

**ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)**

B E T W E E N:

ZURICH INSURANCE COMPANY LTD.

Plaintiff

- and -

**2442931 ONTARIO INC., BONDFIELD CONSTRUCTION COMPANY
LIMITED, JOHN AQUINO, VASOS GEORGIOU and
UNITY HEALTH TORONTO**

Defendants

NOTICE OF MOTION

Unity Health Toronto (formerly, St. Michael's Hospital, and hereinafter both in reference to Unity Health Toronto as a Defendant, and St. Michael's Hospital, "**SMH**") will make a motion to a Judge of the Commercial List, on a date to be scheduled, at 330 University Avenue, Toronto, Ontario, M5G 1S4.

PROPOSED METHOD OF HEARING: The motion is to be heard orally,

THE MOTION IS FOR:

1. Summary judgment pursuant to Rule 20 of the *Rules of Civil Procedure* dismissing the claim of Zurich Insurance Company Ltd ("**Zurich**") against SMH as Zurich is not entitled to rescind or otherwise avoid its obligations under the Bonds, nor is Zurich entitled to invalidate the call on the Performance Bond.
2. Summary judgment pursuant to Rule 20 of the *Rules of Civil Procedure* granting SMH's counterclaim requiring Zurich to forthwith pay the undisputed amount due and owing pursuant to Zurich's election to pay out under the Performance Bond, and directing

a Reference to determine the quantum of any remaining disputed amount that Zurich is required to pay under the Performance Bond.

3. An Order sealing certain confidential information to be filed on this motion related to cost estimates for the completion of the Project;
4. SMH's costs of this motion and the action on a substantial indemnity basis; and
5. Such further and other relief as counsel may advise and this Court considers appropriate.

THE GROUNDS FOR THE MOTION ARE:

Overview

6. The St. Michael's Hospital Redevelopment (the "**Project**") is a transformative project for patient care at the hospital. The Project includes the construction of a new patient care tower, a renovated Emergency Department, and significant upgrades to improve the existing hospital space. This redevelopment will provide state-of-the-art facilities for programs now significantly challenged by older, obsolete, and legacy spaces, which are no longer adequate to continue servicing the hospital's community. The intended goal of the Project is to elevate St. Michael's Hospital into the premier critical care hospital in Canada.

7. SMH entered into a contract (the "**Project Agreement**") with the defendant 2442931 Ontario Inc ("**Project Co**") to design, build and finance the Project.

8. Project Co entered into a Construction Contract with the defendant Bondfield Construction Company Limited ("**Bondfield**"), as construction contractor to design and build the Project. Project Co is a wholly owned subsidiary of Bondfield.

9. As part of the bid submission for the Project, SMH required that each bidder submit a written commitment from a bonding company to issue a Performance Bond and a Labour and Material Payment Bond (the "**Bonds**") in respect of the Construction Contract between the project company and its construction contractor. These Bonds ensure

that in the event of default by the construction contractor, its obligations to the project company are honoured. Zurich gave that commitment and issued these Bonds for Bondfield.

10. Prior to agreeing to bond the Project, Zurich had already agreed to bond future Bondfield projects and had already obtained a comprehensive indemnity from Bondfield and eight other indemnitors for any losses Zurich may sustain in issuing any such bonds.

11. Zurich issued the Bonds under this pre-existing arrangement with Bondfield. Zurich never sought, and SMH did not provide, any representations to Zurich with respect to the procurement process for the Project. Nor did Zurich conduct any due diligence in respect of the Project, either prior to or after issuing the Bonds.

12. After construction had started, in September 2015 and into 2016, facts surrounding an undisclosed conflict of interest between Vasos (“**Vas**”) Georgiou, the Chief Administrative Officer (“**CAO**”) of SMH, and John Aquino, the CEO of Bondfield and President of Project Co, became highly and notoriously publicized through a series of investigative reporting articles published by *The Globe and Mail* (“**The Globe**”), and an investigation by IO into the procurement process. SMH terminated Mr. Georgiou’s employment in November 2015.

13. In the face of information that suggested Bondfield had won its bid as a result of its relationship and collusion with Mr. Georgiou, and with the fairness of the procurement process being loudly and publicly called into question, Zurich raised no concerns and chose to continue to perform its obligations under the Bonds.

14. Over time, delays were encountered in construction of the Project. In late 2018, Project Co was declared in default of its Project obligations, and, in December, 2018 Project Co was put into receivership, Bondfield was declared to be in default of its Project obligations, and Zurich was called on to perform under the Bonds. Zurich again raised no concerns and chose to continue to perform the bonded obligations: Zurich was involved in construction of the Project, hired construction managers, and made payments to trades.

