

CITATION: Western Surety Company v. Dali Drywall Ltd., 2025 ONSC 3632
COURT FILE NO.: CV-24-00719778-0000
DATE: 20250618

ONTARIO SUPERIOR COURT OF JUSTICE

RE: Western Surety Company, Plaintiff

-and-

Dali Drywall Ltd., Massive Devcon Corporation, 2382678 Ontario Ltd., BECC Construction Inc. o/a BECC Construction o/a BECC Modular, 2737566 Ontario Inc. o/a Sanders Steel a.k.a. Sanders Steel Framing, and Ali Kerem Ozden, Defendants

BEFORE: Robert Centa J.

COUNSEL: Andrew Punzo, Mark Borgo, and Emily Paslawski, for the plaintiff

Maria Ruberto and Neeta Sandhu, for the defendants

HEARD: June 3, 2025

ENDORSEMENT

- [1] Western Surety Company issued surety bonds to the defendants, Massive Devcon Corporation and BECC Construction Inc. The remaining defendants signed indemnity agreements in favour of Western. Various project owners and subcontractors have claimed that Massive Devcon and BECC have defaulted on their contractual obligations and have made claims under the bonds.
- [2] Western sued the defendants for indemnification for amounts paid under the bonds and for “exoneration,” which is a contractual obligation on the defendants to advance funds upon Western’s demand even before Western has actually paid out on claims, provided Western has set up a reserve against future payments.
- [3] Western moves for partial summary judgment on its claim for exoneration. In my view, this is a rare case where granting partial summary judgment is appropriate. The nature of the defendants’ contractual obligation strongly suggests that a speedy, summary process is appropriate to resolve this dispute. There is no risk of inconsistent fact finding as the sole issue raised on this motion will not be considered at the trial of the indemnification dispute. I am satisfied that there are no genuine issues requiring a trial and that Western is entitled to judgment on its claim for exoneration.
- [4] I will first explain the legal principles that underpin exoneration clauses. It will be helpful to understand the general nature of such obligations before considering the law related to

summary judgment and when it is appropriate to grant partial summary judgment. I will then explain why partial summary judgment is appropriate in this case and that Western has satisfied me that there are no genuine issues requiring a trial.

1. Legal principles underpinning exoneration clauses

- [5] The parties do not dispute the background facts and I will only outline them briefly. Western issued surety bonds to Massive Devcon and BECC. The defendants signed a series of indemnity agreements, which refer to them as the Indemnitors. The parties agree that all the indemnity agreements are valid and remain in force. Section 28 of each of the indemnity agreements contains an exoneration provision:

Indemnitors' obligation to advance funds required by the Surety to meet its obligations - In order to permit the Surety to meet its obligations under the Bonds, the Indemnitors undertake to advance to the Surety upon demand, funds or satisfactory guarantees sufficient to allow the Surety to perform any or all of its obligations under the Bonds, which would be subject to indemnification under the terms of this agreement, even before any payment has been made by the Surety to a third party. Without limiting the generality of the foregoing, the Indemnitors undertake to advance funds or furnish guarantees, as soon as the Surety establishes or increases a reserve with respect to a claim or a situation relating to any Bonds, up to the amount of such reserve which will be established by the Surety in its sole discretion.

- [6] Courts in Ontario regularly recognize exoneration as a binding contractual obligation between parties.¹ Determining the rights and obligations of the surety and the indemnitor under an exoneration clause is an exercise in contractual interpretation. However, prior cases establish several legal principles, subject always to the language chosen by the parties.
- [7] The concept of exoneration requires the surety to investigate a claim or situation involving a bond to assess whether it exposes the bond to liability. If the surety determines in its sole discretion that the situation or claim exposes the bond to liability, the surety is entitled to demand that the indemnitors provide funding or security to permit the surety to fund the

