

**CITATION:** Mizen Holdings Corporation v. Toronto (City) et al, 2023 ONSC 1882  
**COURT FILE NO.:** CV-16-0563671-0000  
**DATE:** 2023-03-21

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**B E T W E E N:** )  
)  
Mizen Holdings Corporation ) *D. Fiorita*, for the Plaintiff  
)  
)  
Plaintiff )  
)  
- and - )  
)  
City of Toronto, 614128 Ontario Ltd. ) *C. Henderson & A. Barclay* for the  
Operating as Trisan Construction and Ontario ) Defendant, City of Toronto  
Excavac Inc. )  
) *G. Poirier & K. Dow* for the Defendant,  
Defendants ) Ontario Excavac  
)  
-and- )  
)  
2043102 Ontario Ltd., operating as YYZed ) *T. Crljenica & T. Donnelly* for the Third  
Project Management, Otomic Contractors ) Parties, YYZed Shor-Cais and Otomic  
Ltd., and Shor-Cais Consulting Limited, )  
operating as Shor-Cais Foundation ) *P. Di Monte* for the Third Party, Astro  
Contractors ) Environmental Corporation  
)  
Third Parties )  
)  
) **HEARD:** June 28, 2022  
) at Toronto, Ontario

**Madam Justice T. J. Nieckarz**

**Decision On Motion for Summary Dismissal of Third Party Action**

**OVERVIEW**

[1] This action arises from water losses occurring in 2015 at the construction of a condominium in Toronto. Water flooded the construction site during the early stages of the

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project. It is alleged that the flooding was a result of municipal water lines not being properly disconnected.

[2] The plaintiff Mizen Holdings Corporation (“Mizen”) is a condominium developer. Their insurer commenced this litigation in their name in 2016 against the Defendants, City of Toronto (the “City”), 614128 Ontario Ltd., operating as Trisan Construction and Ontario Excavac Inc. (“OE”). Mizen (by their insurer in this subrogated action) alleges that the water losses were caused by the negligence of the City and OE. The City and OE have issued third party claims against 2042102 Ontario Ltd o/a YYZed Project Management (“YYZed”), Shor-Cais Consulting Limited o/a Shor-Cais Foundation Contractors (“Shor-Cais”), and Otomic Contactors Ltd. (“Otomic”) (collectively referred to as the ‘third parties’) seeking contribution and indemnity.

[3] A third-party claim was also brought against another inactive company that was not involved in the construction and has not participated in this motion.

[4] The third parties bring this motion for summary dismissal of the City and OE’s third-party claims. The third parties argue that it is a long-standing principle established by the Supreme Court of Canada that if the plaintiff has no legal right to sue the third parties, then the defendants’ claims for contribution and indemnity against the third parties cannot succeed either. The third parties argue that the applicable legislation, as interpreted by the Supreme Court, denies the Defendants the ability to maintain this action against the third parties.

[5] The third parties argue that Mizen has no right to sue them based on the terms of their contracts with Mizen. Their contracts contain general liability waivers that prevent Mizen from suing them. The terms of their contract also require the third parties to be named additional

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insureds under the insurance policy that indemnified Mizen for the water losses, and which is advancing Mizen's subrogated claim. They further argue that the anti-subrogation rule renders a subrogated claim by Mizen untenable at law as against them, and therefore any third-party claims against them are similarly untenable.

[6] Essentially, the third parties argue that Mizen has contracted out indemnity from their third-party contractors. Mizen agreed to assume certain risks under the terms of its contract with the third parties. The water loss falls within the risk assumed. Mizen cannot sue the third parties, and therefore the Defendants are similarly unable to maintain third-party actions against them for contribution and indemnity.

[7] The Defendants take the position that any damage suffered by Mizen was caused by Mizen's third-party contractors. They argue that Mizen's insurer should not be permitted to pursue the Defendants for damages allegedly caused by the third parties, who are its own additional insureds, without the Defendants having any ability to seek recourse from those third parties. Neither Mizen nor the third parties should be able to rely on contracts and insurance policies to which the Defendants were not privy, and in some cases, were not even in force at the time of the damage to defeat the Defendants' third-party claims. They argue this would be inequitable as it would allow contracting parties to transfer liability to third parties who did not know anything about the contract and were not a party to it. They disagree with the interpretation of the case law relied upon by the third parties, and further argue that the contractual waivers had not even begun to run in favour of *any* of the third parties when the damages occurred, and therefore have no bearing on the rights of the Defendants against the third parties. With respect to YYZed, the Defendants note that no contract had even been signed

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between YYZed and Mizen at the time the damages arose. The Defendants deny that the covenant to insure in the contracts between Mizen and the third parties, or that the anti-subrogation rule defeats their claims. Overall, the Defendants argue that the third-party claims should be permitted to proceed. They seek dismissal of the motion for summary judgment.

[8] For the reasons set out below, the motion is dismissed.

**THE FACTS:**

***The Project:***

[9] This is a subrogated action for \$4 million commenced by Allianz Global (“Allianz”) in the name of its insured, Mizen.

[10] Mizen is the owner/developer of a property located at 2522 Keele Street, Toronto. This property was formerly a strip mall, which Mizen demolished and redeveloped.

[11] In 2014, Mizen commenced construction of a mixed-use residential/commercial condominium at 2522 Keele Street, called Visto Condos.

[12] Mizen hired various parties to work on the construction of the condominium project. YYZed was hired as the project/construction manager. Shor-Cais was hired to provide shoring services. Otomic was hired to provide excavation services.

[13] On May 3, 2012, YYZed applied for approval, on Mizen’s behalf, to build the condominium project. On July 29, 2014, a report was submitted to the City in support of YYZed and Mizen’s application for a building permit that indicated the owner (Mizen) would be responsible for, *inter alia*:

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- a. contacting utility authorities controlling services and appurtenances affected by the demolition work;
  - b. locating existing services to determine buried locations of sewer, water, gas and electrical; and
  - c. disconnecting and capping all services at convenient location.

[14] Demolition of the former structures located at the site commenced on November 4, 2014. The City alleges that YYZed did not apply for a water service disconnection prior to the commencement of the demolition. Excavation and building work proceeded, interrupted by water damage.

