

CITATION: VanMar Constructors ON 1028 Inc. v. Travelers Insurance Company of Canada,
2025 ONSC 6959

COURT FILE NO.: CV-24-00000000547-0000

DATE: 2025-12-11

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)	
)	
VanMar Constructors ON 1028 Inc.)	D. Steele, counsel for the Plaintiff
)	
Plaintiff)	
)	
– and –)	
)	
Travelers Insurance Company of Canada)	R. Yehia, counsel for the Defendant
)	
Defendant)	
)	
)	HEARD: December 2, 2025, at Kitchener

THE HONOURABLE JUSTICE J. R. HENDERSON

DECISION ON MOTION

- [1] This is a motion by the defendant, Travelers Insurance Company of Canada (“Travelers”), for summary dismissal of the plaintiff’s claim pursuant to rule 20.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The plaintiff, VanMar Constructors ON 1028 Inc. (“VanMar”), agrees that the issue raised on this motion, specifically whether the action was commenced prior to the expiration of the applicable limitation periods, is an issue that can be decided on a rule 20 motion.
- [2] In the action, VanMar’s claim is made pursuant to a performance bond (the “Bond”) issued by Travelers in favour of VanMar and relating to a contract between VanMar and a subcontractor, Global Plumbing & Heating Inc. (“Global”).
- [3] The Bond includes a condition (the “Bond limitation period”) that “any suit or action must be commenced before the expiration of two years from... the date on which [Global] is declared in default by [VanMar].” Travelers’ position is that the Bond limitation period expired prior to the commencement of this action on April 1, 2024.
- [4] In the alternative, Travelers takes the position that the action is also statute barred under

the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, as VanMar failed to commence the action within two years of the day on which the claim was discovered (the “statutory limitation period”).

- [5] In both cases, Travelers submits that the limitation period expired at the latest on March 14, 2024.

THE FACTS

- [6] VanMar is a construction manager and general contractor that was engaged in constructing a residential condominium complex in Kitchener, Ontario. In the course of its work on the project, VanMar entered into a subcontract with Global for the supply and installation of mechanical works.
- [7] The subcontract contained a provision that VanMar may give notice of default to Global if Global failed to perform certain obligations, such as supplying proper workers or materials. If notice of default was given by VanMar to Global pursuant to the subcontract, the subcontract provided that Global would have five days to correct the default.
- [8] The subcontract also provided that Global was required to procure a performance bond. Consequently, Travelers issued the Bond, being a performance bond dated March 16, 2021. The Bond named Global as the Principal, VanMar as the Obligee, and Travelers as the Surety.
- [9] The Bond prescribes the preconditions that must be present in order to trigger Travelers’ obligations under the Bond as follows: “Whenever the Principal [Global] shall be, and declared by the Obligee [VanMar] to be, in default under the Contract, the Obligee [VanMar] having performed the Obligee’s [VanMar’s] obligations thereunder, the Surety [Travelers] shall promptly...” Thereafter, the Bond sets out four potential actions that Travelers could undertake.
- [10] The Bond limitation period, set out in the Bond, reads as follows, “It is a condition of this Bond that any suit or action must be commenced before the expiration of two years from the earlier of (1) the date of substantial performance..., or (2) the date on which the Principal [Global] is declared in default by the Obligee [VanMar].” It is clear that the phrase “declared in default” in this section refers to the preconditions that trigger Travelers’ obligations, as discussed above.
- [11] There were difficulties with Global’s performance under the subcontract. From time-to-time, VanMar declared Global to be in default and required Global to remedy the default. In particular, VanMar informed Global that it was in default by way of its correspondence dated August 4, 2021, August 18, 2021, December 14, 2021, and December 23, 2021.

Moreover, on each of those occasions, VanMar informed Global that it may be compelled to make a claim on the Bond.

- [12] During the same time period, VanMar provided status reports to Travelers that included information that Global's performance was unsatisfactory and that Global was in default. On August 18, 2021, VanMar informed Travelers that Global's progress was deteriorating and that, if the problems were not resolved, "it would not be long before we reach out to you." Similarly, on January 6, 2022, VanMar informed Travelers that Global's work was behind and that Global had been put on notice.
- [13] Travelers submits that VanMar's letter to Travelers dated March 14, 2022 confirms that the preconditions that trigger Travelers' obligations under the Bond were present on that date. The first paragraph of that letter reads: "We write to advise that the Principal pursuant to the above-noted Performance Bond, [Global], is and continues to be in significant default of its contractual obligations to the Obligee, [VanMar], and has been declared as such by VanMar on many occasions. Further, VanMar has performed all of its obligations under its contract with Global to date."
- [14] By letter dated March 21, 2022, Travelers confirmed receipt of the March 14, 2022 letter and wrote, "If VanMar decides to make a claim pursuant to the Bond in the future, you may provide written notice to the writer at the email address noted below."
- [15] On April 1, 2024, VanMar issued its statement of claim in this action.