¹ See, for example: *Berkley Insurance Company v. Sampogna* (April 7, 2025), Toronto, CV-24-00730429 (Ont. S.C.J.), at para. 21; *Travelers Insurance Company of Canada v. DPSL Group Ltd.* (January 4, 2024), Toronto, CV-23-00698596-0000 (Ont. S.C.J.) (“DPSL”), at para. 7; *Trisura Guarantee Insurance Co. v. Albert Building Industries Inc.* (November 4, 2024), Toronto, CV-22-00675488-0000 (Ont. S.C.J.), at para. 22; *Northbridge General Insurance v. PSA Construction Inc.*, 2023 ONSC 6536, at paras. 17-18; *Fengar Investments Corp., Re* (1993), 17 C.B.R. (3d) 167 (Ont. C.J., Gen. Div.), at paras. 95-97; *Zurich Insurance Company v. Paveco Road Builders Corp.* (2009), 57 B.L.R. (4th) 174, at para. 14 (Ont. S.C.J.) (“Paveco”); *Royal & Sun Alliance Insurance Company of Canada v. Euro Landscape Construction & Grounds Inc.* (July 19, 2019), Central West Region, CV-18- 597968 (Ont. S.C.J.) (“Euro Landscape”), at paras. 101-105.

reserve that it has established.² The indemnitors are immediately required to advance the funds or security upon demand.³

- [8] An indemnitor's exoneration obligation arises independently and in advance of both a surety's obligation to pay out a claim and an indemnitor's obligation to indemnify a surety for claims paid. An indemnitor's obligation to fulfill its exoneration obligations is unaffected by whether a surety ever pays out a claim on the bonds or an indemnitor is ever called on to indemnify a surety for any such payments.⁴ The purpose of an exoneration provision is to authorize the surety to demand an advance of funds or security to cover any claims that may be made in the future against the bonds.⁵ It would defeat the purpose of exoneration provisions to delay their operation until a surety was entitled to claim indemnification from an indemnitor.⁶ A surety has an obligation to account to an indemnitor for any security provided that is ultimately not required to respond to a claim.⁷
- [9] Where the surety is exercising a contractual discretion to set a reserve, that discretion is not unbounded. There is a common law duty that applies to all contracts as a manifestation of the general organizing principle of good faith: a duty of honest performance, which requires the parties to be honest with each other in relation to the performance of their contractual obligations.⁸ A surety must exercise a contractual discretion in good faith but is not obligated to subordinate its interest to those of the indemnitor.
- [10] As I will explain below, given the nature of a claim for exoneration, a motion for partial summary judgment to enforce that contractual obligation will often be appropriate despite the well-known restrictions on the availability of partial summary judgment.

2. Partial summary judgment would be appropriate

- [11] The court shall grant summary judgment if it is satisfied that there is no genuine issue that requires a trial.⁹ There is no genuine issue that requires a trial if the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process allows the judge to make the necessary findings of fact, allows the judge to apply the law to the facts, and is a proportionate, more expeditious, and less expensive means to achieve a just result.¹⁰
- [12] One of the purposes of the summary judgment rule is to eliminate the need for a trial or shorten it or the action. Partial summary judgment is not impermissible *per se*. Granting

² *Trisura*, at para. 34; *Berkley*, at para. 22.

³ *DPSL*, at para. 6; *Fengar*, at para. 97;

⁴ *Euro Landscape*, at para. 51; *Paveco*, at para. 14; *DPSL*, at para. 7; *Trisura*, at para. 34; and *Berkley*, at para. 24.

⁵ *Euro Landscape*, at para. 51; *Trisura* at para. 31.

⁶ *Berkley*, at para. 24.

⁷ *Euro Landscape*, at para. 35; *Fengar*, at para. 95;

⁸ *Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494, at para. 93.

⁹ *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, at r. 20.04(2),

¹⁰ *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 49.

partial summary judgment may well be appropriate where it would meet the purposes set out in *Hryniak* (access to justice, proportionality, efficiency and cost effectiveness).¹¹ If partial summary judgment does not present a risk of duplicative proceedings or inconsistent findings of fact in the context of the litigation as a whole, and resolving the claim could significantly advance access to justice and be the most proportionate, timely, and cost-effective approach, then it may be in the interests of justice to grant partial summary judgment.¹²

