

CITATION: Wall Savers Ltd. v. Quovadis Apartments Inc., 2026 ONSC 3176
COURT FILE NO.: CV-21-668066
DATE: May 29, 2026

ONTARIO
SUPERIOR COURT OF JUSTICE
IN THE MATTER OF the *Construction Act*, R.S.O. 1990, c.C.30

B E T W E E N :

WALL SAVERS LTD.

Plaintiff

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)
) Arnold H. Zweig for the plaintiff,
) Tel.: 416-593-9189,
) Email: arnold@azweiglawn.com;

-and-

QUOVADIS APARTMENTS INC.

Defendants

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)
) Stephen M. Werbowyj for the defendant;
) Tel.: 416-233-9461,
) Email: Stephen@Werbowyj.com;

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) **DECISION:** April 24, 2026

Associate Justice Wiebe

COSTS AND INTEREST DECISION

[1] On April 24, 2026 I issued my Reasons for Decision on the trial in this matter. I found that Wall Savers Ltd. (“WSL”), having claimed a lien and breach of contract damages in the amount of \$253,615.37 (HST incl.), is entitled to breach of contract damages in the net amount of \$44,999.19 (HST incl.), of which \$42,735.75 is WSL’s lien. Concerning the set-off and counterclaim of the defendant, Quovadis Apartments Inc. (“Quovadis”), in the amount of \$188,992.68, I found Quovadis entitled to a set-off of \$24,084.80 (HST incl.) thereby producing the above noted net entitlement in favour of WS.

[2] As directed, the parties filed costs outlines prior to the closing argument. The WSL costs outline shows partial indemnity costs of \$76,527.17 and substantial indemnity costs of \$100,652.17. The Quovadis costs outline shows partial indemnity costs of \$205,313.82 and substantial indemnity

costs of \$245,607.36. In my Reasons for Decision, I directed that the parties to serve and file written submissions on costs in light of the result. They have done so.

[3] I summarize the parties positions. In its written submission WSL argues that it should be awarded partial indemnity costs in the amount of \$61,434.40. WS derives this amount as follows: the full disbursement for Mr. Gallati (\$16,156.08) + 75% of the remainder of WSL's partial indemnity costs claim (\$45,278.32). It argues that this amount is justified due to the following: Mr. Gallati was the only credible witness on whom the court relied a considerable amount; WSL succeeded in defeating the Quovadis set-off and counterclaim thereby entitling it to half of the remainder of its partial indemnity costs claim reflecting the fact that half the trial was spent on the Quovadis claims; and that WSL should be awarded half of the remainder of its partial indemnity costs claim reflecting the level of its success on its own claims. Quovadis appears to argue that it should be awarded substantial indemnity presumably being the \$245,607.36 it claimed for substantial indemnity costs in its costs outline on account of WSL's misconduct.

Result

[4] The result is the single most important factor on the issue of costs in this case and has some complexity as there were several issues and a divided result. Where there are several issues and a divided result, the question is which party was "substantially successful." Substantial success is not determined by the numeral net outcome of the ruling, but rather by the success of the parties on the issues that drove the action; see *539618 Ontario Ltd. v. Stathopoulos*, 1992 CanLII 7617 (ONCA) at paragraph 64.

[5] The delay related issues drove this action. As I stated in my Reasons, these issues probably provoked and fueled this case. On these issues neither side succeeded. Concerning the other issues, WSL was successful on 35% of its claims, a percentage that includes the unpaid invoice# 2112 and the interest on the holdback and accounts for the successful Quovadis back-charges. In these circumstances, I find that WSL was the marginally successful party; but there must be a significant reduction in its costs entitlement due to the divided result. I find that about 20% of WSL's partial indemnity claim would be a reasonable assessment given the result.

Offers to settle

[6] There were offers to settle. On May 4, 2023 Quovadis offered to settle the action and counterclaim on the basis of a payment by Quovadis to WSL of the WSL slab replacement extra only in the amount of \$20,596.22. This offer was open for acceptance for five days. It was obviously not accepted. At this time, there were numerous deficiency issues raised by Quovadis that were later resolved by the WSL bonding company, Northbridge, and WSL's repair work. In November, 2021 and December, 2022 Mr. Kim valued the cost to correct these deficiencies at well in excess of \$100,000. In my view, this was a reasonable offer. True, it was \$24,402.97 less than the judgment in favour of WSL at trial. But the offer would have spared WSL the bother and apparently substantial cost of involving Northbridge and its expert and doing the deficiency repairs. I will consider this offer in making my costs award.

[7] There were other offers. On August 26, 2025 Quovadis offered to settle the action and counterclaim with a payment by WSL to Quovadis of \$97,000 plus substantial indemnity costs, which offer was open for acceptance until trial. On September 3, 2025 WSL offered to settle the

action and counterclaim with a payment by Quovadis to WSL of \$140,000 plus interest and costs as assessed. In my view, neither of these offers are relevant to the issue of costs other than to show that on the eve of trial, the parties had not properly assessed their evidence and positions and had unreasonable expectations.