15. In April 2019 Bondfield sought and was granted CCAA protection. It had failed to perform on many of its construction projects across Ontario, not just the Project. Zurich, its principal surety, was being called on to pay under the many bonds it had provided to back Bondfield's performance. Zurich's payments on bonds given to back Bondfield company projects were reported as the largest surety loss in Canadian history.

16. In August 2019, Zurich elected to pay the full amount of the Performance Bond rather than carry on directing and paying for construction of the Project. However, by late 2019, Zurich had failed to make payment. In December 2019, this Court ordered that the call made on the Performance Bond and Zurich's election to pay were valid and binding, and a motion was scheduled to address the quantum Zurich had to pay.

17. In March 2020, some evidence was reported which supports the allegation of unfairness in the procurement process that had been publicly known since 2015. The evidence, which arises four and a half years after Zurich knew of the Georgiou/Aquino relationship and its reported impact on the fairness of the procurement process, arose in the context of Zurich having to pay out hundreds of millions for surety bonds given to back many Bondfield projects across the country, and with Bondfield, its indemnifier, being under CCAA protection.

18. Zurich seized on the evidence as a pretext to avoid its obligations under the Bonds, and therefore not add them to its growing Bondfield-related payment liabilities. It is not entitled to do so.

Uncontested Facts to Obtain Expedient Relief

19. SMH requires an urgent determination that the Bonds are valid and enforceable, the call on the Performance Bond is valid and effective, and for payment under the Bonds, to enable the hospital construction to carry on and the Project to be completed.

20. Many of SMH's arguments as to why the Court should order the relief sought are independent of Zurich's complaints about the fairness of the procurement process in respect of the Project.

21. As such, to facilitate an expedient determination of this matter on its merits, for the limited purpose of pursuing its motion for summary judgment on an expedited basis, SMH will prove the relief it seeks without contesting the facts pleaded by Zurich of unfairness in the procurement process, as set out in Schedule A to this Notice of Motion.

Procurement Process for the Project

22. SMH and Ontario Infrastructure and Lands Corporation (“IO”), initiated the Project, which is structured as a Design-Build-Finance model. In December 2012, a public Request for Qualifications was issued to potential bidders.

23. In May 2013, SMH and IO (collectively the “**Sponsors**”) announced the list of short-listed bidders who had pre-qualified to bid to the Request for Proposals for the Project. A consortium that bid through Project Co, a special purpose entity incorporated and wholly owned by Bondfield, was one of those proponents.

24. The project budget of \$301 million, being the amount SMH had available to spend on the Project, was disclosed to all three bidders to consider when preparing their respective proposals for the Project.

25. On August 2, 2013, the Sponsors issued a Request for Proposals to the three pre-qualified bidders. The RFP set out the bid process and the proposed project agreement that the successful bidder would enter into with SMH to design, build and finance the Project.

Project Co’s Bid Proposal and Zurich’s Undertaking to Project Co to Issue the Bonds

26. The RFP closed on May 21, 2014. Project Co submitted its proposal offering a bid price of approximately \$301 million, consistent with the disclosed Project budget.

27. As part of its proposal, Project Co included a surety’s consent executed by Zurich. In its consent, Zurich undertook and agreed to issue a Performance Bond and a Labour and Material Payment Bond (the “**Bonds**”) if Project Co’s proposal won.

28. This undertaking by Zurich to issue the Bonds came prior to the close of the procurement process for the Project, prior to the formation of the Evaluation Committee, and prior to the evaluation of any of the bids by the Sponsors.

29. Indeed, since February 2006, Zurich had a long-standing arrangement with Bondfield to provide surety bonds on its constructions projects. In turn, Bondfield, along with other Bondfield related individuals and entities, including John Aquino, the former president of both Project Co and Bondfield, agreed to indemnify Zurich from any and all losses whatsoever sustained by Zurich as a result of having provided bonds to back the performance of Bondfield related companies.

30. At no point prior to executing the surety's consent did Zurich seek any representation from SMH as to the fairness of the procurement process. Indeed, at no point during or after the procurement process did Zurich seek to elicit any representation from SMH as to the fairness of the procurement process, or at all, nor did Zurich at any time conduct any due diligence or monitor the Project.

31. Further, at no time did SMH make any express or implied representations to Zurich during the procurement process that the process was fair, or any other representation. Nor did Zurich make an inquiries or seek any representations from SMH that the procurement process was fair.