[15] The residential units at Visto Condos were completed and are occupied. The residential condominium was registered in October 2018, with units being sold starting in November 2018. A partial occupancy permit was issued by the City on December 3, 2018, with the final permit still not having been issued as of March 29, 2022. The commercial units, which are intended to be in a commercial condominium (not yet approved or registered) remain unfinished and unoccupied.

***The Contracts:***

[16] On April 13, 2015, Mizen and YYZed entered into a standard CCDC 5A – 2010 Construction Management Contract – for Services, with Supplementary Conditions (the “YYZed Contract”). YYZed had been acting as the project manager for Visto Condos pursuant to the terms of an accepted Project Development Proposal (the “Proposal”) since June 29, 2011, but no formal contract had been signed prior to April 13, 2015.

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[17] The Proposal provided that if accepted, it was to form the basis of a “Design/Build” GMP Contract and was to be understood as a “Letter of Intent”. The Proposal did not specify the form of the contract or provide for insurance covenants or waivers.

[18] The Proposal indicated that YYZed would provide a range of construction management services for the development of Visto Condos, including obtaining municipal approvals and that it would “micro-manage the daily field operation and coordination of trades”.

[19] The Proposal did not contain any terms requiring insurance coverage for risks associated with the project, nor did it contain any waivers or other terms purporting to limit liability.

[20] On January 14, 2015, OE entered into a contract with the City to replace curb boxes, curb stops and valve boxes at various locations identified by the municipality.

[21] On January 15, 2015, Mizen and Shor-Cais entered into a standard CCDC 17- 2010 Stipulated Price Contract for Trade Contractors on Construction Management Projects, with Supplementary Conditions added (the “Shor-Cais Contract”). Shor-Cais was to provide shoring services at the project site.

[22] On January 15, 2015, Mizen and Otomic entered into a standard CCDC 17- 2010 Stipulated Price Contract for Trade Contractors on Construction Management Projects, with Supplementary Conditions added (the “Otomic Contract”). Otomic was to provide excavation services at the project site.

[23] All three contracts between Mizen and the third parties contain the following:

- a. Covenants by Mizen to insure; and

b. Waivers by Mizen in favour of the third parties.

[24] In accordance with Mizen's covenant to insure, Mizen obtained a Builder's Risk Policy (among other policies) with Allianz. The third parties claim they are additional insureds, and Allianz is defending the third-party claims on their behalf. The Builder's Risk (subject to supplementary coverage) is the policy under which Mizen was paid for the water damage. Allianz says they are defending the third parties under a "wrap" up policy.

***The Water Losses:***

[25] On February 12, 2015, Mizen learned that water had been leaking into the Visto Condos excavation site. The allegation is that the City did not turn off underground water lines at the site and/or an adjacent site as requested and the lines froze and broke, causing damage to the site. Mizen further alleges that it immediately notified the City of the leak, and requested it attend to ensure the water was turned off. Mizen alleges that the City failed to do so, resulting in work having to cease in early March 2015.

[26] On March 4, 2015, Mizen's insurer sent a notice letter to the City asserting that it was responsible for the water loss caused by water lines that had not been properly disconnected, which froze and burst.

[27] On March 5, 2015, Shor-Cais struck a water line while boring holes for piles. Another water line was struck by Shor-Cais on March 19, 2015.

[28] On March 6, 2015, OE attended at 2522 Keele Street, as requested by the City on an emergency basis to do the work necessary (replace a curb box) to allow the City to shut off the

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water valves. OE subsequently attended at 2524 Keele Street, as requested by the City to replace another curb box and rod identified by the City.

[29] Water continued to leak into the excavation at the site after the repairs had been completed. OE states that it identified a second water service that was not indicated on the builder's blueprints. The gate valve was shut, and the leak stopped.

[30] On April 8, 2015, Mizen's insurer sent a second notice letter to the City asserting water losses had occurred between April 4<sup>th</sup>, 2015 and April 8<sup>th</sup>, 2015. The insurer alleged that the cause of the loss was an underground water line that should have been disconnected in November 2014.

[31] Mizen alleges that the leaks continued between February and April despite it contacting the City on several occasions to advise that the water remained an issue that was impacting construction at the site. It is alleged by Mizen that the water losses caused delays in construction and led to increased costs to Mizen.

[32] Allianz indemnified Mizen for most of the damages caused by the water losses. There are some losses not covered by the policy. Allianz has subrogation rights for the amounts paid to Mizen under the Builder's Risk Policy. Allianz commenced this subrogated action, in Mizen's name on November 4, 2016, but also seeks damages for the uninsured losses sustained by Mizen.

[33] Allianz, on behalf of Mizen, alleges that the City was negligent for not shutting off water to the Property. Allianz also alleges that OE failed to properly repair and shut off leaking water.

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[34] The City has defended the action by pleading, among other things, that Mizen or its agent YYZed was responsible to obtain a disconnection from the City's waterworks prior to commencing demolition of the property, but failed to do so. The City pleads that Mizen or its agents tried to shut off the water themselves, and in the course of construction repeatedly struck, damaged, drilled into, or otherwise affected water service connections and shut-off valves to the property. The City pleads that it responded promptly and reasonably when it was notified by Mizen of concerns with respect to water at the property.

[35] OE has defended on the basis that it performed the work required of it on March 6, 2015, in a good and workmanlike manner and in accordance with the instructions it received from the City.

[36] On October 31, 2018, the City issued its third-party claim alleging that Mizen's loss was caused or contributed to by their negligence.

[37] On November 5, 2018, OE issued its third-party claim.

**THE ISSUE ON THIS MOTION:**

[38] The third parties argue that the outcome of their motion is dependent upon a determination of the following issues:

- a. Whether there are statutory limits on the right of the City and OE to claim contribution and indemnity from the third parties; and
- b. Whether the defendants' claims against the third parties are otherwise untenable by virtue of any one of the following:
  - i. Do the covenants to insure under the YYZed, Shor-Cais, and Otomic Contracts bar the third-party claims?

ii. Do the general waivers of liability granted by Mizen in favour of the third parties in each of their respective contracts prevent Mizen from suing them, and therefore also bar the third-party claims of the defendants?

iii. As additional insureds under the Builder's Risk Policy, would a subrogated claim by Mizen be untenable at law, therefore rendering the third-party claims of the defendants also untenable?

