# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Faria Mechanical Ltd. v. Bosa Development Corporation,* 2024 BCSC 1946

Date: 20241023
Docket: S248215
Registry: New Westminster

Between:

**Faria Mechanical Ltd.**

Plaintiff

And

**Bosa Development Corporation and Granco Holdings Ltd.**

Defendants

And

**Enersolv Design and Build Ltd. aka Enersolv Design & Build Ltd.**

Defendant by Counterclaim

Before: The Honourable Mr. Justice Gibb-Carsley

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Plaintiff: | C. Coakley |
| Counsel for the Defendant, Bosa Development Corporation: | G. Bowman |
| Counsel for the Defendant by Counterclaim: | A. Way |
| Place and Date of Hearing: | New Westminster, B.C.<br>July 31, 2024 |
| Place and Date of Judgment: | New Westminster, B.C.<br>October 23, 2024 |

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## I. INTRODUCTION

[1] This summary trial application is brought by the plaintiff, Faria Mechanical Ltd. ("Faria"), against the defendants, Bosa Development Corporation ("Bosa"), and Granco Holdings Ltd. ("Granco"). Enersolv Design and Build Ltd. ("Enersolv") is the defendant by counterclaim.

[2] The underlying action relates to a contractual dispute for work performed by Faria during the construction of a 31-story commercial office tower located at 320 Granville Street, Vancouver, British Columbia (the "Project"). Bosa is the general contractor for the Project. Granco owns the land on which the Project is located. Bosa retained Faria as the mechanical contractor for the Project and Enersolv to provide the mechanical engineering services for the Project.

[3] In its application for summary trial now before the Court, Faria seeks payment from Bosa of the remaining amount it says it is owed for work it performed on the Project in the amount of $519,517.15, plus interest. This amount is being held back by Bosa from the full amount the parties agreed Bosa would pay Faria under their contract (the "Holdback Amount"). Faria asserts that its claim for the Holdback Amount is suitable for summary trial because it is a discrete issue and only requires the Court to consider whether Faria completed the required work on the Project such that it is entitled to payment.

[4] In its defence to Faria's claim, Bosa asserts that it suffered damages as a result of two separate flooding events that Bosa alleges were caused by Faria's breach of contract or negligence (the "Flooding Incidents"). Bosa argues that it is entitled to set off these losses against the Holdback Amount. Bosa has also filed a counterclaim against Enersolv for its alleged negligence that caused or contributed to the Flooding Incidents.

[5] Bosa, supported in this application by both Granco and Enersolv, oppose Faria's application for summary trial. Bosa contends that this matter is unsuitable for summary trial and so ought to be dismissed because the issue of whether the Holdback Amount should be paid to Faria is directly related to Bosa's set-off defence

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and counterclaim. Put simply, Bosa asserts that the issues related to the Holdback Amount and the alleged contractual breaches or negligence should be heard together at the trial, which is currently scheduled for ten days to commence on October 20, 2025.

[6] For the reasons that follow, I dismiss Faria's application as I find its claim unsuitable for disposition by summary trial. Faria's claim for the Holdback Amount is sufficiently related to Bosa's set-off defence and counterclaim in that both specifically require an analysis of the parties' obligations and performance on the Project. It follows that having the matters heard together avoids litigating in slices, is efficient, avoids inconsistent findings of fact and is in the interests of justice. Further and importantly, I find I do not have sufficient facts before me to determine Faria's claim as critical facts regarding Faria's contractual obligations are contested and need to be resolved at a trial where the evidence can be properly tested.

[7] Finally, I find that other than not having access to the funds it says Bosa owes Faria from the Holdback Amount until the matters are resolved, there is no prejudice to Faria in waiting to have the issues resolved together because the Holdback Amount is currently secured. However, there is potential prejudice to Bosa if Faria were successful in this summary trial claim obtaining the Holdback Amount only to later be found to be liable to Bosa at trial for an amount equal to or greater than the amount in Bosa's set-off defence because those amounts are unsecured.

[8] In these reasons for judgment, I will provide a brief discussion of the background of the parties' contract and the work on the Project for context. I will then set out my analysis and disposition including the legal principles I must consider in determining whether this matter is suitable for summary trial.

