts to “a proper ground” to discharge a lien or dismiss an action turns on “the particular circumstances of a particular case”: *Infinite, supra* at para. 14.

(ii) *Are there triable issues with Gorbern’s set-off claim and counterclaim?*

[16] Gorbern’s position is that there are no triable issues that Feldt was contractually required to perform the disputed work, that it was not performed, and that Gorbern’s completion costs, which were accepted by the adjudicator, exceed Feldt’s lien amounts such that Feldt has no valid lien. In that regard, Gorbern relies on s. 17(3) of the *Construction Act*, which operates such that Feldt’s liability to Gorbern for outstanding debts, claims, or damages related to the improvement may be taken into account when determining the amount of Feldt’s liens.

[17] Gorbern’s argues that the disputed work was clearly included in Feldt’s electrical scope of work since the project tender specifications were expressly referenced in the purchase order, relevant electrical and mechanical drawings showing the disputed work were provided with the bid documents, and relevant notes in those drawings tied them together. Feldt maintains that it never quoted, nor was it expected to complete, the disputed work under its original quotation. In support of that position, Feldt obtained an opinion from Matt Mortazzavi, an engineer, arbitrator and mediator, whose opinion is that the disputed work was not within Feldt’s scope.

[18] I agree with Feldt that the intentions of the parties must be considered. Feldt was contracted to perform its subcontract work for \$93,350. Its quotation set out the scope of work included in its bid. The evidence before me supports that the disputed work would reasonably cost in the same range as Feldt’s original quote to complete, apart from the work that Feldt did perform. Notably, prior to the work being performed by anyone, Feldt estimated it would cost \$100,000 to complete. The trade ultimately performing the work billed \$94,017.20. It raises an eyebrow, to say the least, that the parties were *ad idem* when the subcontract was formed that Feldt would be performing nearly \$200,000 worth of work for \$93,350.

[19] In response to Feldt’s quotation, Gorbern issued a purchase order. It identified the work as “To proceed with the electrical scope of work as per Tender document, Plans, specifications and addendums 1-4”. The purchase order was not signed back, although the purchase order number was noted in subsequent invoicing. There are accordingly issues around whether the broad language of the purchase order was agreed by Feldt, whether Feldt’s quotation still governs, and the legal relationship between the two documents in the context of the parties’ commercial dealings.

[20] In the affidavit of Gorbern’s project manager, Ted Hampson, he states that he was told by Feldt’s estimator, Chad Wilcott, that Feldt’s quote included all of the electrical work set out in the tender documents. However, no particulars of the discussion are provided, including what specifically was discussed, when precisely the discussion occurred, the context of the discussion, and how the discussion about Feldt’s scope of work unfolded. Although Feldt did not tender an affidavit from Mr. Wilcott in response to this motion, and could have, I nevertheless have concerns

about relying on Mr. Hampson's self-serving evidence on such a critical point in the parties' dispute over whether the electrical scope had been agreed.

[21] Gorbern has attempted to walk me through how the various specifications and drawings connect to both Feldt's quotation and the purchase order issued to Feldt. While the process was quite helpful to understanding the dispute, the contrary interpretations of portions of specifications and notes on drawings put forward by Feldt have only served to crystallize that there are triable issues over whether the disputed work was intended to be incorporated into Feldt's base subcontract scope of work and whether it was, in fact, incorporated.

[22] Mr. Hampson sets out in his affidavit that he understood, and believed that Feldt understood, that the disputed work was always part of the subcontract scope. He explains that coordinating with Feldt on a change order request to the TDSB was about supporting Gorbern's trade. Specifically, he states, "I made the change order request because I wanted to support Feldt as Gorbern's subcontractor so far as was possible", but goes on to state that he anticipated the change order would be rejected because it appeared from his own review of the tender and bid documents that the disputed work was part of the electrical scope of work.

[23] Leonard Feldt's evidence is that that work was not, and never was, part of Feldt's scope of work. In his evidence, he includes contemporaneous emails that support Feldt's challenge to Mr. Hampson's claimed belief that the disputed work was included. At a minimum, they support that Gorbern's position that the work was within Feldt's scope was not relayed to Feldt when it was seeking the change order. I have been walked through various evidence that tends to support that Gorbern only took the position that Feldt was required to complete the work *after* TDSB refused to approve the change order.