The Proposals are Evaluated by SMH and IO

32. In June 2014, the Sponsors created an Evaluation Committee (the "EC"). The evaluation of Project Co's proposal was ultimately ratified by the EC on a consensus basis and recommended to be the first ranked proponent. Following commercial negotiations between Project Co and the Sponsors, and executive approval of the Board of Directors of IO and SMH, Project Co was awarded the contract. Project Co.'s winning bid was announced on January 28, 2015.

33. As is generally the case with the winning bid, Project Co's bid was for the lowest Project price. That price was consistent with the project budget that the Sponsors had disclosed to all of the bidders.

The Project Contracts

The Project Agreement

34. SMH and Project Co entered into a Project Agreement for the design, build, and financing of the Project. The Project Agreement provided for a guaranteed fixed price of \$301,189,863, and was executed on January 27, 2015 (the “**Project Agreement**”). All of the project contracts, including the Bonds, were executed on the same day.

35. The Project Agreement at Section 1.1(d) expressly provides that no one shall rely on or use the Request for Proposals or Project Co’s proposal to interpret or qualify any of Project Co obligations or liabilities in the Project Agreement. Project Co’s obligations under the Project Agreement include its requirement to obtain and maintain the Bonds in good standing until the fulfilment of the Project Agreement.

The Design and Construction Contract

36. Project Co and Bondfield entered into a Design and Construction Contract (the “**Construction Contract**”). The Construction Contract is the agreement that Zurich guaranteed the performance of through the Performance Bond.

37. There are no representations made by either Project Co or Bondfield in the Construction Contract relating to the fairness of the procurement process.

The Performance Bond

38. The Performance Bond is in the amount of \$156,325,362.60 (the “**Performance Bond Amount**”).

39. Under the Performance Bond, Zurich (the “Surety”) guarantees the obligations of Bondfield (the “Principal”) in favour of Project Co (the “Obligee”). SMH and BMO, the Administrative Agent representing the lenders to Project Co, are each named as an “Additional Named Obligor” pursuant to a Multiple Obligor Rider which is attached to and forms part of each of the Bonds, respectively.

40. The Multiple Obligee Rider provides that the Additional Named Obligees shall “be entitled to enforce the obligations of the Principal and the Surety under the Bond and this Multiple Obligee Rider, as though such Additional Named Obligees were named as an Obligee in the Bond.”

41. Further, Section 9 of the Performance Bond provides that each of the Obligees, including SMH and BMO, have the right to bring a claim under the bond.

42. Collectively, these provisions provide each of the Obligees with a direct cause of action under the Bond, and the right to enforce Zurich’s obligations.

The Labour and Material Payment Bond

43. The L&M Bond is in the amount of \$142,113,966. As with the Performance Bond, Bondfield is the principal and Zurich is the surety. The L&M Bond is likewise subject to a Multiple Obligee Rider whereby SMH and BMO are both additional Obligees.

44. Under paragraph 2 of the L&M Bond, any subcontractor to Bondfield who has supplied labour or materials to the Project and has not been paid as provided for under its subcontract with Bondfield, may in their own right sue for payment under the L&M Bond.

The Globe & Mail Investigation and Articles

45. In September 2015, Mr. Georgiou informed SMH that The Globe contacted him to enquire about a fraud that had taken place while Mr. Georgiou was employed at IO (although unrelated to his work at IO).

46. On September 12, 2015, SMH placed Mr. Georgiou on paid leave. Mr. Georgiou’s employment was terminated with cause on November 12, 2015.

47. Between September 15, 2015 and February 16, 2016, The Globe published a series of articles arising from its investigation into Mr. Georgiou’s fraudulent scheme while employed at IO and his undeclared conflict of interest with Mr. Aquino during the procurement process. These articles included reports of the following facts and opinions:

- (a) September 15/16, 2015 – SMH was reviewing Mr. Georgiou’s tenure at the hospital, as it had been unaware when it hired Mr. Georgiou that he had issued false invoices that were used in a kickback scheme at York University while he was employed by IO.
- (b) On September 24, 2015 – “A Toronto hospital executive was evaluating potential bidders for a \$300-million construction project during the same period he was involved in a private real estate venture with the builder that eventually won the contract – casting doubt on the fairness of a process that will lead to the creation of Canada’s premier critical-care centre.” Mr. Georgiou is identified as that executive, and Mr. Aquino the builder. Mr. Georgiou confirmed that he served as an advisor to companies controlled by Mr. Aquino prior to starting his role as CAO at SMH, and that he continued to do work for those companies while in that role.
- (c) On September 29, 2015 – Markham Stouffville Hospital was conducting its own investigation into its expansion and renovation project that was completed in 2014 given that Mr. Georgiou was involved in that project during his employment at IO.
- (d) November 13, 2015 – SMH terminated Mr. Georgiou and it was reported that “St. Michael’s continues to review Mr. Georgiou’s role in the bidding process – one that numerous sources have told The Globe was fraught with irregularities.” The Project had a \$301M budget-cap proposed by SMH to the bid proponents, and “Bondfield’s larger rivals, PCL and EllisDon, said it was not possible to perform the work for this price, and submitted bids at least \$100-million more than the cap, according to numerous sources.” This led to an impasse within the EC, and that “A senior Infrastructure Ontario official argued that Bondfield’s bid was not compliant, while Mr. Georgiou pushed for Bondfield, sources close to the process said.”
- (e) February 10, 2016 – Mr. Georgiou’s maintained a stake in GP8 Sportwater along with Mr. Aquino during the SMH procurement process. Mr.

Georgiou also provided services to commercial real estate companies headed and partly owned by Mr. Aquino.

- (f) February 16, 2016 – Mr. Georgiou’s family business, which he controls, loaned OTEC Research Limited (“**OTEC**”), which is partly owned by Mr. Aquino, \$102,639 in March 2013 (two months after Mr. Georgiou began his employment at SMH).

48. The Ontario Superior Court of Justice, in proceedings which considered these articles, found that *“the average Globe reader would almost inevitably conclude that Georgiou was a fraudster who undermined the fairness and integrity of the SMH procurement process. The reader would further conclude that Bondfield had won its bid as a result of its relationship and collusion with Georgiou.”*

IO Reports on its Internal Investigation into the Procurement Process

49. In September 2015, IO formed a Special Committee to investigate, among other things, the Project procurement and other IO projects in which Mr. Georgiou had been involved.

50. The Special Committee released its report and findings on June 23, 2016, which was posted to the IO website (where it remains today). The Special Committee concluded that Mr. Georgiou had “significant potential conflicts of interest which required disclosure” and had Mr. Georgiou disclosed these conflicts to the SMH Conflict Review Team, he would likely have been prohibited from participating in the procurement process for the Project.

Zurich Takes no Action and Continues to Perform Under the Bonds

51. Despite the fact that it knew of unfairness in the Project procurement process as a result of media reports in September 2015 to February 2016 and the release of the IO Investigation Report in June 2016, Zurich did not seek any information from SMH relating to the fairness of the procurement process and/or seek to or take any steps to rescind the Bonds or otherwise end its obligations under the Bonds.

52. Instead, knowing the Obligees and others were relying on the Bonds, Zurich continued to perform under the Bonds.

53. Zurich also continued to bond other Bondfield projects, under its long standing arrangement to provide Bondfield with surety bonds, and pursuant to the indemnity granted by Bondfield and other indemnitors in its favour.

54. In reliance on Zurich having raised no concerns and its continued performance under the Bonds, and at a time when it could have, SMH did not seek alternate bonds for the Project. Had Zurich raised a concern or indicated it was unwilling, or relieved of its obligations, to perform under the Bonds in the circumstances, SMH would have required Project Co to obtain a new surety pursuant to its obligations under the Project Agreement. It is now too late for SMH to do so.

Bondfield Defaults and the Bondfield Receiver Calls on the Performance Bond

55. Bondfield experienced delays in its performance under the Construction Contract. Despite efforts by SMH to help keep the Project on track, Project Co and Bondfield continued to default in their respective obligations. In November, 2018, SMH declared Project Co in default under the Project Agreement.

56. Bondfield's failure to meet its obligations under the Construction Contract was not unique to the Project. The Project issues that led to it being declared in default, were emblematic of the issues Bondfield was having across many of its Ontario projects.

57. By the fall of 2018, Bondfield was financially distressed. It sought and obtained CCAA protection on April 3, 2019. At that time, it had over \$1 billion in contract value in outstanding construction projects for major public-sector institutions. It had defaulted on numerous projects.

58. On an application brought by the lenders to the Project, Alvarez & Marsal Canada Inc. (the "**Receiver**") was appointed as the receiver of Project Co by Court Order dated December 21, 2018. The central purpose of the appointment was to allow Project Co via

the Receiver to make a call on the Performance Bond. The Receiver declared Bondfield in default and made a call on the Performance Bond that same day.