[39] The Defendants argue that:

- a. there were no waivers of liability applicable on the dates of Mizen's alleged losses;
- b. the covenants to insure do not apply to the alleged losses; and
- c. Mizen's claim seeks recovery of uninsured losses, which prevents the operation of the anti-subrogation rule.

[40] For these reasons, the Defendants submit that the third parties' motion for summary judgment must fail.

**ANALYSIS:**

***Rule 20:***

[41] This is a motion for summary judgment pursuant to Rule 20. For the third parties to succeed I must determine, after applying the enhanced powers in Rule 20.02(2.1) of the *Rules of Civil Procedure*, that there is no genuine issue requiring a trial with respect to the third-party claims.

[42] Part of the challenge in making this decision is that the parties did not relate their arguments to the test on summary judgment. They did not address the summary judgment principles at all in either their factum or oral argument. While the motion was framed as a

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summary judgment motion, it was argued in a manner more reminiscent of a Rule 21 motion; that the third-party claims should be struck for failing to disclose a reasonable cause of action. Nonetheless, I have applied principles related to summary judgment to this motion.

***Statutory Limits on The Right of the Defendants to Claim Contribution and Indemnity:***

[43] The right of a defendant to claim contribution and indemnity from a co-defendant or third party is created by, and limited by the terms of the *Negligence Act*, R.S.O. 1990, c. N.1 as amended.

[44] Section 1 of the *Negligence Act* provides:

“Where damages have been caused or contributed to by the fault or neglect of two or more persons, the court shall determine the degree in which each of such persons is at fault or negligent, and, where two or more persons are found at fault or negligent, they are jointly and severally liable to the person suffering loss or damage for such fault or negligence, but as between themselves, ***in the absence of any contract express or implied***, each is liable to make contribution and indemnify each other in the degree in which they are respectively found to be at fault or negligent.” [emphasis added]

[45] The Defendants acknowledge that their third-party claims are statutory claims pursuant to the *Negligence Act* (the “Act”). The Act permits tortfeasors to seek contribution and indemnity from others who could be liable to the plaintiff in negligence, even if they owe no duty of care to that tortfeasor. The concept enshrined in the Act is that if there is more than one concurrent tortfeasor, liability may be apportioned based on their degree of responsibility for losses suffered by a plaintiff.

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[46] The right to claim contribution and indemnity is not absolute. The emphasized words in s. 1 make it clear that the degree of fault otherwise assigned to a defendant, or third party, can be altered by contract.

[47] In *Giffels v. Eastern Construction*, 1978 CanLII 39 (SCC), [1978] 2 S.C.R. 1346, the Supreme Court of Canada considered the limits on s. 1 (then s. 2(1)) claims, and in particular the effect of the contractual alteration permitted by s. 1.

[48] *Giffels* and Eastern Construction were contractors hired by Dominion Chain to build a roof on a new factory. There was no contractual relationship between *Giffels* and Eastern Construction. Approximately five years after construction, the roof buckled. Dominion Chain brought an action against both *Giffels* and Eastern Construction to recover damages for the defective roof.

[49] The contract between Dominion Chain and Eastern Construction contained a clause stating that the issuance of the final certificate of completion would constitute waiver of all claims by Dominion Chain against Eastern Construction. The roof buckled three years after the final certificate of completion was issued. The waiver had been signed, crystallized, and was in effect at the time of the loss.

[50] *Giffels* claimed contribution and indemnity from Eastern Construction. Eastern Construction argued that *Giffels*' claim for contribution and indemnity was barred by the contractual waiver, even though *Giffels* was not a party to the contract. The Supreme Court agreed and dismissed *Giffels*' claim for contribution and indemnity against Eastern Construction.

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[51] In short, the Supreme Court held that if, due to express or implied contractual waivers a plaintiff cannot maintain an action against a party, no defendant(s) can claim contribution and indemnity from that protected party. The reason for this is that a precondition of Giffels' right to contribution was that Eastern be found liable to the plaintiff. A contractor protected by a valid contractual limitation of liability cannot in these circumstances be said to have contributed to any actionable loss by the plaintiff: *Giffels*, at pp. 1354-1356; *Orange Julius Canada Ltd. v. Surrey (City)*, 2000 BCCA 467, at paras. 62 to 64.

[52] The rule in *Giffels* is still good law, having been reaffirmed by the Supreme Court of Canada in *R. v. Imperial Tobacco Canada Ltd.*, 2011 SCC 42, at para. 29, applied by the Ontario Divisional Court in *Weinbaum v. Weidberg*, 2017 ONSC 1040 (Div. Ct.), at para. 30, and recently by Justice Kimmel of this court in *Nuyork Investments Ltd. v. Toronto Hydro-Electric System Ltd.*, 2021 ONSC 3235.

[53] The parties agree that the Defendants' claim for contribution and indemnity can only succeed if the third parties are otherwise liable to Mizen. Stated differently, if Mizen cannot maintain an action against the third parties, the Defendants cannot claim for contribution and indemnity under s. 1 of the Act, as interpreted by *Giffels*.

[54] The third parties argue that there are three reasons why Mizen cannot maintain an action against them. They further argue that any one of these three reasons are sufficient for me to dismiss the Defendants' third-party claims for contribution and indemnity. Those reasons are:

- a. covenants to insure in which Mizen assumed the risk of water loss;
- b. contractual waivers that prevent Mizen from suing the third parties; and

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c. the anti-subrogation rule.

Does the Contractual Covenant to Insure Bar the Third Party Claims?:

[55] The third parties argue that Mizen’s covenants to insure bar the third-party claims. They rely on the principle of “tort immunity”. Furthermore, the third parties argue that because the insurance covenants would prevent Mizen from claiming against any of them, both s. 1 of the *Negligence Act* and *Giffels* bar the Defendants from seeking contribution and indemnity on the basis of the insurance covenants alone.