[24] Feldt has quite effectively challenged the reliability, if not credibility, of Mr. Hampson's evidence by pointing out his emails and conduct at the material times. Since there were no cross-examinations, it is difficult to make a finding on the record before me whether Mr. Hampson's uncorroborated, self-serving affidavit evidence is factually accurate or is revisionist history with the benefit of hindsight. It may well also be somewhere in between the two. Both affidavits identify other potential witnesses whose evidence appears quite relevant in deciding the issue, but their evidence is not before me.

[25] Neither side has put forward sufficiently detailed information on the discussions and subjective understanding of Feldt's scope of work at the time of subcontract formation. The dealings between Mr. Hampson and Mr. Feldt and others during the period when the issue of the disputed work crystallized is nuanced and detailed, as set out in both of their affidavits. In my view, the record before me is not sufficiently complete to make a finding that there is no triable issue on the required scope of work under the subcontract. To the contrary, the record supports a genuine issue in dispute over Feldt's scope of work.

[26] In my view, it is neither just nor fair to the parties to decide Feldt's contractual scope of work on what is clearly an incomplete record. I find a triable issue on contract formation regarding the contractual scope of work. In my view, that issue is more appropriately decided at trial with a fulsome evidentiary record addressing the parties' contract dealings.

Issue #2: Should the lien action be stayed?

[27] Since I have not granted Gorbern's primary relief, I turn to the alternative relief to stay Feldt's lien action pending payment of the adjudicator's determination and, separately, whether the lien security previously posted by Gorbern into court should be returned. Gorbern argues that a lien claimant who fails to comply with its statutory obligation to pay an adjudicator's determination should not be permitted to pursue its lien rights until it has done so.

(i) Relevant legal framework

[28] Although there are pending amendments to the adjudication provisions in Part II.1 of the *Construction Act*, the adjudication provisions relevant to this motion as they stand today (and at the time of the parties' adjudication in this case) are as follows:

- (a) A party to a contract or subcontract may refer to adjudication specific enumerated disputes with the other party to the contract or subcontract: s. 13.5(1)-(2). The enumerated matters subject to adjudication are as follows:
 - (i) the valuation of services or materials provided under the contract;
 - (ii) payment under the contract, including in respect of a change order, whether approved or not, or a proposed change order;
 - (iii) disputes that are the subject of a notice of non-payment under Part I.1 of the *Construction Act*;
 - (iv) amounts retained under s. 12 (set-off by trustee) or s. 17(3) (lien set-off);
 - (v) payment of a holdback under s. 26.1 or 26.2;
 - (vi) non-payment of holdback under s. 27.1; and
 - (vii) any other matter that the parties to the adjudication agree to, or that may be prescribed.
- (b) An adjudication cannot be commenced if the notice of adjudication is given after the date the contract or subcontract is completed, unless the parties to the adjudication agree otherwise: s. 13.5(3).
- (c) An adjudication may only address a single matter, unless the parties to the adjudication and the adjudicator agree otherwise: s. 13.5(4).
- (d) An adjudicator may exercise certain powers in conducting the adjudication, including drawing inferences and on-site inspection, and has discretion to conduct the adjudication in a manner determined appropriate in the circumstances, but must do so in an impartial manner: s. 13.12.
- (e) An adjudicator's determination must be made no later than 30 days after receiving the documents required by s. 13.11 (from the party giving the notice of adjudication), unless the adjudicator and the parties to the adjudication consent to an extension: s. 13.13(1)-(2).