## II. BACKGROUND

### A. The Contract

[9] On July 26, 2019, Bosa and Faria entered into a contract in which they agreed that Faria would provide mechanical services, material, and labour for work

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on the Project in exchange for payment of the stipulated price of $13,995,730, plus GST (the "Contract"). Over the course of completing the Project, Bosa and Faria agreed to written change orders that increased the contract price to $14,284,829.66, plus GST. Bosa retained a holdback of $1,499,885.10, inclusive of GST. However, subsequent to the initial holdback, Bosa has made additional payments to Faria and completed warranty work on the Project that Faria agrees should be deducted such that the current amount of the holdback is $519,517.15.

[10] Bosa drafted the Contract. Faria agreed to the terms of the Contract, but notably amended some of the terms initially proposed by Bosa. Specifically, Faria amended one term of the Contract to remove Faria's obligation to retain a third party to scope the Project's pipes to ensure the Project's piping remained free of construction debris. The importance of this amendment, according to Faria, is that Faria made the amendment because it was unwilling to guarantee that the piping in the Project remained free of construction debris. Faria says this is the case because on large projects, such as this Project, there are many trades working on the premises over whom Faria has no control. As discussed below, the relevance of the amendment is that Faria says that there is no merit to Bosa's allegations that Faria caused the Flooding Incidents because Faria was not contractually obligated to clear the pipes of debris deposited by third parties.

[11] As referenced above, the damages allegedly suffered by Bosa from the Flooding Incidents are the basis of Bosa's set-off defence and counterclaim. I will now turn to the Flooding Incidents.

## B. Construction and Flooding Issues

### *i. Cooling Tower Flood*

[12] On November 8, 2022, the cooling towers at the Project premises flooded the 29th and 30th floor of the building (the "Cooling Tower Flood"). Bosa alleges that the sudden discharge of liquid from the cooling towers located in the mechanical room of the 30th floor of the building caused the Cooling Tower Flood. In its set-off claim and counterclaim Bosa alleges that Faria's contractual breaches or negligence caused

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the Cooling Tower Flood arising from either the clogging of drains installed by Faria or by Faria's failure to install two funnel drains in the mechanical room housing the cooling tower. Bosa alleges that damage from the Cooling Tower Flood exceeded $450,000, but acknowledges that it received partial indemnity from its insurers. However, Bosa asserts that it still suffered damages of $250,000 for its insurance deductible it was required to pay that resulted directly from the Cooling Tower Flood.

[13] Faria denies liability for the Cooling Tower Flood and says that Bosa has failed to adduce the evidence necessary to establish that an act or omission of Faria caused the Cooling Tower Flood. Faria argues it completed its work on levels 29 and 30 of the building in accordance with the mechanical drawings issued for construction by Enersolv. Faria says the plumbing drawings for level 30 only reference the installation of a single roof drain and Faria installed this roof drain in accordance with the drawings provided to it. Faria argues that Enersolv and the City of Vancouver inspected and signed off on the work before the Cooling Tower Flood, thus demonstrating Faria was not negligent in its installation of the drains. I will return to this issue in my analysis below.

### *ii. Bathroom Flood*

[14] Bosa alleges that in or around January 2023, toilets on the 29th and 30th floor started to back up and flood the bathrooms (the "Bathroom Floods"). Bosa asserts that it suffered damages in excess of $165,000 in connection with the Bathroom Floods.

[15] Faria asserts that after the Bathroom Flood, Bosa asked Faria to investigate the cause of the flooding. Faria scoped the pipes and asserts that the cause was paper towel in the pipes. Faria also discovered that there was a drain that was plugged by concrete slurry in the loading bay. In an email dated January 5, 2023, from Faria to Bosa, Faria states that, "We will deal with it this time but wont be coming back multiple times to clean out drains as people keep blocking them."

[16] I note that when Bosa's alleged damages of the $250,000 deductible for the Cooling Tower Flood is added to the $165,000 of alleged damages related to the

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Bathroom Flood, Bosa's set-off defence and counterclaim related to the Flooding Incidents is in the range of the Holdback Amount sought by Faria in the summary trial.

### C. Procedural History

[17] On February 10, 2023, Faria filed its claim of lien against the land upon which the Project is located in the amount of $1,521,959.75. On September 11, 2023, Bosa made a partial payment to Faria in the amount of $945,773.10.