THE POSITION OF THE PARTIES

- [16] Travelers submits that the words set out in the Bond with respect to the Bond limitation period are clear and unequivocal. It submits that the requisite preconditions prescribed in the Bond were present by at least March 14, 2022. Specifically, it submits that only VanMar had the ability to declare Global in default under the subcontract, and that VanMar did so at least by March 14, 2022. Thus, Travelers submits that the limitation period for making a claim under the Bond expired by March 14, 2024.
- [17] In the alternative, Travelers refers to s. 4 the *Limitations Act, 2002*, which states, "[A] proceeding shall not be commenced in respect of a claim after the second anniversary of the date on which the claim was discovered." Travelers submits that VanMar knew that it could make a claim on the Bond at least by March 14, 2022.
- [18] VanMar submits that the Bond limitation period and the statutory limitation period did not commence immediately upon VanMar declaring Global to be in default under the subcontract. That is, VanMar submits that its declaration that Global was in default, in isolation, did not trigger Travelers' obligations under the Bond. Rather, in consideration of

reasonable commercial sense and the intention of the parties, VanMar submits that the Bond should be interpreted to read that Travelers' obligations are triggered only after VanMar gives notice to Travelers that it is relying on Global's default to call upon Travelers to perform its obligations.

ANALYSIS

- [19] The plain language of the Bond clearly favours Travelers' position. The preconditions that trigger Travelers' obligations are neatly prescribed in the words, "Whenever the Principal shall be, and declared by the Obligee to be, in default under the Contract, the Obligee having performed the Obligee's obligations thereunder..."
- [20] I accept Travelers' position that those words set out three preconditions that must be present before VanMar may make a claim on the Bond, namely: 1. Global is in default under the subcontract, 2. VanMar has declared Global to be in default under the subcontract, and 3. VanMar is not in default under the subcontract. There is no dispute with respect to the first and third preconditions.
- [21] Regarding the second precondition, I accept that there is evidence that, from time to time prior to March 14, 2022, VanMar had declared Global to be in default under the subcontract. However, whether the earlier defaults can be relied upon is irrelevant as the March 14, 2022 letter clarifies the circumstances as of that date.
- [22] The first paragraph of the March 14, 2022 letter confirms that Global is in default, that VanMar has declared Global to be in default, and that VanMar is not in default. Further, in his cross-examination, VanMar's representative, John Hoeve, confirmed that the three preconditions prescribed in the Bond were present as of March 14, 2022.
- [23] Therefore, I find that, by at least March 14, 2022, VanMar had declared Global to be in default under the contract. Accordingly, all three of the preconditions that were required to trigger Travelers' obligations were present by March 14, 2022. Thus, on the plain language of the Bond, the Bond limitation period commenced no later than March 14, 2022.
- [24] VanMar's position is that the court should read words into the Bond, or imply terms into the Bond, so that the Bond will be interpreted in accordance with reasonable commercial sense and the intention of the parties. In that respect, VanMar relies on the decision in *Thomas Fuller Construction Co. (1958) Ltd. v. Continental Insurance Co.*, [1973] 3 O.R. 202 (H.C.), in which Houlden J. confirmed at para. 63, "The document in question, like every other guarantee, must be construed according to the intention of the parties as expressed by the language they have employed, understanding it fairly in the sense in which it is used; and this intention is best ascertained by looking to the relative position of the parties at the time the instrument is written."