- (f) A determination made by an adjudicator after the deadline to make it (whether 30 days or the consent extended deadline) is of no force or effect: s. 13.13(5).
- (g) The determination and reasons of an adjudicator are admissible as evidence in court: s. 13.13(7).
- (h) A determination is binding until a determination by either the court or arbitration under the *Arbitration Act, 1991*, SO 1991, c 17, or a written agreement between the parties respecting the matter: s. 13.15(1).
- (i) Parties to an adjudication presumptively bear their own costs, unless an adjudicator determines that a party to the adjudication has acted in respect of the improvement in a manner that is frivolous, vexatious, an abuse of process or other than in good faith, in which case the adjudicator may direct that the party be required to pay some or all of the other party's costs and/or any part of the adjudicator's fee that is payable by the other party: ss. 13.16 and 13.17.
- (j) An adjudicator's determination is subject to judicial review, with leave: s. 13.18.
- (k) An adjudicator's determination must be paid no later than 10 days after the determination has been communicated to the parties, with interest accruing on any unpaid amount at the greater of the rate of interest in the parties' contract or subcontract and the rate under the *Courts of Justice Act*, RSO 1990, c C.43: s. 13.19(2)-(3).
- (l) The adjudicator's determination may be filed with the court and, on filing, the determination is enforceable as if it were an order of the court: s. 13.20(1).

[29] Although the *Construction Act* contemplates a speedy and targeted adjudication process, that process must still be procedurally fair to the parties, including the right to be heard on a determinative issue: *Ledore Investments v. Dixin Construction*, 2024 ONSC 598 (Div Ct) at paras. 5 and 25; *Jamrik v. 2688126 Ont. Inc.*, 2024 ONSC 2854 (Div Ct) at paras. 5-6.

[30] Gorbern submits that, although the *Construction Act* does not specifically provide that a lien action may be stayed for a breach of its provisions, I have authority in the *Rules*, which apply in lien actions except to the extent of any inconsistency with the provisions of the *Construction Act* and its regulations: *Construction Act*, s. 50(2). Gorbern specifically points to rule 2.1.01, 57.03, and 60.12 of the *Rules* as providing jurisdiction to stay a proceeding, although has provided no case law under any of them. Those rules provide as follows:

2.1.01 (1) The court may make an order staying or dismissing a proceeding that appears on its face to be frivolous or vexatious or otherwise an abuse of the process of the court.

57.03 (1) On the hearing of a contested motion, unless the court is satisfied that a different order would be more just, the court shall,

- (a) fix the costs of the motion and order them to be paid within 30 days; or

(b) in an exceptional case, refer the costs of the motion for assessment under Rule 58 and order them to be paid within 30 days after assessment.

(2) Where a party fails to pay the costs of a motion as required under subrule (1), the court may dismiss or stay the party's proceeding, strike out the party's defence or make such other order as is just.

60.12 Where a party fails to comply with an interlocutory order, the court may, in addition to any other sanction provided by these rules,

- (a) stay the party's proceeding;
- (b) dismiss the party's proceeding or strike out the party's defence; or
- (c) make such other order as is just.

[31] Gorbern has filed the adjudicator's determination with the court under s. 13.20(1) of the *Construction Act*, so it is enforceable as if it were an order of the court. Gorbern submits that Feldt's failure to pay the determination in this circumstance is akin to a failure to pay an award made in the proceedings and a failure to comply with an interlocutory order, such that subrule 57.03(2) and rule 60.12 should be applied either directly or by analogy.

(ii) Do the reasons for non-compliance with an adjudicator's determination matter?

[32] There is a sizeable body of case law under the *Construction Act* focusing on the special protective rights afforded to those who supply services and materials to an improvement, notably the lien and trust remedies. That, though, is not the totality of the legislation. It also imposes mandatory and often strict obligations that can directly impact the ability of a claimant to access those special rights created by the act.

[33] Prompt payment and adjudication were introduced in Ontario ostensibly to assist in ensuring the ongoing flow of funds on projects. Adjudication permits resolution of disputes that may otherwise derail a project on an interim binding basis. Adjudicators make decisions on tight timelines set by the statute, which do not preclude the parties from litigating, arbitrating, or settling the dispute at a later date. It allows projects to keep going. That, at least, is the intention.