[18] Faria filed this summary trial application on August 25, 2023, with an original hearing date of September 26, 2023. The hearing did not commence. On September 27, 2023, the lien bond was reduced to $576,186.65 to reflect the partial payment of the amount held back by Bosa.

[19] On November 17, 2023, Bosa brought an application and obtained an Order from Associate Judge Bilawich to add Enersolv as a party to its counterclaim in this action. On November 28, 2023, Faria served Enersolv with this summary trial application.

[20] Due to a lack of Court resources the summary trial was not heard on the second scheduled hearing date of December 6, 2023, nor the subsequent rescheduled hearing date of May 7, 2024.

[21] On February 28, 2024, Bosa issued an invoice to Faria in the amount of $14,872.22 for warranty work that Faria performed on the project in late December to January 2024. Faria admits the warranty invoice should be deducted from the amount owing under the Contract. On July 9, 2024, Bosa made an additional partial payment to Faria in the amount of $36,854.13. Faria's position is that after deducting the warranty repair and partial payments, the unpaid contract amount is $519,517.15. As already referenced above, this is the Holdback Amount that is the subject of this summary trial application brought by Faria.

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## III. ANALYSIS

### A. Legal Principles

[22] Rule 9-7(15) of the *Supreme Court Civil Rules* establishes the scope of a summary trial application and provides that the court may grant judgment unless it is unable on the whole of the evidence before it to find the facts necessary to decide the issues of fact or law, or if the court is of the opinion that it would be unjust to decide the issues on the application.

[23] I would summarize what the Court is to consider in determining whether it would be unjust to proceed summarily as provided by our Court of Appeal in *Gichuru v. Pallai*, 2013 BCCA 60 at paras. 30 and 31, with reference to *Inspiration Management Ltd.* v. *McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 265 (C.A.), as including the following factors:

1. the amount involved;
2. the complexity of the matters;
3. urgency;
4. any prejudice to arise by reason of delay;
5. the costs of taking the case forward to a conventional trial in relation to the amount involved;
6. the course of the proceedings;
7. costs of the litigation and the time of the summary trial;
8. whether credibility is a critical factor in the determination of the dispute;
9. whether the summary trial may create unnecessary complexity in the resolution of the dispute; and
10. whether the application would result in litigating in slices.

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[24] I accept that at a summary trial application the parties must "put their best foot forward" and marshal all available evidence to support the claims and defences being proffered" so that a party does not frustrate the availability of the summary trial process: *Elworthy Electrical Services Ltd. v. Lucava Farms Inc.*, 2022 BCSC 1787 at para. 29, referring to *Gichuru*.

[25] In respect of the principles applicable to Bosa's claim for equitable set-off, and more particular whether Faria's claim should be heard separately and summarily from Bosa's set-off defence, in *Cactus Restaurants Ltd. v. Morison* 2010 BCCA 458, our Court of Appeal confirmed that an equitable set-off, as distinct from a procedural set-off, is a substantive right held by a debtor that constitutes a charge against a chose in action for his debt. If there is an entitlement to an equitable set-off, the creditor, as a matter of equity, is not entitled to treat the debtor as being indebted to him to the extent of the debtor's own claims against him: *Cactus* at para. 11.

[26] It is with these legal principles that I turn to Faria's application for summary trial.

### B. Parties' Positions

[27] Faria contends that its application is suitable for determination by summary trial because there is no conflicting affidavit evidence regarding the amounts outstanding to Faria under the Contract and its builder's lien claim. In other words, Faria asserts that the Holdback Amount is a discrete issue and the Court has the necessary facts before it to determine whether Bosa should pay the Holdback Amount to Faria. Faria argues that determining if Bosa owes Faria the amount remaining on the Contract raises no triable issues and it would not be unjust for this Court to make the award.

[28] Faria also contends that resolving the issue of the Holdback Amount summarily will not lead to litigation in slices or the potential for differing findings of fact. Rather, it will simplify the trial by resolving the Holdback Amount claim summarily.