59. Following the call on the Performance Bond, Zurich's involvement in the Project included retaining a construction and project management company to oversee and manage the Project, and funding Bondfield's sub-contractors for the work being performed.

60. In addition to its obligations under the Performance Bond, Zurich also responded to and paid claims of Bondfield's unpaid subcontractors pursuant to Zurich's obligations under the L&M Bond and entered into ratification agreements with various Bondfield trades to settle their past claims and secure go-forward performance of the Project works.

Zurich's Election and the Injunction Motion

61. On August 22, 2019, Zurich advised the Receiver that it wished to and did elect Option 2.4(a) under the Performance Bond, to pay the remaining balance of the Performance Bond Amount and cease its involvement with the Project.

62. At the same time, Zurich threatened to abandon the Project, without sufficient notice, unless SMH and the Lenders approved all payments already made by Zurich purportedly under the Performance Bond, in the absence of necessary substantiating information and documents.

63. In response, BMO, supported by SMH, brought a motion for injunctive relief, which was ultimately resolved by a series of adjournments, on terms, leading to an Order, unopposed by Zurich. The adjournment terms endorsed by the Court on consent (on one occasion only unopposed by Zurich) included that until the return date before the Court, ultimately extended to December 20, 2019, the *status quo* with respect to Zurich's involvement with the Project was to be maintained, including the obligation that Zurich continue to pay all subcontractors.

64. Zurich breached the endorsed terms of the adjournment. It stopped making any payments to subcontractors in or around October 2019.

December 20, 2019 Order

65. On December 20, 2019, SMH sought and was granted an order that, *inter alia*, permitted SMH to exercise its remedial rights under the Project Agreement to directly retain a construction manager, payment certifier, and new and existing trade contractors under new Trade Agreements (as defined in the Order) to carry out the works required to achieve Tower Interim Completion, an interim milestone under the Project Agreement (the “**December 20, 2019 Order**”).

66. In addition, the December 20, 2019 Order also declared that the Receiver’s demand on the Performance Bond on December 21, 2018 was valid, and that Zurich elected Option 2.4 under the Performance Bond, and is bound by its election.

67. Zurich was represented by counsel before the Court and did not oppose the December 20, 2019 Order. At no time did it seek to appeal the Order.

Zurich Refused to make any Payment (including an Interim Payment) unless SMH approved the Accounts

68. Despite Zurich electing Option 2.4 in August 2019, offering to make an interim payment under the Performance Bond in November 2019, and not opposing the December 20, 2019 Order binding Zurich to its election to pay the balance of the Bond Amount, Zurich refused to do so unless SMH approved all payments made by Zurich as having been proper payments under the Performance Bond.

69. SMH and BMO thus brought a motion to enforce the December 20, 2019 Order and obtain payment by Zurich in accordance with its obligation to pay under the Performance Bond, and to enforce Zurich’s undertaking to pay Bondfield subcontractors up until the date of the Order.

70. Instead of directly responding to the motion, Zurich commenced its Action in April 2020, taking the position that it is not required to make the payments that it had been delaying making since August 2019.

The Relief Sought by Zurich Not Available in Law

71. There is no genuine issue requiring a trial to conclude Zurich is not entitled to avoid its obligations under the Bonds or that the call on the Performance Bond was valid.

1. *No Rescission of the Bonds*

72. Zurich seeks declaratory relief rescinding and voiding the Bonds *ab initio*, declaring the Bonds to be of no force and effect and voiding Zurich's obligations under the Bonds. The basis for this relief is an alleged misrepresentation as to the fairness of the procurement process. Zurich's claims cannot succeed including for the reasons set out below.

A. SMH Did Not Make any Representations to Zurich

(i) There were no express representations as to fairness

73. SMH never made any express representations to Zurich as to the fairness of the procurement process, or at all. To the contrary, SMH made express representations, as set out in Section 1.1(d) of the Project Agreement, that no one can rely on the procurement process to qualify the obligations of Project Co, including those concerning the Bonds.

74. In addition, Zurich never made any inquiries to SMH or sought any representations from SMH relating to the fairness of the procurement process either prior to or after issuing the Bonds.