Galati costs

[8] WSL wants compensation for the costs it incurred for Frank Galati, \$16,155 (HST incl.). Mr. Galati was WSL's expert witness. Indeed, he was the only opinion expert at the trial. I indeed found him to be the most credible and helpful of the witnesses. I found him to be particularly helpful in assessing the remainder of the Quovadis set-off and counterclaim. WSL deserves this claim as it went to the cost and bother of retaining the only expert witness, and one that assisted the court. I am not prepared, however, to order payment of the full disbursement for Mr. Galati. It is clear that a large part of Mr. Galati's work concerned the deficiency items that were resolved in the bond action. As a result, I will award WSL about half of the Galati costs, namely \$8,000 (HST incl.).

Conduct

[9] Quovadis argues that it should receive substantial indemnity costs because of Mr. Mackowiak's misconduct. Mr. Werbowyj referred me to *Construction Act*, R.S.O. 1990, s. 86(1), which specifies that where a party knowingly participates in the preservation and perfection of a lien that is without foundation, is frivolous, vexatious or an abuse of process, or is for a wilfully exaggerated amount, an order for substantial indemnity costs may be made against that party.

[10] This argument can indeed be applied to the claim made by WSL for \$24,456.25 plus HST in alleged excessive BBL inspections. Mr. Mackowiak openly admitted that he made this claim as a "*quid pro quo*" due to the Quovadis back-charge for these BBL inspections. He made no effort to ground this claim in the Contract or provide proof of the alleged damages. Yet, Mr. Mackowiak had WSL purport to preserve and perfect a lien for this amount. The same cannot be said, however, of the other unsuccessful WSL claims. There is no doubt in my mind that WSL performed the alleged extra waterproofing work, did the mobilization and demobilization it alleged, and lost productivity due to the pandemic. These claims were not exaggerated. They failed because of a lack of proof and notice.

[11] I also note, on the other hand, that Quovadis' conduct received criticism from me as well: the delay in the payment of the holdback; the non-payment of invoice# 2112; the assertion of the back-charge for the BBL inspections when Quovadis had given no notice of such a claim; the failure to produce the BBL invoices despite numerous requests from WSL for same. In my view, Quovadis' decision to assert a back-charge for the engineering expenses when it gave no notice of such a claim provoked this entire dispute. This all weighs on my assessment of this argument and costs.

[12] I have, therefore, decided to reduce WSL's entitlement to costs on account of Mr. Mackowiak's objectionable conduct concerning the BBL inspections. But I will not award Quovadis substantial indemnity costs.

Conclusion

[13] In conclusion, for the reasons stated, I award WSL the costs for Mr. Galati (\$8,000) plus 20% of its non-Galati partial indemnity costs (20% x \$60,379) divided in half due to Mr.

Machowiak's conduct in wilfully exaggerating the WSL claim for lien and in rejecting the Quovadis May 4, 2023 offer to settle. This produces the following total: $\$8,000 + [(20\% \times \$60,379)/2] = \$14,037.90$. I round the number up to **\$15,000**. This is what I award WSL in costs.

[14] I find that this award is fair and reasonable in the circumstances of this case and within the reasonable expectation of Quovadis in the event of a defeat, given my ruling and the result. I note that this number corresponds roughly with the partial indemnity costs WSL incurred prior to the reasonable May 4, 2023 Quovadis offer.

Prejudgment interest

[15] WSL invoice#2112 dated May 21, 2021 was delivered on that day and stated that it was due to be paid in 30 days from the date of the invoice, namely by June 20, 2021. WSL invoice# 2118 dated June 30, 2021 (the invoice that contained the charges for the slab replacements) was delivered on that day and stated that it was due to be paid in 30 days, namely by July 30, 2021.

[16] Both invoices stated that interest was due on overdue accounts at the rate of 2% per month or 24% per annum. This is also the rate claimed in the Statement of Claim. I note as well that WSL claimed in the alternative the rate specified by the *Courts of Justice Act*, R.S.O. c.C.43 ("*CJA*") section 128. However, the Contract article 5.3 specifies that interest at the rate of 2% per annum above the Bank of Canada prime rate should be charged on overdue accounts for the first 60 days and 4% per annum above the Bank of Canada prime rate thereafter. There is a clear discordance, therefore, between the non-*CJA* interest claimed by WSL and what the Contract specified. There was also no evidence as to the Bank of Canada prime rate at any of the relevant times.

[17] In the circumstances, I have decided to exercise my discretion under *CJA* section 130 and award WSL prejudgment interest on the judgment amount of \$44,999.19 at the rate of **3% per annum running from June 20, 2021**. Concerning the rate, this is the prejudgment interest rate WSL claimed for the overdue holdback and is the rate that was specified by the *CJA* section 128 adjusted to account for intervening fluctuations in the rate. I see no reason to apply a different rate to the judgment amount. Also, this rate is much lower than the Contract rate and, therefore, reflects my disapproval of Mr. Mackowiak's conduct as noted above. Concerning the commencement date for the running of the prejudgment interest, it should be June 20, 2021 as that is the date the WSL invoice# 2112 was due to be paid. This is the invoice that in most part survived the Quovadis back-charges. That is what I find.

[18] I attach a draft report for the review and comment of the parties. As can be seen, I intend to sign and distribute the report on

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ASSOCIATE JUSTICE C. WIEBE

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