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[29] Bosa contends that its set-off defence is so closely related to the Contractual issues that gave rise to the Holdback Amount that both Faria's claim and Bosa's set-off defence and counterclaim must be heard together at trial. In this regard, Bosa asserts that the Court must make findings of fact in respect of the scope of the work contemplated under the Contract that Faria was to perform on the Project, as well as an assessment of whether Faria breached its contractual obligations or was negligent. More specifically, Bosa asserts that the Court must decide if Faria's actions caused or contributed to the Flooding Incidents and if so, whether those actions amount to a breach of contract or negligence. Bosa submits that these are triable issues and not suitable for resolution by summary trial. Further, Bosa argues that because the set-off defence and counterclaim will need to be tried in any event, there is no efficiency in having Faria's claim heard by way of summary trial.

[30] Bosa also argues that determining Faria's claim by summary trial amounts to litigating in slices because even if the Holdback Amount issue is decided, the counterclaim and set off defence will need to be decided at the trial in October 2025. Bosa contends that deciding Faria's claim summarily will not create efficiency nor simplify matters, but instead add expense and complexity and lead to potentially inconsistent outcomes.

## C. Determination

### *i. Should the Claim and Set-off Defence/Counterclaim be Heard Together?*

[31] In order to grant summary judgment, Rule 9-7(15) of the *Rules* requires that I must be able to find the facts necessary to decide the issues of law or fact and that it would not be unjust to decide the matter summarily. Both of these considerations weigh against me finding that this matter is suitable for summary trial.

[32] As a starting point, and what is a fundamental underpinning for my decision, is that I am persuaded that Faria's claim for the Holdback Amount and Bosa's set-off defence and counterclaim should be heard together. Faria's claim and Bosa's defence and counterclaim are sufficiently connected in how they relate to the

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interpretation of the terms of the Contract and how the parties' performed their obligations under the Contract. Due to their connection, to hear the matters separately is not in the interests of justice.

[33] My conclusion finds support in the decision of our Court of Appeal in *Cactus.* At para. 11 of *Cactus,* the Court described why an equitable set-off can prevent a party from receiving judgment:

> …An equitable set-off, as distinct from a procedural set-off, is a substantive right held by a debtor that constitutes a charge against a chose in action for his debt. (See the discussion in *Aboussafy v. Abacus Cities Ltd.*, 1981 ABCA 136 (CanLII), [1981] 4 W.W.R. 660 at 669-71 (Alta. C.A.).) In his text, *Set-Off*, 2d ed. (Oxford: Clarendon Press, 1996), S.R. Derham discusses equitable set-off proceeding from the following distinction at 56-58:
>
> > 1.7.4 The substantive nature of equitable set-off
> >
> > We saw earlier that the right of set-off derived from the Statutes of Set-off takes effect only as a procedural defence. By this it is meant that separate and distinct debts remain in existence until judgment for a set-off, and, moreover, the defence has no effect until judgment. Prior to judgment the rights consequent upon being a creditor still attach, as do the obligations and liabilities consequent upon being a debtor. A similar analysis should apply when equity acts by analogy with the Statutes. However, a characteristic of the form of equitable set-off under discussion which has emerged in recent years is that it operates as a true, or substantive, defence. It may be invoked independently of any order of the court or of arbitrators. It may be set up by a person indebted to another, not merely as a means of preventing that other person from obtaining judgment, but also as an immediate answer to his liability to pay the debt otherwise due. ...
> >
> > Notwithstanding some judicial statements suggesting the contrary, the view that the defence is substantive does not mean that it operates as an automatic extinction of the cross-demands. A proper statement of the principle is that, if there is an entitlement to an equitable set-off, the creditor *as a matter of equity* is not entitled to treat the debtor as being indebted to him to the extent of the debtor's own claims against him. The cross-demands as a matter of law remain in existence between the parties until extinguished by judgment or agreement, though, as far as equity is concerned, it is unconscionable for the creditor even before then to regard the debtor as being in default to the extent of the cross-demand if circumstances exist which support an equitable set-off. A court of equity will protect the debtor's position by way of injunction, and it may also be the subject of a declaration.
> >
> > [Emphasis added; footnotes omitted in original.]