- [13] The defendants submit that partial summary judgment is not appropriate because this case does not meet the considerations set out in *Malik*.¹³ In *Malik*, Brown J.A. explained the three factors that should be considered “before embarking on a motion for partial summary judgment.” Justice Brown explained as follows:

Yet, the risk of inconsistent findings is only one of several matters that a motion judge must consider when asked to entertain a motion for partial summary judgment. Reduced to its essence, the decision in *Hryniak* ... promoted summary judgment as a procedural tool that offers the prospect, when used in the right circumstances, to provide litigants with timely and affordable access to the civil court system: at paras. 2-5. Given that simple objective, before embarking on hearing a motion for partial summary judgment a motion judge must determine whether, in the circumstances, partial summary judgment will achieve the objectives of proportionate, timely, and affordable justice or, instead, cause delay and increase expense....

When faced with a request to hear a motion for partial summary judgment, a motion judge should make three simple requests of counsel or the parties:

- (i) Demonstrate that dividing the determination of this case into several parts will prove cheaper for the parties;
- (ii) Show how partial summary judgment will get the parties’ case in and out of the court system more quickly;
- (iii) Establish how partial summary judgment will not result in inconsistent findings by the multiple judges who will touch the divided case.

¹¹ *Chitaroni Estate v. Coleman (Township)*, 2025 ONCA 424, at para 16; *VP Auto Sales & Service Ltd. v. Ahmed² Inc.*, 2024 ONCA 507, at para. 25.

¹² *Boltyansky v. Joseph-Walker*, 2024 ONCA 682, at para. 17; *Heliotrope Investment Corporation v. 1324789 Ontario Inc.*, 2021 ONCA 589, 462 D.L.R. (4th) 731, at para. 32; *Truscott v. Co-Operators General Insurance Company*, 2023 ONCA 267, 428 D.L.R. (4th) 113, at para. 54; and *Canadian Imperial Bank of Commerce v. Deloitte & Touche*, 2016 ONCA 922, 133 O.R. (3d) 561, at para. 38.

¹³ *Malik v. Attia*, 2020 ONCA 787, 29 R.P.R. (6th) 215.

I do not know what, if any, motion case management or triage system was in place in the Central West Region at the time this motion for partial summary judgment appeared on the motion judge's docket. But, had those three requests been made before embarking on the hearing, I strongly suspect the answer would be along the following lines: while proceeding with a motion for partial summary judgment was not likely to risk inconsistent verdicts or findings, it would certainly increase the overall costs of litigating this case and delay its end-point even further.¹⁴

- [14] In the Toronto Region, parties who wish to schedule a motion for summary judgment must appear in Civil Practice Court. It is common for respondents to object at CPC to the scheduling of a motion for partial summary judgment on the grounds that the motion does not meet the three *Malik* factors. If a respondent does not raise such objections, it is common for the CPC judge to ask the moving party to explain why their proposed motion meets the three *Malik* factors.
- [15] In this case, the parties appeared in CPC on November 26, 2024, before Callaghan J., an experienced member of the civil team. Justice Callaghan scheduled the hearing for June 3, 2025, and his endorsement makes no mention of any objections raised by the defendants. At the hearing before me, counsel for Western confirmed that he delivered the notice of motion for the motion for partial summary judgment to counsel for the defendants before they attended in CPC. Counsel for Western advised me, and counsel for the defendants admitted, that the defendants raised no objections to the plaintiff's request to schedule a motion for partial summary judgment during the appearance at CPC.
- [16] In my view, a responding party's objection to a motion for partial summary judgment on the basis of the first two *Malik* factors (that dividing the determination of the case into several parts will not prove cheaper for the parties or that partial summary judgment will not get the parties' case in and out of the court system more quickly) will have much more force at the time the motion is scheduled than at the time it is heard.
- [17] The parties attended CPC in November 2024. It is now June 2025. The parties have prepared their motion records, attended cross-examinations, answered undertakings, written factums, and prepared for this hearing. The seven months spent waiting for this hearing and the significant expense associated with preparing for this motion are now sunk costs. If the defendants wished to object to this motion for partial summary judgment on the basis of expense and delay, the time to raise that objection was when the parties appeared in CPC before the judge acting as the gatekeeper for the motions list.
- [18] Having not raised the objections in November 2024, I give significantly less weight to the defendants' objections that this motion does not meet the first two *Malik* factors. Given

¹⁴ *Malik*, at paras. 61-63.

where the parties are today in this proceeding, granting partial summary judgment will cause no further delay or expense.