(ii) There could not have been any implied representations as to fairness

75. SMH never made any implied representations to Zurich as to the fairness of the procurement process. There could not have been any implied representations including for the following reasons:

- (a) The legislation governing the procurement process relied on by Zurich to ground its allegation of an implied representation of fairness, the *Broader Public Sector Accountability Act, 2010*, S.O. 2010, c. 25, expressly

provides that no cause of action, including an action seeking declaratory relief or any form of compensation, arises against any organization subject to the act (in this case, SMH) as a result of anything done or not done in accordance with the Act or the regulations or the directives or the guidelines issued under the Act, including the Broader Public Sector Procurement Directive, referred to at paragraph 30(a) of the Claim;

- (b) Similarly, Zurich has no cause of action relating to SMH's alleged failure to abide by the policy statement, "Building a Better Tomorrow", referred to at paragraph 30(d) of the Claim;
- (c) Moreover, neither the Management Board of Cabinet Procurement Directive referred to at paragraph 30(b) of Zurich's Statement of Claim, nor the IO Procurement Policy referred to in paragraph 30(d) of the Claim, apply to SMH;
- (d) Section 1.1(d) of the Project Agreement provides that the request for proposals and Project Co's proposal are superseded entirely by the Project Agreement and are rendered null and void, and shall not be relied on by anyone, including third parties such as Zurich, to interpret or qualify any obligations or liabilities of Project Co, or anything else contained in the Project Agreement, including Project Co's obligations to obtain and maintain the Bonds in good standing until the fulfilment of the Project Agreement; and
- (e) The Performance Bond guarantees the performance of the Construction Contract between Bondfield and Project Co, which is not the contract that was the subject of the procurement process with which Zurich is taking issue.

B. There Was No Relationship Between Zurich and SMH that Would Permit Zurich to Rely on a “Representation” from SMH

76. Even if SMH had made representations as to the fairness of the procurement process, Zurich, as a stranger to that process, was not entitled under statute, common law or contract to rely on any acts or omissions or any representations, implied or otherwise, made by SMH relating to the fairness of the procurement process.

77. There was no special relationship between SMH and Zurich giving rise to a duty of care that would entitle Zurich to claim against SMH for any reliance by it on any representations by SMH as to the fairness of the procurement process. Neither the requirement of proximity nor of reasonable foreseeability is met (or even pleaded) by Zurich. In any event, policy considerations, including the application of the *Broader Public Sector Accountability Act, 2010*, S.O. 2010, c. 25 and the spectre of indeterminate liability, would negate any such duty.

C. Zurich Did Not Rely on any Representations as to the Fairness of the Procurement Process

78. Even if there was a misrepresentation made by SMH to Zurich relating to the fairness of the procurement process for the Project on which Zurich was entitled to rely, any representation as to fairness was not material to Zurich’s decision to issue the Bonds, and Zurich did not rely on it. This is evident because:

- (a) Any losses sustained by Zurich arising from its obligations under the Bonds were the subject of a pre-existing indemnity. Bondfield and Zurich entered into an Agreement of Indemnity on February 8, 2006, requiring Bondfield to indemnify Zurich from and against any and all liability for losses and/or expenses whatsoever kind in nature which Zurich may sustain and incur by reason of executing the Bonds;
- (b) Zurich provided a surety’s consent as part of Project Co’s bid proposal, by which it undertook to issue the Bonds for the Project, prior to the procurement process being completed;

- (c) Zurich never sought any representations from SMH as to the fairness or propriety of the procurement process at any time prior to, or after, issuing the Bonds, despite having the means and opportunity to make those inquiries;
- (d) Zurich never conducted any due diligence in respect of the Project, either prior to or after issuing the Bonds;
- (e) With knowledge of a public investigation and extensive media coverage impugning the fairness of the procurement process, Zurich made no enquiries of SMH as to the fairness of that process, did not itself conduct investigations, nor did Zurich take any steps to rescind or otherwise end its obligations under the Bonds;
- (f) Zurich instead continued to bond Bondfield projects; and
- (g) Zurich did not and could not reasonably rely on any alleged misrepresentations, including for the reasons articulated above.

D. SMH Did Not Owe Zurich a Duty or Obligation to Disclose Unfairness in the Procurement Process

79. Even if SMH had known of any unfairness during the procurement process, it had no positive duty or obligation to Zurich in common law, contract, or otherwise to disclose any such knowledge to Zurich.

80. Zurich, a stranger to the procurement process, is not entitled to assert liability for breaches of obligations relating to the procurement process when it was owed no such duties or obligations by SMH.

E. Zurich's Failure to Act on Known Unfairness in the Procurement Process in 2015/16 Precludes it From the Relief it is Now Seeking

81. By 2015/2016, Zurich knew of reported unfairness in the procurement process, which is the basis on which it asserts its claim. It did not act on that knowledge to rescind or otherwise cancel, or even raise any concerns about, the Bonds.