[34] Ontario was the first Canadian jurisdiction with legislation combining prompt payment and adjudication with lien rights. There is an inherent tension between those two regimes. Notably, an aggrieved contractor or subcontractor may commence an adjudication to seek to resolve their dispute. However, if unsuccessful in the adjudication, nothing prevents that contractor or subcontractor from simply lien-ing for the same amount rejected by the adjudicator. Adjudications in Ontario are legislated to be binding only on an interim basis. The *Construction Act* expressly contemplates that parties only have their dispute decided on a final basis by the court, by arbitration, or by settlement.

[35] The issue raised before me on this motion is what consequence, if any, there should be to a lien claimant who knowingly and intentionally refuses to make payment as directed in an adjudicator's determination, contrary to the mandatory obligation to do so in s. 13.19(2) of the *Construction Act*.

[36] In my view, the rights and obligations under the *Construction Act* go hand in hand. The lien is an extraordinary remedy providing significant protection to a person who supplies services or materials to a construction project. A lien claimant who disregards its mandatory obligations under the *Construction Act* and seeks to insist that the court nevertheless enforce its lien rights is rolling the dice. Lien claimants cannot expect the court to ignore defiance and breach of their obligations under the prompt payment and adjudication provisions of the *Construction Act*. Accessing the extraordinary lien remedy comes with complying with other mandatory obligations under the *Construction Act*. I agree with Gorbern that there is a serious concern with permitting parties to ignore adjudication decisions and pursue a fresh determination on the same issues in court without ramification or recourse. That is not the scheme created in the *Construction Act*. Mandatory language is used in both the prompt payment and adjudication provisions. The legislature intended that those provisions would be complied with.

[37] Nevertheless, each case must be decided on its own facts. There is no “cut and dry” or “one size fits all” approach to breaches of payment obligations under the *Construction Act*. When faced with a discretionary discretion such as this one, the context in which a breach occurred is relevant to deciding whether to exercise the court’s discretion in favour of one party or another. The court’s primary concern is always doing what is fair and just in the context of each particular case. To that end, the reasons for non-compliance with an adjudicator’s determination may matter, depending on the facts and circumstances of the case.

(iii) Should I consider Feldt’s adjudication challenges in exercising my discretion?

[38] Feldt does not dispute that the adjudicator ordered it to pay \$94,017.20, plus interest and costs, to Gorbern. Feldt acknowledges that it is aware of the adjudicator’s determination and that it did not seek judicial review as permitted by s. 13.18 of the *Construction Act*. Feldt also does not dispute that it has failed to pay the determination. Frankly, it seems evident from the record that Feldt has no intention of paying it.

[39] Gorbern argues that allowing Feldt to continue its lien claim in the face of its refusal to pay the adjudicator’s determination runs contrary to the clear spirit and intent of the adjudication provisions of the *Construction Act*. Gorbern has cited several decisions of the Divisional Court over the past several years discussing the intention behind and importance of the prompt payment and adjudication provisions. That case law is not in dispute.

[40] Feldt’s reason for non-payment is, at its core, a view that that adjudication process was procedurally unfair, notably that the adjudicator exceeded his jurisdiction and conducted the adjudication in a manner that unfairly excluded Feldt. Gorbern argues that it would be inappropriate for me to determine whether the adjudicator was entitled to adjudicate the matter before him or whether the procedure followed in the adjudication was fair. I agree. That is statutorily a function of the Divisional Court. As set out in s. 13.18(1) of the *Construction Act*, a judicial review of an adjudicator’s decision may only be made with leave to the Divisional Court. Feldt does not argue otherwise.

[41] Feldt submits that, without making any determination on the adjudication process, I may nevertheless still consider its concerns about unfairness in the adjudication as a factor in deciding

whether to exercise my discretion in this case. I agree. There is no principled reason why I should be precluded from considering Feldt's concerns and the circumstances of the adjudication when deciding whether to grant substantive relief arising from Feldt's non-payment of the adjudicator's determination. That context matters in understanding the factual circumstances giving rise to this motion. To ignore the context would be akin to deciding the case in a vacuum.

[42] In my view, the contextual lens is an appropriate means for the court to consider the interplay between adjudication and other rights under the *Construction Act*, without assuming jurisdiction that the court does not have or usurping the Divisional Court's statutory function. Rather, I am only considering Feldt's reasons for not paying the determination as a factor in deciding whether staying the action and returning the security is appropriate relief in the particular circumstances of this particular case.