[56] The principle of “tort immunity” is that where one party to a contract has agreed to insure against a particular risk, that party cannot sue the other party (or parties) if the risk materializes, and a loss is suffered. The Supreme Court of Canada established the principle of tort immunity in a trilogy of cases: *Ross Southward Tire Ltd. v. Pyrotech Products Ltd.*, 1975 CanLII 25 (SCC), [1976] 2 S.C.R. 35; *Agnew-Surpass Shoe Stores Ltd. v. Cummer-Yonge Investments Ltd.*, 1975 CanLII 26 (SCC), [1976] 2 S.C.R. 221; *T. Eaton Co. v. Smith*, 1977 CanLII 39 (SCC), [1978] 2 S.C.R. 749.

[57] This principle recognizes that the parties to the contract have agreed to assign the risk of loss to just one contractual party, thereby avoiding the need for each contract and subcontractor to obtain its own duplicative insurance for losses of the same nature. While tort immunity was first recognized by the Supreme Court of Canada in the context of landlord-tenant matters, the Ontario Court of Appeal has since held that it is equally applicable to construction projects: *Madison Developments Ltd. v. Plan Electric Co.*, 1997 CanLII 1277 (ON CA), 36 O.R. (3d) 80, at pp. 7 and 8.

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[58] A covenant to insure has the presumptive effect of creating tort immunity unless the covenantor (in this case, Mizen) can establish something specific that displaces it: *North Newton Warehouse Ltd. v. Alliance Woodcraft Manufacturing Inc.*, 2005 BCCA 3099, at para. 45; *JDC Ltd. v. CAW Ltd.*, 2022 ONSC 1611, at para. 49.

[59] A covenant to insure is a contractual benefit. The effect of the covenant to insure is a matter of contract interpretation: *JDC Ltd.*, at paras. 47 and 48.

[60] The covenant to insure only transfers the risk of loss caused by the perils against which the contract obligates the covenantor to insure, and to the extent the contract dictates: *JDC Ltd.*, at paras. 51 and 52.

[61] To displace the presumptive effect of the covenant to insure and maintain the covenantee's liability for its own negligence, "very express language" is required: *JDC Ltd.*, at paras. 51 and 54.

[62] The third parties argue that there is no such "very express language" present in the YYZed, Shor-Cais, or Otomic contracts. They further argue that if by virtue of the covenant to insure they could not have been liable to Mizen directly, then they cannot be held liable to contribute with the Defendants to Mizen's losses: *Orange Julius*, at para. 22.

[63] The Defendants argue that the wording of the covenant to insure is not clear that Mizen agreed to assume the risk associated with water damage.

***Is there a genuine issue for trial with respect to what losses the covenants to insure cover?***

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[64] Sections 8.1.1. and 8.1.2 of the YYZed Contract and sections 11.1.3 and 11.1.4 of the Shor-Cais and Otomic contracts require Mizen to maintain “wrap up” general liability coverage and “broad form” insurance in the joint names of the owner, the construction manager, the consultant and the trade contractor.

[65] All three contracts provided that “wrap up” general liability coverage will come into effect ninety days after the “Project In-Use Date”. The parties agree that the “Project In-Use Date” was after the date of loss.

[66] “Broad form” insurance was required by the contracts to be in effect immediately. The parties did not argue the covenant to insure based on the wrap-up policy. The question to be determined from their arguments is what was contemplated by the term “Broad form” insurance.

[67] The third parties argue that while not defined by the contracts themselves, this issue has been considered in case law. Broad form insurance is also known as “Builder’s Risk” or “Builder’s Risk Broad Form”. The purpose of this type of policy is to provide coverage for physical damage occurring during a construction project so as to ensure that a project is not disrupted or grinds to a halt due to disputes and litigation. It is generally obtained by the owner of the project, and provides coverage for the owner, and all contractors and subcontractors working on the project, without regard to fault or liability. In other words, coverage is provided even if one or more of the tradespersons involved in the project caused or contributed to the loss: *Commonwealth Construction Co. Ltd. v. Imperial Oil Ltd.*, 1976 CanLII 138 (SCC), [1978] 1 S.C.R. 317, at pp. 323 to 324; *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*,

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2016 SCC 37, at paras. 1, 66-67; *The Dominion of Canada General Insurance Co. v. Viking Fire Protection Inc.*, 2019 NLCA 13, at paras. 30-55.

[68] The third parties also argue that “broad form” is a term of art in the construction industry. I accept that it is a term of art. The difficulty is, that I have no evidence as to what is contemplated by this term of art. It was not in the affidavit evidence. Voluminous transcripts of examinations were filed. I have considered only what was referred to me in argument.

[69] The third parties argue that the water losses at issue in this action are precisely the type of loss intended to be covered by the broad form insurance contemplated by the contracts. The fact that Mizen obtained insurance covering water damage is indicative of what was in the contemplation of the parties. They argue that Mizen, in covenanting to obtain this policy, agreed to assume the risk of losses occurring during the construction of Visto condos, such as water losses, and was agreeing to forfeit the right to claim against any of the parties involved in the construction project, including YYZed, Shor-Cais, and Otomic, even if one or more of them caused or contributed to the water losses.

[70] The Defendants argue that even if broad form insurance equates to builder’s risk insurance (which they argue there is no evidence to support), such policies contain standard exclusions for water losses, even if not caused by an act of nature. That was evident in this case, as the Policy excludes coverage for water damage. Mizen only acquired coverage for water losses by purchasing an additional “Builder’s Risk Plus Endorsement”. As there is no reference in the relevant insurance covenants of the contracts to an obligation to purchase the additional

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endorsement, there is no covenant to insure for this risk and nothing in the contracts that expresses an intention to shift the risk of loss caused by flooding or surface water to insurance.

[71] The third parties say that this is not a correct interpretation. They rely on *Partners Investments Limited v. Etobicoke*, 1981 CanLII 1831, with respect to the scope of flood and surface water exclusions in an all risk policy to say that the type of water damage suffered in this case was not covered by the exclusion, but rather part of the policy.

[72] I find that there is a genuine issue for trial as to the scope of the covenant to insure and whether it covered water losses. Firstly, I accept that broad form equates to builder's risk. While Counsel for the third parties represented that it is known in the industry that coverage for water losses is included in "broad form" insurance, and this does make some sense, I do not have evidence to that effect. I acknowledge that this is what was purchased. The challenge is that there was supplementary coverage purchased to cover certain types of water damage. I do not have sufficient evidence from which I can make a finding of fact that the covenant to insure was intended to include the water losses suffered.

