Ontario Court confirms strict enforcement of suit limitation periods in surety bond claims

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In *VanMar Constructors ON 1028 Inc. v Travelers Insurance Company of Canada*, 2025 ONSC 6959, the Ontario Superior Court found that a performance bond action by a contractor was commenced after expiry of the bond limitation period, and dismissed the action. While the facts were straightforward, the court's analysis provides important guidance on the interpretation and enforcement of limitation periods under performance bonds.

Background

- VanMar Constructors ON 1028 Inc. (VanMar) was a construction manager and general contractor engaged in building a residential complex in Kitchener, Ontario (the Project).
- VanMar subcontracted with Global Plumbing & Heating Inc. (Global) for mechanical works for the Project. The subcontract required Global to obtain a performance bond (the Bond) for its scope of work, which was issued by Travelers Insurance Company of Canada (Travelers).
- On March 14, 2022, VanMar wrote to Travelers alleging that Global was in default of its obligations to VanMar, was declared to be in default, and that VanMar had performed all of its obligations to Global. However, VanMar did not make a claim on the Bond in this correspondence, and did not make a claim until December, 2022.
- On April 1, 2024, VanMar commenced an action against Travelers under the Bond.

Travelers sought summary judgment on the basis that the action was commenced outside the limitation period set out in the Bond, or in the alternative under the *Limitations Act*. VanMar took the position that such limitation period did not commence until VanMar “formally” made a call on the Bond and required Travelers to take action.

Strict enforcement of bond limitation periods

The Court began by confirming that whether an action is barred by an applicable limitation period is an issue that can be properly resolved on a summary judgment motion.

The Court first noted the express and clear language of the Bond, which provided that:

- Travelers' obligations arose upon three preconditions being met, being:
  - Global being in default;
  - VanMar declaring Global in default; and
  - VanMar not being in default.
- "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]."

Relying on this express language and the March 14, 2022 correspondence from VanMar setting out the three preconditions to Travelers' obligations, the Court found that the Bond limitation period begun to run no later than March 14, 2022.

The Court then addressed the positions raised by VanMar, that the Bond should be interpreted to include an implied term delaying the start of the Bond limitation period until "formal notice" of a claim was given to Travelers.

The Court rejected this position, finding that reading in additional language would conflict with the intent of the parties as expressed in the clear and unambiguous language of the Bond. It would also undermine commercial reality, allowing VanMar to extend its claim, potentially indefinitely, by delaying giving a "formal notice" of a claim on the Bond. The Court stressed that the purpose of a contractual limitation period is to provide certainty and finality. Allowing claims to be delayed indefinitely would expose sureties to open-ended liability, impair their ability to assess risk and exposure, and prevent timely investigation of claims, which would not be commercially sensible.

Accordingly, the Court found that VanMar's action was commenced after expiry of the Bond limitation period and was therefore barred. Given this finding, the Court did not address the limitation period under the *Limitations Act*.

While the Court's decision confirms that limitation periods set out in bonds will be strictly enforced, it is important to note different bond forms set out different triggering events for their limitation periods. The Bond at issue in this case (which was a CCDC 221-2002 performance bond) provided that the limitation period began when the Principal was declared to be in default by the Obligee. However, the limitation period in the CCDC 221-2024 performance bond and the Form 32 *Construction Act* performance bond is tied to the date when the surety receives written notice under the bond, which may be different. Therefore, the specific facts of each case must be addressed to determine when the appropriate limitation period begins to run. This is significant, as such limitation periods will be strictly enforced by the courts.

Conclusion

The express language of a bond remains paramount in determining the rights, obligations, and conditions of the bond, including strict enforcement of limitation periods set out therein. Further, such limitation periods will be interpreted in light of commercial

reality and certainty, to allow sureties to properly assess risk and investigate claims, and avoid open-ended and potentially indefinite liabilities.

Travelers was represented in this motion by Borden Ladner Gervais LLP.

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