[43] This is a case where Feldt's fairness concerns go to the root of whether the adjudicator exceeded his jurisdiction in entertaining Gorbern's submissions and making the determination. In my view, relying on a jurisdictionally-flawed determination to stay substantive lien rights could essentially double-down on unfairness to Feldt. Whether or not the adjudicator exceeded his jurisdiction and conducted a procedurally unfair adjudication is thereby fairly considered as a factor in deciding this motion. So, too, is Feldt's apparent defiance of the statutory scheme by refusing to pay the adjudicator's award in compliance with the mandatory obligation imposed by s. 13.19(2) of the *Construction Act*.

[44] Feldt's main concerns with the adjudication process are as follows:

- (a) the adjudicator found that he had jurisdiction to deal with the dispute despite Feldt specifically objecting to the adjudicator's jurisdiction on the basis that the proposed adjudication was not merely a matter of payment, but rather a contractual dispute that required determination of the parties contractual rights and scope of work under the subcontract before any determination could be made on amounts to be paid;
- (b) the adjudication dealt with issues beyond the scope of those permitted by s. 13.5(1) without Feldt's consent;
- (c) the adjudicator proceeded with the adjudication in the absence of evidence from or participation by Feldt; and
- (d) the adjudicator ignored Feldt's opinion report from Matt Mortazavi on Feldt's scope of work.

[45] In my view, there is merit to many of these concerns, but the jurisdictional concern is particularly notable and, in my view, warrants some discussion in the context of the relief being sought on this motion for non-payment of the adjudicator's determination.

[46] Following appointment of the adjudicator, Leonard Feldt sent an email objecting to the adjudicator's jurisdiction. Notably, Mr. Feldt specifically identified the dispute as being one of contractual interpretation.

[47] Although initially suggesting that “the contract dispute is an issue for the courts and not an Adjudication”, the adjudicator ultimately decided that he should address his jurisdiction and sought to schedule a meeting with the parties. A call was set up, to which Mr. Feldt objected and reiterated his position that the involvement of an adjudicator was inappropriate and that the dispute was one of contractual scope beyond the jurisdiction of adjudication. The adjudicator asserted that he had been appointed for the case and intended to proceed with the adjudication. Mr. Feldt specifically directed the adjudicator to the matters subject to adjudication under s. 13.5, stating again that “this matter is NOT a Monetary Issue, but a Contractual Issue, which is not within your mandate to Adjudicate.”

[48] The adjudicator ultimately proceeded to find that he did have jurisdiction by decision dated June 20, 2023. I have reviewed the adjudicator’s decision on jurisdiction. He found that the dispute fell within ss. 13.15(1)(1)-(2) of the *Construction Act*, i.e., valuation of services or materials provided under the contract and payment under the contract, including in respect of a change order, whether approved or not, or a proposed change order.

[49] As I read the decision, the adjudicator accepted Gorbern’s position that the dispute scope of work was part of Feldt’s subcontract work. He viewed the dispute as being the “valuation of services or materials provided under the contract.” In the “Facts” section of his decision, he seems to state as fact the positions of Gorbern. The adjudicator acknowledges that Feldt submitted a change order, but does not discuss anything about that change order. From this motion, it is clear to me that the proposed change order was in respect of the same work that Gorbern subsequently arranged to be performed and was being back charged to Feldt.

[50] I note that the adjudicator does acknowledge Feldt’s position in his jurisdiction decision. He states, “The Respondent states that the Claimant is not permitted to adjudicate this dispute as it is a ‘contract interpretation dispute’ related to the ‘scope of work.’” Nevertheless, that position is not further discussed or addressed. The adjudicator simply acknowledges Feldt’s arguments, but does not appear to have meaningfully addressed them.