[73] The motion to dismiss cannot succeed on this ground.

*Is there a genuine issue for trial with respect to whether there was a covenant to insure in effect at the relevant time?*

[74] In the event I am incorrect in finding that there is a genuine issue for trial with respect to what the covenant to insure includes, this issue must be determined. I find there was a covenant to insure in effect in favour of Shor-Cais and Otomic. The only issue to be determined for these two parties is, as identified above, what the scope was.

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[75] YYZed did not sign their contract with Mizen until April 13, 2015. This was after the date of loss. There was no written covenant to insure directly between YYZed and Mizen at the time of the loss and therefore nothing indicating that Mizen assumed this risk. YYZed argues that the fact the Policy was in effect as of October 2014 and/or the contract ultimately signed expressly states it applies to the duration of the relationship between Mizen and YYZed. While I acknowledge that the Policy was in effect prior to the date of loss, there was no express covenant to insure as between YYZed and Mizen prior to the April contract. Further evidence will be required to determine this issue and the impact of no written covenant until after the loss. Case law interpreting *Giffels* has expressed reservation about applying the principle when there is post-tort conduct such as this. This will be discussed in greater detail below.

[76] I do, however, note that the Shor-Cais and Otomic contracts require Mizen to insure not only them as trade contractors, but also the “Construction Manager”. Construction Manager is defined in the Shor-Cais and Otomic to mean YYZed. It is arguable that there was a covenant to insure in favour of YYZed as a third-party beneficiary of the Shor-Cais and Otomic contracts. The parties did not argue whether the test of intended third party beneficiaries as set out in *London Drugs Ltd. v. Kuehne & Nagal International Ltd.*, 1992 CanLII 41 (SCC), [1992] 3 S.C.R. 299 and revisited in *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, 1999 CanLII 654 (SCC), [1999] 3 SCR 108, at para. 31, applies. Given there was no argument on this point and my findings with respect to the scope of the covenants to insure I have not decided this issue.

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Do the Contractual Waivers Bar the Third-Party Claims?

[77] The third parties argue that Mizen’s contractual waivers in their favour, which have now crystallized, `combined with the *Negligence Act* and *Giffels* also bars the Defendants from seeking contribution and indemnity from them.

[78] The relevant contractual provisions are:

a. YYZed Contract:

- i. Section 9.2.3 of the YYZed Contract contains a general waiver granted by Mizen in favour of YYZed:

9.2.3 As of the date of one year from the *Project In-Use Date*, the *Owner* waives and releases the *Construction Manager* from all claims which the *Owner* has or reasonably ought to have knowledge of that could be advanced by the *Owner* against the *Construction Manager* arising from the *Owner’s* involvement in the *Project*, including, without limitation, those arising from negligence or breach of contract in respect to which the cause of action is based upon acts or omissions which occurred prior to or on the *Project In-Use Date*, except as follows:

.1 claims arising prior to or on the *Project In-Use Date* for which *Notice in Writing* of claim has been received by the *Construction Manager* from the *Owner* no later than 20 days from the *Project In-Use Date*;

.2 indemnification for claims advanced against the *Owner* by third parties for which a right of indemnification may be asserted by the *Owner* against the *Construction Manager* pursuant to the provisions of this *Contract*;

.3 damages arising from the *Construction Manager’s* actions which resulted in substantial defects or deficiencies in the *Project*. “Substantial defects or deficiencies” mean those defects or deficiencies in the *Project* which affect the *Project* to such an extent or in such a manner that a significant part or whole of the *Project* is unfit for the purpose intended by this *Contract*;

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.4 claims arising from acts or omissions which occur after the *Project In-Use Date*.

- ii. The contract contains additional waivers.
- iii. The YYZed Contract defines the italicized terms as follows:

*Owner* means Mizen

*Construction Manager* means YYZed

*Project* is Visto Condos

*Project In-Use Date* is the date when the Project is ready for use or is being used for the purpose intended and is so confirmed in writing by YYZed in consultation with the Consultant and Mizen.

- iv. YYZed and Mizen agree that the Project In-Use Date is August 1, 2017, which is when all residential condo units were permitted to be occupied. Therefore, YYZed takes the position that Mizen's waiver in favour of YYZed crystallized under the terms of the contract August 1, 2018.

b. The Shor-Cais Contract:

- i. Section 12.2.3 of the Shor-Cais Contract contains a general waiver granted by Mizen as follows:

12.2.3 Subject to any lien legislation applicable to the *Place of the Project*, as of the fifth calendar day before expiry of the lien period provided by the lien legislation applicable at the *Place of the Project*, the *Owner* waives and releases the *Trade Contractor* from all claims which the *Owner* has or reasonably ought to have knowledge of that could be advanced by the *Owner* against the *Trade Contractor* arising from the *Owner's* involvement in the *Work*, including, without limitation, those arising from negligence or breach of contract in respect to which the cause of action is based upon acts or omissions which occurred prior to or on the date of Substantial Performance of the *Work*, except as follows:

.1 claims arising prior to or on the date of Substantial Performance of the *Work* for which Notice in Writing of claim has been received by the *Trade Contractor* from the *Owner* no later than the sixth calendar day before the

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expiry of the lien period provided by the lien legislation applicable at the *Place of the Project*;

.2 indemnification for claims advanced against the *Owner* by third parties for which a right of indemnification may be asserted by the *Owner* against the *Trade Contractor* pursuant to the provisions of this Contract;

.3 claims for which a right of indemnity could be asserted by the *Owner* against the *Trade Contractor* pursuant to the provisions of paragraph 12.1.4 of the GC – INDEMNIFICATION;

.4 damages arising from the *Trade Contractor's actions which result in substantial defects or deficiencies in the Work*. “Substantial defects or deficiencies” mean those defects or deficiencies in the *Work* which affect the *Work* to such an extent or in such a manner that a significant part or the whole of the *Work* is unfit for the purpose intended by the Contract Documents;

.5 claims arising pursuant to GC 12.3 – WARRANTY; and

.6 claims arising from acts or omissions which occur after the date of Substantial Performance of the Work.

