Performance bonds remain effective despite stay ordered in CCAA proceedings

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On April 17, 2025, Earth Boring Co. Limited (EBCL) sought protection under the *Companies' Creditors Arrangement Act* (the CCAA). Among the provisions of the court's initial order was a temporary stay preventing claims being made on certain performance bonds. This temporary stay led some in the construction industry to question the value of performance bonds during an insolvency. The outcome of the EBCL case, however, demonstrates the objectives of the CCAA process can be achieved without prejudicing the rights of project owners who want to ensure that their bonded contracts are completed.

Background

- Contract surety bonds are used primarily in the construction industry. These bonds protect the obligee (the project owner or general contractor) from financial loss if the principal (the contractor or subcontractor, as the case may be) fails to fulfill the terms and conditions of their contract. The obligee is protected against a contractor's inability to complete a job.
- Performance bonds serve this express purpose, and allow obligees, subject to the terms and conditions of the relevant performance bond, to assert claims against the surety that issued the performance bond.
- Typically, in addition to performance bonds, obligees will also require labour and material payment bonds, which (again subject to their terms and conditions) ensure the payment of subcontractors and suppliers of the contractor in the event of non-payment by the contractor.
- These bonds are essential tools in the construction industry to ensure effective completion of construction projects.

Earth Boring Co. Limited

As part of the initial order that was sought by EBCL and granted in the CCAA proceeding, and as maintained in the second and third amended and restated initial orders, the court granted a stay of claims under certain performance bonds issued in favour of EBCL, as follows:

> THIS COURT ORDERS AND DECLARES that during the Stay Period, no Person, holding a Performance Bond (as defined in the First Woodbridge Affidavit), including any Person named as an owner or oblige under such bond, shall be permitted to enforce and/or call on the Performance Bond (Performance Bond Claim), except with the written consent of the Applicants and the Monitor, or with leave of this Court, and any and all Performance Bond Claims currently under way against or in respect of the Applicants or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.

This stay, requested by EBCL and its court-appointed monitor (not the surety), has led to misinformed and inaccurate statements by some external commentators regarding the benefit and applicability of performance bonds in the face of a CCAA proceeding.

However, the performance bonds that were subject to the stay remained (and still remain) effective and operational, and the protections granted under the performance bonds remained in place. The intended purpose of the CCAA was achieved: The limited stay worked as designed and allowed EBCL to continue to operate notwithstanding its insolvency, which ultimately benefitted the owners and contractors who are the intended beneficiaries of the performance bonds. EBCL was able to continue to perform the bonded contracts (with financing from EBCL's CCAA lender and EBCL's surety, Aviva Insurance Company of Canada [Aviva] through the payment of EBCL's subcontractors). These owners and contractors experienced no interruption in the supply of work from EBCL and, now that EBCL is beginning to emerge from its insolvency, EBCL will be allowed to continue to perform the bonded contracts uninterrupted.

The facts of the EBCL case do not support claims that the stay had dire consequences. The court granted the stay because it was appropriate to do so in the specific circumstances, and this ultimately led to a positive outcome for obligees, where bonded contracts are being completed without any need for performance bond claims.

Facts from the proceeding

In the case of EBCL, the surety, Aviva, issued bonds on eight active construction projects being performed by EBCL. As mentioned, EBCL sought and obtained creditor protection under the CCAA. Such stays are standard in CCAA proceedings, and are designed to give the debtor breathing room to reorganize. In turn, the debtor is required to continue performing their contractual obligations.

In this sense, the limited stay on performance bonds granted by the court to EBCL is entirely in line with the consistent (and necessary) approach under the CCAA. Obligees could not make bond claims, but EBCL had to continue performing its obligations. If EBCL defaulted, obligees could seek to lift the stay - as expressly permitted in the court order.

In addition, several key facts highlight how the bonds remained effective:

- The stay only applied to performance bonds, not labour and material payment bonds. This meant that the protection granted by the labour and material payment bonds in favour of the subcontractors of EBCL was not subject to the stay. As a result, subcontractors could (and did) make claims against the relevant

labour and material payment bonds, and Aviva, as surety, made payments to the subcontractors consistent with its obligations under the bonds. In essence, Aviva financed completion of the bonded projects through the labour and material payment bonds.

- The stay was not objected to by any obligee. This makes sense, as EBCL was required as part of the CCAA to continue to work on the bonded projects to which the stay applied, and therefore, from the obligees' perspective, it would be business as usual. To the extent it was not, the obligees were entitled to seek to lift the stay to make a claim under the relevant performance bond.
- The stay was only granted in relation to the performance bonds issued for seven of the eight construction projects bonded by Aviva. The last project was disclaimed by EBCL, meaning that EBCL did not intend on performing the bonded contract. Accordingly, the stay did not apply to that project, such that the obligee could (and did) make a claim under the relevant performance bond, pursuant to which Aviva accepted liability and arranged for the bonded contract to be completed. Again, Aviva ensured that it complied with its performance bond obligations where EBCL did not perform as required under its contract.
- It is typical for CCAA initial orders to provide for a broad stay of proceedings and the exercise of rights and remedies. Accordingly, in the event that an obligee wished to exercise their default and termination rights under a bonded contract, it would be necessary to have the standard stay lifted, even if a specific stay of performance bond claims had not been granted.

The result: EBCL continued operating and completed all but one of its bonded contracts despite its insolvency. The one contract it did not complete was subject to a performance bond claim, and Aviva arranged for completion in accordance with its obligations under the performance bond.

The sale of EBCL

On September 15, 2025, EBCL sought and was granted a reverse vesting order, in essence approving the sale of EBCL to a purchaser and allowing EBCL to continue to operate and complete its remaining projects, including its bonded projects. At the request of counsel for one obligee, a specific term confirming the effectiveness of the bonds was added to the order, as follows:

> THIS COURT ORDERS that all performance bonds and labour and material payment bonds issued by Aviva in respect of Continuing Project Contracts other than the Excluded Caledon AP shall continue to be in force and effect notwithstanding any other term of this order.

For obligees, this means the court expressly confirmed the bonds' effectiveness - the result sought and agreed to by all parties. No obligee lost their rights under the performance bonds.

Going forward

For project owners and general contractors, the EBCL case demonstrates that performance bond stays can benefit obligees when properly applied. Each situation

must be evaluated based on its specific circumstances, with courts balancing competing interests under the CCAA to determine if a stay is appropriate.

The key takeaway: a court-ordered stay on performance bond claims during a CCAA proceeding does not void the protections provided by performance bonds. As the EBCL case confirms, the bonds remain in full force and effect, and are available to be called upon if the contractor ultimately fails to perform.

**Aviva was represented in the EBCL CCAA proceedings by a team of BLG lawyers, including Rich Yehia, Denise Bambrough, Sam Babe, Nick Hollard and Rebecca Torrance.*

By

Richard Yehia, Denise L Bambrough, James W. MacLellan, Andrew Punzo

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BLG Offices

Calgary
Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3
T 403.232.9500
F 403.266.1395

Ottawa
World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9
T 613.237.5160
F 613.230.8842

Vancouver
1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2
T 604.687.5744
F 604.687.1415

Montréal
1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4
T 514.954.2555
F 514.879.9015

Toronto
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3
T 416.367.6000
F 416.367.6749

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