82. Instead, for years while it knew the Obligees and others were relying on the Bonds, it continued to perform under the Bonds. Having chosen this path, Zurich is not entitled now to rescind or void the Bonds.

83. As a result of Zurich's undue delay in asserting its right to rescind the Bonds, the Obligees cannot be restored to their original position. No alternate Bonds are now available. Further, innocent third parties, including those against whom no allegations of wrongdoing have been made, such as BMO and the Bondfield subcontractors, have since 2015/2016 acquired rights under the Bonds. Rescission of the Bonds or otherwise allowing Zurich to avoid its obligations under the Bonds would undermine these third parties' rights.

84. In the alternative, Zurich is precluded from avoiding its obligations under the Bonds owed to BMO and the Bondfield subcontractors, as Zurich's obligations to those parties arise from independent legal rights distinct from Project Co and SMH's rights under the Bonds, and cannot be invalidated by any other parties' conduct.

2. Equitable and Statutory Defences to Rescission

85. Zurich is barred by equity and statute from obtaining rescission or other legal remedy to avoid its obligations under the Bonds.

86. Zurich raised no concerns about the Bonds when it learned from public reports in 2015-2016 that the fairness of the procurement process had been undermined. It made no inquiries to SMH on this issue, despite having the means and opportunity to do so, nor conducted any due diligence. Instead, it continued for years to perform under the Bonds. Zurich did not notify SMH of an intention, when it had a duty to do so, nor did it take any

steps that would otherwise have been required of it, to avoid its obligations under the bond. In so conducting itself, Zurich unequivocally elected to perform under the Bonds. Further, Zurich represented or promised that it would continue to perform under the Bonds. These assurances were intended to affect the legal relationship and intended for SMH to act on, which it did by continuing to have the Project constructed relying on the validity of the Bonds.

87. SMH relied to its detriment on Zurich's course of conduct in 2015/2016 and its conduct of continuing to perform from 2015-2019. SMH has been prejudiced by relying on Zurich's conduct. But for Zurich's representation or promise, SMH would have required Project Co to obtain replacement bonds in 2015-2016 prior to Bondfield and Project Co's defaults. SMH is no longer able to obtain alternate bonds for the Project. Zurich is accordingly estopped from rescinding the Bonds.

88. Zurich knew that the Obligees and other third-party beneficiaries were relying and would continue to rely on the Bonds and gave them no notice of the concerns it now seeks to raise as a means of avoiding its obligations under the Bonds. Zurich intentionally waived any right it had to seek to rescind or otherwise avoid its obligations under the Bonds.

89. Zurich has purported to rescind the Bonds *ab initio* without returning any premiums, again affirming the Bonds' continuing validity.

90. Zurich's acquiescence in not acting on its knowledge of unfairness of the procurement process in 2015-2016, resulted in the prejudice to SMH as set out above. It would be unfair and unjust to allow Zurich to avoid its obligations under the Bonds in these circumstances.

91. Zurich is estopped from, and the doctrines of election, acquiescence, and laches preclude it from, seeking the rescission of the Bonds, voiding the Bonds *ab initio*, invalidating the Bonds or the call on the Bonds, and invalidating its obligations under the Bonds. Further, Zurich waived any right to seek rescission or otherwise avoid its obligations under the Bonds in 2015-2016.

92. Zurich's claim is statute-barred pursuant to the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B. Zurich knew or ought to have known of the material facts underlying its cause of action to avoid its obligations under the Bonds more than two years prior to the issuance of the Statement of Claim.

93. Zurich's allegations that it learned something new in March 2020 are not tenable. At most it obtained evidence of the material facts that underlie its allegations, about which it was or ought to have been aware more than two years before it commenced its claim.

3. *The Call on the Performance Bond was Valid*

94. Zurich's claim also seeks a declaration that the call on the Performance Bond by Project Co on December 21, 2018 is invalid and of no force and effect. There is no genuine issue requiring a trial to conclude this claim cannot succeed including because:

- (a) The alleged unfairness of the procurement process cannot invalidate the call on the Performance Bond for the same reasons set out above as to why it cannot relieve Zurich of its obligations under the Bonds;
- (b) All bases on which Zurich proposes to challenge the call on the Bond were known to Zurich at the time the December 20, 2019 Order was made;
- (c) Zurich's claim is a collateral attack on the December 20, 2019 Order that was unopposed by Zurich, represented in Court by counsel, and which declared the call on the Performance Bond and Zurich's election under Option 2.4 to be valid. Zurich has not appealed the Order. Zurich is precluded seeking this relief as it is *res judicata* by operation of the doctrine of issue estoppel;
- (d) Zurich has no right to assert alleged delay in declaring a default as a defence to its obligations under the Bonds. Section 3 of the Performance Bond provides that Zurich shall not be discharged or released from liability under the Bond as a result of the extension of time granted by the Obligees,

or by an Obligee's forbearance from exercising any right or power under the Construction Contract;

- (e) There was no delay in the call on the Performance Bond, which is within the discretion of the Obligees.