- ii. the Shor-Cais Contract defines the italicized terms used in section 12.2.3 as follows:

*Owner* means Mizen

*Trade Contractor* means Shor-Cais

*Place of the Project* is 2522 Keele Street in Toronto, Ontario, with the Project meaning Visto Condos

*Work* means shoring services

- iii. Shor-Cais takes the position that the general waiver applied as of September 21, 2015. This is the fifth calendar day before the expiry of the lien period. The *Construction Act*, R.S.O. 1990, c. C.30 as amended, at section 31(2) defines the expiry date of a contractor's lien as 60 days after the earlier of: (i) substantial performance of the contract and (ii) the date the contract is completed, abandoned, or terminated. Shor-Cais finished

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work at Visto Condos on July 28, 2015, making the waiver by Mizen in favour of Shor-Cais crystallizing on September 21, 2015.

- c. The wording of the Otomic Contract and waivers granted by Mizen in favour of Otomic, and the exceptions to those waivers are the same as the Shor-Cais Contract. Otomic takes the position that the date of substantial performance was July 7, 2015, making the waivers crystallize as of August 31, 2015.

[79] The third parties argue that given that the waivers have crystallized with respect to all three contracts, Mizen cannot sue any of the third parties and therefore *Giffels* and the *Negligence Act* prevent the Defendants from claiming against them also. They argue that it is irrelevant that the waivers crystallized after the date of the losses. The fact is that the third parties have no liability to Mizen, and therefore no contribution and indemnity can be sought from them by the Defendants.

[80] The Defendants argue that *Giffels* does not apply because the contract between Mizen and YYZed was not entered into until after the date of the water losses. With respect to all three third parties, the Defendants argue that the waivers have not crystallized so as to prevent Mizen from having any claims against them for their alleged negligence associated with the water loss. If they have, it is undisputed that they did not crystallize until after the date of the water losses, which still excludes the application of *Giffels*.

*No Contract Between Mizen and YYZed on the date of loss:*

[81] YYZed and Mizen did not enter into a contract containing a waiver until April 2015, being after the date of the water losses. This is not in dispute.

[82] The Defendants argue that *Giffels* does not operate to defeat a claim for contribution and indemnity with respect to damages arising *before* a waiver was executed. The third parties argue

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that the date of the signing of the contract containing the waiver is irrelevant as the contract applies to the entire duration of the relationship between Mizen and YYZed.

[83] I agree with the Defendants that YYZed's claim for summary dismissal must fail with respect to this argument. The contract relied upon to shield YYZed from liability was not entered into until after Mizen's damages arose.

[84] On the circumstances of this case, I find that the date for determining whether Mizen had any cause of action against YYZed was the date of loss, and not some subsequent date (i.e. the date of commencement of the Third Party Claims or date of determination).

[85] In *Ysselstein v. Talon*, 1992 CarswellOnt 414, at para. 39, Justice Sutherland held that the date as of which the determination should be made as to whether the third party has any liability is the date when the damages were sustained and not the date when the claim for contribution was made.

[86] In *Re National Carpet Mills Ltd.*, [2015] O.J. No. 4106, at para. 71, Master Wiebe summarized the ruling of Sutherland J., as follows:

[71] [T]he date on which the *Giffels* principle applies is the date of the damage, not the date of liability determination. Therefore if there was a potential for liability by the co-defendant as against the plaintiff on the date of the damage, any subsequent settlement as between the co-defendant's right to claim contribution and indemnity against the co-defendant pursuant to the *Negligence Act*...

[87] The Defendants also rely on *Owners, Strata Plan LMS 1751 v. Scott Management Ltd.*, 2010 BCCA 192. In *Scott Management*, the British Columbia Court of Appeal considered a

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contractual waiver in a construction context, between the plaintiff and a third party. At para. 57,  
the Court held:

[57] ...the plaintiff had a cause of action against each of them when the alleged tort occurred. The objective of that right is to ensure that any damages established by the plaintiff will be shared equitably among concurrent tortfeasors according to their degree of fault. There is no principled reason why the post-tort conduct of the plaintiff...should interfere with the defendants' right of contribution.

[88] Similarly, in *Tucker v. Asleson*, [1991 CanLII 8258](#) (B.C.S.C.), aff'd in part [1993 CanLII 2782](#) (B.C.C.A.) it was held that post-tort actions by a plaintiff that extinguish its claim against one tortfeasor, such as granting them a release as part of a settlement, do not compromise the right of concurrent tortfeasors to claim contribution from the released party.

[89] Based on the evidence before me, on the face of it, it would appear that Mizen and YYZed are attempting to shield YYZed from liability based on post-tort conduct. Counsel for the third parties argues that the contract governs the entire duration of the relationship between Mizen and YYZed. The contract references the commencement date for services being September 2011. YYZed argues that the contract merely confirmed what the parties always intended, which was to have the standard form CCDC apply to their relationship.

[90] The fact that YYZed and Mizen may have always intended, but not executed a standard form CCDC contract prior to April 2015 is not in evidence but even if it were, it would have little impact on my decision. Mizen and YYZed were free to enter into a contract between them that applied to their entire relationship, even their relationship prior to the date of the contract, but they cannot attempt to grandfather the provisions of the contract to affect the claims of third parties. This is different than the situation in *Giffels*.

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[91] Regardless of what Mizen and YYZed now allege after the fact was their intention, the reality is that the contract containing the waivers was not entered into until April 2015, which was after the date of the losses and after the date that Mizen and YYZed's insurer had given notice to the Defendants of a claim. There is no explanation for why they continued in a relationship for almost four years with no contract. I agree with the Defendants that if parties could retroactively contract out of liability after they are aware of a potential claim and in doing so affect the rights do this, particularly once they have knowledge of a claim, it would create an absurd result.

*Do the Contractual Waivers Shield Shor-Cais and Otomic?*

[92] The situation is more complicated with respect to Shor-Cais and Otomic. These contracts were clearly entered into before the water losses were suffered by Mizen, but the waivers preventing Mizen from making any claims against Shor-Cais and Otomic had not yet come into effect.