[51] I am somewhat at a loss for how the dispute regarding contractual scope of work was not investigated and addressed by the adjudicator. As set out in s. 13.12(5) of the *Construction Act*, the statutory mandate is for an adjudicator to conduct an impartial adjudication. In this case, although formal submissions were not made by Feldt following the adjudicator’s request for them, the issues of contractual scope of work and the need for contractual interpretation had already been raised by Leonard Feldt directly with the adjudicator at the outset of the process, yet they were not explored when he was considering and deciding his jurisdiction. I note that failing to make findings on points on which the parties had expressly joined issue was a concern for the Divisional Court when overturning an adjudicator’s determination in *Jamrik v. 2688126 Ont. Inc.*, *supra*, at paras. 13-14.

[52] On this motion, Gorbern took the position that there was no triable issues on its set-off claim and counterclaim. I have disagreed, finding that there is a triable issue on whether the disputed work was even within Feldt’s contractual scope. It was apparent to me that was a threshold issue for determination.

[53] This is not a situation where the contractual scope of work was agreed between the parties. Far from it. Reaching the determination that the adjudicator made required either an assumption or a finding that the disputed electrical work was within Feldt's base subcontract scope. Given the nature of the parties' dispute, such an assumption would be improper and a finding on Feldt's scope of work could only reasonably have flowed from contractual interpretation. That is not among the matters that may be submitted to adjudication absent consent of both parties.

[54] Although it is not for me to determine, in this case, the adjudicator does appear to have exceeded his statutory jurisdiction. In my view, the genuine issues submitted to adjudication by Gorbern were not captured by any of the items in s. 13.5(1), and certainly not s. 13.5(1)(1) or (2) as relied upon by the adjudicator. It thereby appears that they were not properly the subject matter of an adjudication absent Feldt's consent under s. 13.5(1)(7). Feldt did not consent. This squarely calls into question the correctness of the adjudicator's determination on jurisdiction and, accordingly, the determination made in the adjudication.

[55] I need not engage in discussion over Feldt's other challenges to procedural fairness, which also have merit. My view that the adjudicator exceeded his statutory jurisdiction by accepting and engaging in the adjudication is itself relevant to my exercise of discretion on this motion. I have found triable issues on Gorbern's position on the scope of Feldt's subcontract work. The adjudicator's determination is only interim and is not binding on me: *Construction Act*, s. 13.15(1). Regardless of whether judicial review was pursued, both the adjudicator's finding on jurisdiction and ultimate determination are in question. In the circumstances of this case, it would only exacerbate procedural unfairness to Feldt if I were to turn a blind eye to those concerns when deciding the appropriateness of staying Feldt's lien action for non-payment of the adjudicator's determination. Significantly, it could lead to a potentially improper determination being the basis of unfairly interfering with or even finally disposing of Feldt's substantive lien rights.

[56] With respect to the rules relied upon by Gorbern in support of a stay order, I am not convinced that this action is frivolous, vexatious, or an abuse of process. Rule 2.1.01 of the *Rules* accordingly does not apply. Similarly, the adjudicator's determination is not captured by subrule 57.03(2) of the *Rules*. Feldt has not failed to pay costs of a motion ordered under subrule 57.03(1). Neither of those rules assists Gorbern in seeking a stay for non-payment of the determination.

[57] I agree with Gorbern, though, that rule 60.12 of the *Rules* does apply since the determination has been filed with the court and is enforceable as if it was an order of the court by operation of s. 13.20(1) of the *Construction Act*. However, Gorbern has tendered no case law under rule 60.12. The operative language in that rule is that the court "may" stay the proceeding or grant other relief. It is, like a decision under s. 47 of the *Construction Act*, a discretionary decision based on the facts and circumstances of a particular case.

[58] I acknowledge that Feldt did not avail itself of its statutory right under s. 13.18 of the *Construction Act* to seek judicial review and a stay of the award. The adjudicator's determination stands. Feldt is also in ongoing breach of its obligation to pay the adjudicator's award under s. 13.19. As already noted, since Gorbern has filed the adjudicator's order with the court, it is enforceable as an order of this court. However, none of that changes my view of the injustice to

Feldt of granting relief that would curtail or impact its substantive lien rights when I have serious concerns about the adjudication itself.