- [19] The third *Malik* factor, the prospect of inconsistent findings, is a critical factor at the hearing of a motion for partial summary judgment. Often, the risk of inconsistent findings may not be apparent until the record on the motion is developed. Here, I am satisfied that there is no risk of inconsistent findings.
- [20] As noted, partial summary judgment is reserved for a discrete issue that may be readily bifurcated from the remaining issues in the action.¹⁵ Western's claim for exoneration is precisely such an issue. Courts have previously granted motions for partial summary judgment with respect to claims for exoneration.¹⁶
- [21] The issues raised in the motion for judgment on the exoneration obligation are very limited:
- a. Is there a demand on the bond?
 - b. Did Western establish a reserve?
 - c. Did Western act in bad faith in establishing the reserve?
- [22] None of those issues will be canvassed in the indemnification action. Any findings made on this motion for judgment on the exoneration claim will not be relevant to the issues in the indemnification action. In the indemnification proceeding, the key issue is whether Western was liable to make a payment on the bond. Whether Western was liable to pay under the bond raises myriad issues but will not raise any of the issues raised on this motion for judgment. As noted above, the exoneration and indemnification obligations are distinct. As Ricchetti J. held in *Euro Landscape*, the exoneration claim can clearly be bifurcated from an indemnification claim.¹⁷ The indemnification claims arise in different factual and legal context.
- [23] I find that the exoneration claims are fully severable from the indemnity claims. There is little or no possibility for duplicative or conflicting findings. As explained above, the questions to be asked and answered about a claim for exoneration are different from and do not overlap with the issues raised in an indemnification claim.
- [24] The nature of an exoneration claim also supports its bifurcation from the rest of the indemnification claims. The purpose of the exoneration provision is to provide the surety with security for its reserve against future claims and associated transaction costs. It would

¹⁵ *1000425140 Ontario Inc. v. 1000176653 Ontario Inc.*, 2024 ONCA 610, 500 D.L.R. (4th) 639, at para. 34; *Truscott*, at para. 54; *Butera v. Chown, Cairns LLP*, 2017 ONCA 783, 137 O.R. (3d) 561, at para. 34.

¹⁶ *Travelers Insurance Company of Canada v. LCL Builds Corporation*, 2018 ONSC 1805, 90 C.L.R. (4th) 217; *Euro Landscape*, at para. 35.

¹⁷ *Euro Landscape* at paras. 35 to 36.

defeat the purpose of the exoneration provision to defer its determination until the same time as the resolution of the indemnification claims.

[25] I am satisfied that partial summary judgment will provide a cheaper, faster alternative to trial for the exoneration claim. I believe that it is appropriate in the context of the litigation as a whole given the nature of the claim, its discrete nature, and the efficiency of having this part of the case determined now.

[26] I am satisfied that it would be appropriate to grant partial summary judgment on this motion if there is no genuine issue requiring a trial.

3. Western is entitled to judgment because there is no genuine issue requiring a trial

[27] Western issued four surety bonds to certain of the defendants. The bonds totaled approximately \$16.2 million and were related to projects described as the OCWA project, the OCHC project, the Chatham project, and the Lambton project. So far, Western has paid out over \$8 million on those bonds. Those payments are not at issue on this motion.