[93] The Defendants argue that the contractual waivers between Mizen and Shor-Cais and Otomic did not crystallize until *after* the losses were suffered in February/March and April 2015, if they have crystallized at all. Therefore, at the time the losses arose, Mizen had a right to sue these third parties. Based on the principles outlined above, the Defendants argue that *Giffels* only operates to defeat a claim for contribution and indemnity with respect to damages arising *after* a waiver of liability between the plaintiff and the party from whom contribution is sought has crystallized.

[94] By each of the third parties' own evidence, their waivers crystallized after the dates of losses suffered in February to April 2015. If, as the Defendants urge, I find that the waivers had

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to have crystallized by the date of the loss to prevent their third party claims, then the third-party summary motion must be dismissed with respect to this ground. It also must be dismissed if I accept the Defendants' argument that the waivers still have not crystallized. But if, as the third parties argue I simply need to find that the waivers have crystallized at *some* point, then the motion succeeds.

[95] The third parties also argue, and I agree, that it is necessary to look at the contract as a whole. They further argue that the contract as a whole was intended to shield them from liability. The covenant to insure combined with the waivers, they argue, support this conclusion.

[96] Firstly, I find that there is no genuine issue for trial with respect to whether the waivers in favour of Shor-Cais and Otomic have crystalized. Those waivers are tied to the date of substantial performance of the contracts, and the expiry of the applicable lien period, which I find was 45 days under the then applicable construction lien legislation.

[97] With respect to whether the waivers shield Shor-Cais and Otomic from liability for the third-party claims, I find that they do not.

[98] The British Columbia Court of Appeal in *Scott Management*, when it made the finding at para. 57 of that decision that I have referred to above, noted the distinction between pre-tort contractual immunity, and immunity arising from actions taken after the tort. *Scott Management* considered whether the plaintiff's actions in permitting the expiry of a statutory limitation period against a third party prevented a defendant from seeking contribution and indemnity. It was held that this was post-tort conduct that did not bar the defendant's claim against the third party.

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[99] I find that this is a case similar to *Giffels* in which the potential future liability of Shor-Cais and Otomic to Mizen are allocated by their contracts. I note that the immunity claimed by Shor-Cais and Otomic arises not from any transaction independent of the contractual relationship or settlement made after the date of loss (post-tort conduct). In *Giffels* at pp. 1355-1356, Laskin C.J. stated:

What we have here is a case where the immunity of Eastern from liability did not arise from some independent transaction or settlement made after an actionable breach of contract or duty, but rather it arose under the very instrument by which Eastern's relationship with the plaintiff was established. *Giffels* had no cross-contractual relationship with Eastern upon which to base a claim for contribution; and once it was clear, as it was here, that Eastern could not be held accountable to the plaintiff for the latter's loss, any ground upon which *Giffels* could seek to burden Eastern with a share of that loss disappeared.

[100] Based on the case law cited throughout this decision, I find that the question to be asked is: As of the date of loss, did Mizen have a cause of action against Shor-Cais and Otomic, or were there contractual limits on Mizen's ability to sue for the damages claimed?

[101] Prior to the water damage occurring Mizen, Shor-Cais and Otomic contractually agreed that Shor-Cais and Otomic would not have liability to Mizen upon the coming into effect of the waivers. All parties agree that the waivers had not crystallized as of the date of loss. Therefore, as of that date Mizen had a cause of action against the third parties. This distinguishes the outcome of this case from that in *Giffels* and the other cases relied upon by the third parties in which the contractual waivers or limitations on liability had crystallized as of the date of the loss.

[102] In making these finding I do note that the *Negligence Act* does not set any temporal limits on the contractual exception to contribution and indemnity. I was somewhat tempted by the third parties' argument that as of the date of loss the third parties had a contract with Mizen that protected them from liability upon the coming into effect of the waivers, unless Notice in Writing was otherwise provided by Mizen. Given that no such notice was provided, Shor-Cais and Otomic no longer have any liability to Mizen, and the third parties argue that they cannot have liability to the Defendants under the *Act*. As tempting as this argument is given that the third parties bargained for no exposure to liability upon the coming into effect of their waivers, this simplistic analysis goes contrary to the caselaw that has interpreted *Giffels*. Even though those cases on their facts are distinguishable, the principles established are applicable.

Does the Anti-Subrogation Rule Bar the Third-Party Claims?

[103] The anti-subrogation rule is a common law rule barring an insurer from pursuing subrogation against a party that is an insured under the subrogating policy. The rule recognizes that the insurer has contracted to assume the risk for which insurance was purchased, and to take that risk away from the insured. It would negate the purpose of insurance if the insurer could then sue an insured that was to be protected from risk by the policy. It also recognizes that by suing its own insured, whether under the subrogating policy or a different policy, the insurer would effectively be suing itself. *Commonwealth Construction Co. Ltd. v. Imperial Oil*, 1976 CanLII 138 (SCC), [1978] 1 S.C.R. 317; *Rochon v. Rochon*, 2015 ONCA 746, at paras. 73 and 74; *Scaffidi-Argentina v. Tega Homes Developments*, 2020 ONSC 6656, at paras. 28 to 47, aff'd *Scaffidi-Argentina v. Tega Homes Developments*, 2021 ONCA 738.

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[104] The third parties allege that they, along with Mizen, are all insureds under the Policy.

[105] The third parties argue that because Mizen is unable to advance its subrogated action against any of the third parties, the *Negligence Act* and *Giffels* bars the Defendants from seeking contribution and indemnity from YYZed, Shor-Cais, and Otomic.

[106] The Defendants argue that the anti-subrogation rule does not apply given that the third parties acknowledge in their Notice of Motion (pg. 3, para. S) that Mizen’s claim seeks damages for “covered and uncovered losses”. In other words, there is a component to the claim that pertains to losses not covered by insurance.

[107] An insurer is only subrogated with respect to the amounts it has paid out to indemnify its insured. Any additional recovery is the property of the insured: *Douglas v. Stan Fergusson Fuels Ltd.*, 2018 ONCA 192 (CanLII), at para. 57.