- [25] VanMar submits that if the Bond is interpreted without implying a term that VanMar must give notice that it is calling on Travelers to perform its obligations, then the Bond does not make commercial sense. VanMar submits that in any construction project it is anticipated that there may be some defaults by some of the subcontractors, but the general contractor would in practice not make a claim to the bond surety with respect to every default as there are methods in the subcontracts that can be used by the general contractor to remedy the default without the involvement of the surety. That is, it makes no sense for a general contractor to be compelled to involve the surety in each and every default. If that were the case, it would be an extraordinarily cumbersome process for dealing with routine defaults.
- [26] Therefore, VanMar submits that it makes more commercial sense for VanMar to simply inform Travelers from time to time about defaults, but not require Travelers to perform its obligations unless and until VanMar gives formal notice to Travelers that it will be making a claim under the Bond.
- [27] Further, VanMar submits that it was the intention of the parties that Travelers would not be called upon to fulfill its obligations unless and until VanMar gave formal notice. In support of that proposition, VanMar refers to several pieces of correspondence between VanMar and Travelers that are dated after March 14, 2022. In that correspondence, the parties acknowledge that VanMar is keeping Travelers informed of the situation with Global and that VanMar has a potential claim on the Bond.
- [28] There are several difficulties with VanMar's position. Regarding the commercial sense argument, although I understand the logic of VanMar's submissions, I find that VanMar's proposed interpretation of the Bond may also cause commercial difficulties. In particular, if the three preconditions set out in the Bond were met, but Travelers' obligations were not triggered until some future date on which VanMar gives formal notice to Travelers, it would be open to VanMar to indefinitely delay its claim on the Bond.
- [29] If VanMar's submissions are correct, VanMar may choose to delay giving notice of its intention to make a claim for years. If so, there could be a situation in which a subcontractor could remain in default for years, without remedying the default, and Travelers would be left waiting, exposed to the risk of a claim but not knowing if or when VanMar might choose to proceed with the claim.
- [30] A surety, such as Travelers, by its nature, is in the business of quantifying risk. If a claim against a surety could be indefinitely delayed by the claimant, the surety, in my view, would not be able to properly assess its exposure to potential claims. Moreover, the surety would not be able to investigate legitimate claims in a timely manner and thus would be restricted in its ability to assess its risk. This indefinite delay of a claim would not be commercially sensible.

- [31] Furthermore, the purpose of a contractual limitation period is to provide some finality to the contract, and claims made thereunder, at a specific future date. Thus, in my view, it is not commercially sensible to imply words into the Bond that would create an indefinite time frame in which claims could be made under the Bond.
- [32] Regarding the submission that the post-March 14, 2022 correspondence is evidence of the intention of the parties, it must be remembered that the important issue is the intention of the parties at the time they entered into the contract. In my view, the pieces of correspondence referenced by VanMar do not establish that the parties intended to act, at the time they entered into the contract, in a way contrary to the plain words of the Bond. The letters do suggest that VanMar was attempting to resolve the matters with Global after March 14, 2022, without any action by Travelers, but they do not suggest that VanMar was not in a position to make a claim under the Bond.
- [33] Finally, I accept Travelers' submission that courts should be reluctant to rewrite the words of a written contract provided that the words of the contract are clear and unambiguous. As stated by the Ontario Court of Appeal in *KPMG Inc. v. Canadian Imperial Bank of Commerce*, 1998 CanLII 1908, at para. 3, where the intention of the parties is plainly expressed in the language of the agreement, "the court should not stray beyond the four corners of the agreement."
- [34] Further on the same point, the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at para. 57, wrote, "While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement."
- [35] As Iacobucci J. wrote in *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, at para. 29, "A court, when dealing with terms implied in fact, must be careful not to slide into determining the intentions of reasonable parties. This is why the implication of the term must have a certain degree of obviousness to it, and why, if there is evidence of a contrary intention, on the part of either party, an implied term may not be found on this basis."
- [36] In my view, the words used in the Bond are clear and unambiguous. The intention of the parties is effectively expressed in the words in the Bond. The implied terms suggested by VanMar are not necessary and do not fit with what the parties have agreed upon.
- [37] For these reasons, I find that the Bond limitation period commenced no later than March 14, 2022 and expired no later than March 14, 2024. This action was not commenced prior to the expiry of the Bond limitation period, and therefore the action is barred. The action is hereby dismissed.

- [38] Given my decision on the Bond limitation period, it is not necessary to consider the statutory limitation period.
- [39] If either party wishes to make submissions as to costs, I direct that the party seeking relief shall serve and file written submissions, no longer than five pages, on or before January 15, 2026, with responding submissions to be delivered within ten days thereafter. If no submissions are received within this time frame, the parties will be deemed to have settled all of the costs issues as between themselves. A copy of any such submissions, once filed with the court, shall also be emailed to the Judicial Assistants at: St.Catharines.SCJJA@ontario.ca.

J. R. Henderson, J.

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