[28] In addition to the claims it has already paid out, Western has established reserves in respect of future losses and expenses on three of the projects. Western established reserves as follows:

- a. OCWA: OCWA alleged that Massive Devcon defaulted under its contract and made a claim under the bond, which Western denied. OCWA then commenced an action against Western seeking damages under the bond. This action remains ongoing and has not yet progressed passed the discovery phase. As a result of the ongoing litigation, Western established a reserve in the amount of \$35,000 for anticipated future legal expenses.
- b. OCHC: Three subcontractors made claims under the OCHC bond. Western investigated the claims and paid out a portion of the amounts claimed. After payments, \$388,382.89 remains in dispute. Western established a reserve of \$200,000 against the \$388,382.89 of total claims that remain in dispute.
- c. Chatham: Chatham terminated BECC from the project on May 17, 2024, alleging that the project was 18 months overdue, stalled, and far from completion. Chatham refuses to permit BECC to have any further involvement in this process and made claims under the bond. To mitigate BECC's alleged breach, Chatham conducted a competitive bid process and selected another contractor, who bid \$5.3 million to complete the job. However, this bid exceeds the balance of funds remaining under the initial contract by about \$4.7 million. In addition, three subcontractors have made claims under the bond. These claims total about \$100,000 and remain outstanding. Western established a reserve of \$3.55 million against these future claims and the associated professional fees.

[29] The uncontradicted evidence demonstrates that there are claims ongoing against the bonds and that Western has set reserves in respect of those amounts. Where Western has not

accepted or disputed liability under the bonds, the claimants have not accepted Western's position. As of the date of the motion, Western had set current loss reserves in the amount of \$3,990,000, which reflects its assessment of ongoing risk and exposure under the bonds. Western has demanded that the defendants provide exoneration in this amount. The defendants have not honoured this request.

- [30] Western has satisfied me that there is no genuine issue requiring a trial in respect of its claims for exoneration. While not every claim for exoneration will be suitable for determination on a motion for summary judgment, this one is.¹⁸ The parties have assembled a complete record. I am satisfied that Western responded to each proper question posed on cross-examination and that it has produced all relevant documents necessary to determine this matter in a fair way.¹⁹
- [31] Western has investigated the claims and established reserves against the future losses and expenses in respect of the OCWA, OCHC, and Chatham, and there is no evidence to the contrary. Western has already paid out claims in respect of two of the bonds and the third project is in active litigation. There is no genuine issue requiring a trial regarding Western's conclusion that it is exposed to future losses and expenses in respect of these bonds.
- [32] The defendants raise a number of defences to Western's demand for exoneration. Western has satisfied me that none of these defences require a trial.
- [33] First, the defendants submit that Western should be refusing to pay out some of the claims and should be aggressively advancing defences that Massive Devcon and BECC did not breach their contracts as alleged. This submission is irrelevant and conflates exoneration with indemnification. I accept Western's submission that many of the defendants' submissions conflate these two principles. Whether Western is required to pay out any further claims and whether it is entitled to obtain indemnification in respect of those amounts from the defendants is irrelevant to the defendants' obligation to respond to the demand for exoneration.²⁰ The only question in this claim is whether the surety received a claim and has established a reserve. As the court held at paragraph 34 of *Trisura*:

Moreover, whether [the claimant's] claim is valid or invalid is irrelevant to the concept of exoneration. The concept of exoneration requires [the surety] to investigate a claim and if it believes the claim exposes the bond to liability, entitles [the surety] to demand that the indemnitor provide funding or security satisfactory to [the surety] to establish a reserve. Whether that reserve is then paid out to the

¹⁸ *Stratton Electric Lid. v. Guarantee Co. of North America* (2006), 55 C.L.R. (3d) 12 (Ont. S.C.J.); *Paveco*;

¹⁹ Unlike, for example, the situation in *Intact Insurance Co. v. Meyknecht-Lischer*, 2019 ONSC 5998, 100 C.C.L.I. (5th) 320, leave to appeal refused *Intact Insurance Co. v. Meyknecht-Lischer Contractors Ltd.*, 2021 ONSC 1529, where the surety answered few questions taken under advisement, issued blanket refusals, and took an unreasonably narrow view of relevance.

²⁰ *Trisura*, at para. 34.

claimant is an entirely separate issue that will be determined down the road either by a settlement or an adjudication.