[59] In my view, staying Feldt's lien action is disproportionate to the nature of Feldt's breach in context of the underlying adjudication and surrounding circumstances. In the circumstances of this case, I am not prepared to stay the lien action for non-payment of the adjudicator's determination. It would be unjust to do so when the adjudicator's jurisdiction to even make the award is in question and a stay could potentially bar Feldt from allowing its lien and contract claims to be tried on the merits. Importantly, a stay may also bar Feldt from obtaining a judicial determination on its contractual scope of work: a matter that, in my view, was not properly within the adjudicator's jurisdiction to assume or decide.

[60] Although I have accepted that it is appropriate to consider the circumstances of the adjudication in this case, that may not be true in all cases. Also, in many cases, I expect it may well be appropriate to stay a lien action (or a defence to one) pending compliance with an unpaid adjudication award. The obligation to pay an adjudicator's determination under s. 13.19 of the *Construction Act* is mandatory. Challenges to an adjudicator's determination are properly addressed by judicial review in the Divisional Court, with a stay of the determination sought if the party seeking judicial review does not intend to pay an adjudication award.

[61] Ultimately, though, each case must be decided on its own facts. I have thereby quite intentionally focussed my analysis specifically on the factual circumstances of the dispute and adjudication between Gorbern and Feldt. This case has a unique set of facts and circumstances. My decision turns entirely on them.

Issue #3: Should security for the liens be returned?

[62] Gorbern also seeks a reduction in the lien security under s. 44(5) of the *Construction Act* as a consequence for Feldt's non-payment of the adjudicator's determination. Specifically, Gorbern seeks a reduction of security to nil and a return of the lien bonds posted to vacate Feldt's liens. In my view, such relief for non-payment of an adjudication determination would be unfair and contrary to the scheme of the *Construction Act*.

[63] As set out in s. 44(6) of the *Construction Act*, upon posting the security into court, Feldt's liens became a charge upon that security. If the security were returned, then the lien would attach to nothing. In granting such an order, I would not formally be discharging the lien, but the effect would be the same. The lien would have no value. If proven, it would be enforceable against nothing. An interim adjudicator's determination, which is expressly non-binding on this court pursuant to s. 13.15 of the *Construction Act*, would become the basis for a final order effectively disposing of Feldt's lien without any prior court order for compliance with the adjudicator's award.

[64] Had I stayed the lien action, Gorbern's concern that it would be subject to ongoing bond premiums during the period of stay is a fair one. However, it would have been readily ameliorated by an order that Feldt pay the lien bond premiums during the period of any stay. Since I am allowing Feldt's lien action to proceed to trial, such an order is unnecessary and would be unfair

in the circumstances. Gorbern is not precluded from seeking recovery of the bond premiums at trial if it is successful.

COSTS

[65] Although Feldt has successfully opposed the motion, it shall not be entitled to any costs. Feldt's ongoing breach of its mandatory payment obligations under s. 13.19 of the *Construction Act* is problematic. While this motion remained under reserve, I did consider granting at least the stay of proceedings and requiring Feldt to either pay Gorbern or post the determination amount into court as a pre-condition to continuing its action. My ultimate decision not to discharge Feldt's lien or stay this lien action was grounded in what I feel is most fair and just in the particular circumstances of this particular case. It does not change my view that Feldt ought to have commenced an application for judicial review after receiving the adjudicator's decision. For whatever reason, it did not.

[66] This outcome is a significant indulgence to Feldt. It is also one that other litigants should not assume will be granted if they follow Feldt in defying an adjudicator's determination without seeking judicial review. For these reasons, Feldt shall bear its own costs.

[67] Gorbern has been unsuccessful in its motion. No argument was made for costs in any event, but I would not have awarded costs of an unsuccessful motion to Gorbern in the circumstances.

DISPOSITION

[68] For the foregoing reasons, Gorbern's motion is dismissed. Each party shall bear their own costs of the motion.

[69] Since the lien action will be proceeding, I am directing the parties to agree on a timetable for next steps, failing which I will impose one. A follow-up hearing for directions may be arranged through my Assistant Trial Coordinator for submissions on an appropriate timetable if the parties cannot agree on one.

ASSOCIATE JUSTICE TODD ROBINSON

DATE: July 11, 2025