[108] I agree with the Defendants that the anti-subrogation rule can only apply to that part of the losses that were covered/insured losses. The anti-subrogation rule, by itself (absent consideration of the contracts), does not prevent Mizen from pursuing any claim in negligence it would otherwise be entitled to do as against the third parties for uninsured losses. Therefore, the anti-subrogation rule alone cannot defeat the Defendants’ claims against the third parties with respect to uninsured losses.

[109] Does it apply to the subrogated portion of the claim? The Defendants argue that the anti-subrogation rule does not apply to the subrogated portion of the claim either. They rely on *111 St. Clair Ave. West v. Ron Boyko Group*, 2015 ONSC 4576 (“*St. Clair*”).

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[110] In *St. Clair*, the plaintiff sued the defendant for negligence, negligent misrepresentation and breach of contract. The defendant named a third party, with whom it had third party claim on the basis that it had a Builder's Risk Policy under which it, and the plaintiff were both named insureds. The insurer had brought the action as a subrogated claim.

[111] At para. 8 of *St. Clair*, Justice Hood found that true anti-subrogation did not apply as this was not a situation where *all* of the potentially liable parties were insured by the same insurer. While ultimately the third party claim was dismissed on the basis of contractual indemnity provisions between the defendant and third party, Justice Hood's comments with respect to anti-subrogation are helpful to determining this case and are equally applicable.

[112] If the third-party insureds are dismissed from the case the plaintiff insurer will be able to recover a greater percentage of its damages from each of the remaining defendants than the subrogors could recover in a direct action. Ordinarily a subrogee has no greater rights than a subrogor. Furthermore, Allianz contracted with Mizen to provide coverage for Mizen, its construction manager and trade contractors. Allianz contracted to assume the covered risks associated with this project occasioned by the actions of those parties (subject to any exceptions in the Policy). To now try to shift that risk that Allianz contracted to assume to the defendants, who were not parties to the contract of insurance, by seeking to have the third parties removed from this action strikes me as an unreasonable extension of the anti-subrogation rule that produces not only inequitable, but commercially undesirable results. I find that any limitations on the rights of Allianz to prosecute a subrogated action against its insureds, the third parties, is not a limitation of liability as between those parties and Mizen. That must be found elsewhere in

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the contract or relationship between the parties, and I have found it did not exist as of the date of loss.

[113] In reaching this conclusion I am mindful of the third parties' argument, based on Justice Kimmel's comments in *Nuyork*, that *Giffels* can produce inequity but still needs to be applied. But to get to *Giffels*, given my findings on the issues of the covenant to insure and the contractual waivers, the third parties must establish that the anti-subrogation rule applies in these circumstances. I have found it does not.

[114] By way of *obiter*, I note that Mizen (by its insurer Allianz) has not agreed to limits its claim to the Defendants' several liability (if any). Given that the action is brought by Allianz as a subrogated action and given that the third parties are its own insureds and a large part of the third parties' (represented by Allianz) argument is that Mizen assumed their risk, this strikes me as an approach that would have made sense. The Defendants have plead contributory negligence by Mizen, which presumably (or with pleading amendments) includes Mizen's agents for which Mizen has assumed liability under the terms of its contracts with those agents. On the face of it, it would have avoided this motion and would simplify the litigation with less parties involved. Nonetheless, I appreciate that there may be nuances to the case I am not appreciating in making this comment.

[115] With respect to the Defendants' argument that it is an issue for trial as to whether the third parties, and in particular YYZed are in fact named insureds, given my conclusion that the anti-subrogation rule does apply if they are, it is not necessary to decide this issue. If I am

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wrong, I would find that Shor-Cais and Otomic are clearly trade contractors under the terms of the policy. The situation is less clear with respect to YYZed.

[116] The Defendants argue that there is nothing in the Policy identifying any additional insureds. The only provision may be found in a Builder's Risk Plus Endorsement, which provides:

**Blanket Additional Insured/Loss Payee**

Blanket Additional Insureds and Loss Payees are added for covered property under the Builder's Risk Coverage Form as their interest(s) may appear under a written agreement with you prior to any loss.

[117] There was a covenant to insure with Shor-Cais and Otomic prior to the loss. YYZed's covenant to insure did not arise until after the loss. Having said this, as mentioned above, the parties did not argue whether the Shor-Cais and Otomic Contracts extend the obligation to insure to YYZed.

[118] Regardless, the Affidavit of Rohit Trivedi, Adjuster with Allianz confirms that under both the "wrap up" and "builder's risk" policies, the third parties are "additional insureds". This is a sworn statement of a representative of Allianz. I appreciate that Allianz refused an undertaking to advise if it had ever deemed the third parties (or any of them) not be insureds. What is relevant is that *now* Allianz has confirmed to the court that they are insureds.

[119] For the foregoing reasons the motion is dismissed. If the parties cannot agree as to costs, written submissions shall be made as follows, failing which costs shall be deemed to have been resolved:

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- a. The Defendants, as the presumptively successful party, shall deliver their submissions within thirty days of the date of this decision, limited to five pages (per Defendant), double-spaced, not including attachments (Bill of Costs, caselaw and relevant offers/correspondence);
- b. The third parties shall deliver their responding submissions, also limited to five pages, double-spaced, within thirty days of receipt of the Defendants' submissions; and
- c. Any Reply submissions shall be delivered within fifteen days of receipt of the responding submissions, limited to two pages (double-spaced).

“Original signed by”  
The Honourable Madam Justice T.J. Nieckarz

**Released:** March 21, 2023

**CITATION:** Mizen Holdings Corporation v. Toronto (City) et al, 2023 ONSC 1882  
**COURT FILE NO.:** CV-16-0563671-0000  
**DATE:** 2023-03-21

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**B E T W E E N:**

Mizen Holdings Corporation

Plaintiff

- and -

City of Toronto, 614128 Ontario Ltd.  
Operating as Trisan Construction and Ontario  
Excavac Inc.

Defendants

-and-

2043102 Ontario Ltd., operating as YYZed  
Project Management, Otomic Contractors  
Ltd., and Shor-Cais Consulting Limited,  
operating as Shor-Cais Foundation  
Contractors

Third Parties

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**DECISION ON MOTION FOR SUMMARY  
DISMISSAL OF THIRD PARTY ACTION**

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Nieckarz J.

**Released:** March 21, 2023