- [34] Second, the defendants submit that there is a genuine issue for trial regarding whether Western acted in bad faith in establishing the reserve funds. I disagree. None of the facts pointed to by the defendants raise a genuine issue requiring a trial.
- [35] The parties agree that Western has an obligation to exercise its contractual discretion in a manner consistent with the purposes for which it was granted. Western could breach this duty if it exercised its discretion unreasonably and in a manner unconnected to the purposes underlying the discretion.²¹ The purpose of the grant of discretion in the exoneration provisions is to ensure that Western has sufficient collateral from the defendants to respond to its bonded obligations, if and when liability is established.
- [36] The defendants submit that Western was not justified in setting reserves against future losses. I disagree. I accept Western's submission that Western is required to establish a reserve against all claims pursuant to the *Insurance Companies Act* and the *Insurance Act*.²²
- [37] The defendants observe that the amount of the reserve established by Western has fluctuated over time. In its evidence, Western explained that it is continually revising the amount of the reserves as necessary. Contrary to the submissions of the defendant, Western did provide cogent and coherent explanations for its calculations. At some points in time, Western has significantly reduced the size of the reserve because it paid out additional claims (which moves the amounts claimed from the reserve column into the indemnity column). The defendants provided no evidence to suggest that Western has set the reserve amounts arbitrarily. The defendants presented no case law to suggest that Western is not able to adjust the reserve amounts as it updates its assessment of the future losses.²³
- [38] The defendants submit that Western was motivated to establish the reserves and seek exoneration only because some of the defendants were known to be in financial difficulty. As it turns out, on May 21, 2025, a creditor sought an order seeking a receivership over the assets of BECC, Dali, Sanders and Massive Devcon. This issue is irrelevant and, therefore, cannot raise a genuine issue requiring a trial. Exoneration is itself a type of security. The surety is entitled to consider whether the indemnitors will be able to satisfy any future indemnification order when it is deciding whether to exercise its rights to exoneration. While financial hardship may make the defendants less willing or able to fulfill its contractual obligation to provide Western with exoneration, that issue is not capable of raising a genuine issue requiring a trial.

²¹ *Wastech Services Ltd. v. Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7, [2021] 1 S.C.R. 32, at para. 4.

²² *Insurance Companies Act*, S.C. 1991, c.47, at ss. 365(1) and 667(1); *Insurance Act*, R.S.O. 1990, c I.8; and *Kanani v. Economical Insurance*, 2020 ONSC 7201, at para. 15.

²³ To the contrary, see *Osborne v. Non-Marine Underwriters, Lloyd's of London* (2003) 68 O.R. (3d) 770, at para. 24.

- [39] The defendants submit that Western's claims for indemnification are not reasonable and that this raises a genuine issue for trial. I disagree. There is no evidence that Western refused to consider any relevant information or denied the defendants the ability to provide it with any information relevant to its calculation of the reserves. Western explained how it calculated the reserves in its affidavits. These calculations were not challenged on cross-examination and the defendants have provided no evidence to raise an issue about the reasonableness of the calculations. Although the defendants baldly assert that Western has not explained how it set its reserves, this is simply not the case. Western's record is full of evidence regarding how it set the reserves.²⁴ This is not a case where the surety simply set the reserve at 100 percent of the potential losses and called it a day.²⁵ The reserves set by Western appear very reasonable in light of all the circumstances and the defendants marshalled no evidence to raise an issue requiring a trial.
- [40] Western has satisfied me that there is no genuine issue requiring a trial in respect of its claim for exoneration. I grant partial summary judgment in favour of Western.

4. Conclusion and costs

- [41] I find that the defendants are jointly and severally liable to exonerate Western in connection with the bonds to the amount of \$3,990,000. The parties agree that 2737566 Ontario Inc. o/a Sanders Steel a.k.a. Sanders Steel Framing is not liable for the reserve under the OCWA bonds. The parties may submit a draft order to reflect this result for my review and signature.
- [42] If the parties are not able to resolve costs of this motion, Western may email its costs submission of no more than three double-spaced pages to my judicial assistant on or before June 25, 2025. The defendants may deliver their responding submission of no more than three double-spaced pages on or before July 3, 2025. No reply submissions are to be delivered without leave.

Robert Centa J.

Date: June 18, 2025

²⁴ See, for example, the citations to the record found in the footnotes accompanying paragraph 12 of Western's reply factum.

²⁵ Unlike the situation in *Paveco*.