95. In the alternative, if the call on the Performance Bond by Project Co via the Receiver on December 21, 2018 is invalid or ineffective, this Court should permit SMH and/or BMO to make a call under the Performance Bond, such that the call will be deemed to have been made on December 21, 2018, *nunc pro tunc*, or find that BMO's November 16, 2018 call on the Performance Bond was and remains a valid call on the Performance Bond.

Zurich is Liable To Pay the Undisputed Performance Bond Amount

96. There is no genuine issue requiring a trial in respect of SMH's Counterclaim seeking payment from Zurich of the undisputed amounts owing under the Performance Bond.

97. If Zurich is not relieved of its obligations under the Bonds, it must pay the full amount of the Performance Bond less amounts determined to have been properly paid pursuant to its obligations under the Performance Bond. SMH requests that this amount be paid by Zurich to the Receiver for the purposes of construction, not to be disbursed until further agreement of the Obligees or Order of this Court.

98. The calculation of the *undisputed* amount owing under the Performance Bond is based on the remaining balance of the Performance Bond after deducting all amounts that Zurich asserts are proper payments that it made under the Performance Bond, whether they are in fact proper or not. As this calculation takes Zurich's case at its highest, no trial is required to fix the undisputed amount and order its payment, forthwith.

99. Both the quantum of certain payments purported to have been made by Zurich under the Performance Bond and the allocation of certain payments made by Zurich to the

Performance Bond (as opposed to the L&M Bond or not allocable to either Bond) are disputed by SMH.

100. The adjudication of whether these disputed amounts were proper payments that were made by Zurich under the Performance Bond can be determined on a Reference.

101. Of the disputed amount, the Referee will determine what payments, if any, were improperly paid by Zurich, improperly allocated to the Performance Bond by Zurich, or cannot be credited to Zurich's benefit against either of the Bonds. Any such amounts will form the balance owing by Zurich under the Performance Bond, and are similarly requested to be paid to, and held by, the Receiver for the purposes of construction until further agreement of the Obligees or Order of this Court.

Statutory and Other Grounds

102. SMH will rely on:

- (a) Rule 20, 30, 37, 39, 40, 54 and 57 of the *Rules of Civil Procedure*;
- (b) Section 101 and 137 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43;
- (c) Section 22 and 23 of the *Broader Public Sector Accountability Act, 2010*, S.O. 2010, C. 25; and
- (d) such further and other grounds as counsel may advise and this Court may permit.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- 1. the Affidavit of Michael Keen, to be sworn;
- 2. the Affidavit of Susan Neil (Hanscomb), to be sworn;
- 3. the Affidavit of Augusto Patmore (KPMG), to be sworn;
- 4. confidential evidence regarding estimates of the costs to complete the Project;

5. the Application Record, Supplemental Application Record, and other materials filed as part of the CCAA application in the matter of Bondfield, et al, proceeding under Court File No. CV-19-615560-00CL; and

6. such further and other evidence as counsel may advise and this Court may permit.

May 22, 2020

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TO: THE SERVICE LIST

SCHEDULE “A”

For the limited purpose of this motion for summary judgment commenced by SMH to dismiss Zurich’s claim against SMH and grant SMH summary judgment on its counterclaim, SMH will not contest the following facts:

1. The procurement process for the Project was unfair because of the alleged conduct as pleaded in the Statement of Claim;
2. Knowledge of the unfairness of the procurement process was attributable to SMH, such that SMH knew or ought to have known of the unfairness of the procurement process; and
3. SMH did not disclose the unfairness of the procurement process to Zurich.

Notwithstanding these allegations, Zurich is not entitled to rescind or otherwise escape its obligations under the Bonds or to invalidate the call made on the Performance Bond, for the reasons articulated in this Notice of Motion.

ZURICH INSURANCE COMPANY LTD.
Plaintiff

and

2442931 Ontario Inc., et al.
Defendants

Court File No.
CV-20-639601-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

Proceeding commenced at Toronto

NOTICE OF MOTION

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