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[34] I accept that Bosa's claim is properly characterized as an equitable set-off as Faria's claim and Bosa's set-off defence and counterclaim both arise out of the Contract, thus, there is a sufficient nexus between the claims necessitating that they be heard together. In the language of the Court in *Cactus* at para. 10, I find Bosa's defence and counterclaim so clearly connected with Faria's demand that it would be manifestly unjust to allow Faria to enforce payment of the Holdback Amount without taking into consideration Bosa's set-off defence and counterclaim. Put differently, Faria's claims for payment for the work it performed under the Contract and Bosa's allegation set out in its defence and counterclaim that Faria's work either breached the Contract or was negligent, are both rooted in the Contract. I find that to decide Faria's claim summarily and independently only to wait to address Bosa's counterclaim and set-off defence at trial, gains no judicial efficiency, amounts to litigating in slices and is not in the administration of justice.

[35] In coming to my conclusion, I have considered Faria's argument and reliance upon the decision of *M3 Steel (Kamloops) Ltd. v. RG Victoria (Construction) Ltd,* 2005 BCSC 1375 [*M3 Steel*]. In *M3 Steel*, the Court granted a summary trial application in which M3 Steel (Kamloops) Ltd. ("M3 Steel"), the subcontractor, sought payment of its unpaid holdback and final progress draw against RG Victoria (Construction) ("RG Construction"), the general contractor, despite RG Construction's set-off and counterclaim that alleged M3 Steel's deficiencies and delays had resulted in RG Construction suffering damages. RG Construction argued that the holdback claim should not be decided summarily as the potential value of its set-off and counterclaim would equal or exceed the amount owing to M3 Steel. The Court disagreed and granted summary judgment.

[36] I find that the facts in *M3 Steel* are distinguishable from the case at bar, and indeed provide an illustration as to when a matter will, or will not be suitable for disposition by summary trial in circumstances when there is a claim and set-off defence. The Court described that although damages were claimed by RG Construction, the damages were not quantified in any way in the evidence before the Court and there was "nothing to assist in the estimation of what might be proven by

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RG Construction if it perfected the claims it pleads by way of counterclaim and set-off": *M3 Steel* at para 30. Unlike the facts in *M3 Steel*, Bosa has provided sufficient grounds to establish a triable issue that goes directly to Faria's contractual entitlement to the Holdback Amount. In short, I am unpersuaded by Faria's reliance on *M3 Steel* other than it demonstrates that cases of this nature will be inherently discretionary and depend on the court's assessment of whether resolving an issue summarily would be unjust based on the particular circumstances of the matter.

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### *ii. Is the Matter suitable for summary trial?*

#### *Availability of Necessary Facts for Summary Trial*

[37] I have also considered whether I have the necessary facts before me to determine Faria's claim and Bosa's defence and counterclaim summarily. For the reasons addressed below, I conclude I do not.

[38] Resolution of both Faria's claim and Bosa's defence and counterclaim will require the Court to make findings of fact regarding the parties' obligations and expectations under the Contract as well as how those obligations were actually performed. In addition to raising a triable issue, this will require a trier of fact to make credibility assessments of the parties and assess their understanding of certain terms of the Contract and why certain actions were taken, or not taken. Two examples illustrate my concern that the Court will need to make findings of fact that are not available on this summary trial application.

[39] First, Bosa claims that Faria's actions were a cause of the Cooling Tower Flood in potentially two ways. First, Bosa alleges that Faria improperly installed the roof drains that were to drain the discharge from the cooling tower. More particularly, Bosa alleges that Faria did not install the proper number or type of drains required to ensure that the water from the cooling tower – water that is chemically treated – was carried to drains attached to the sanitary drainage lines as opposed to the rainwater drainage lines. Bosa put evidence before the Court on this application that it says demonstrates that Faria failed to install two "funnel drains" that were required for proper water discharge. Specifically, Bosa references engineering documents titled,

Mechanical Site Instructions, that purport to clarify earlier engineering schematics that the rainwater drain should be connected to the storm drain and that two funnel drains were missing and were required to be installed for the cooling tower water discharge and that those drains should be connected to the sanitary lines.

[40] In response to Bosa's allegations, Faria argues that it installed the proper drainage in accordance with engineering plans prepared by Enersolv. Notably, Faria points to the fact that the Mechanical Site Instructions are dated December 5, 2022, which is after the Cooling Tower Flood. Faria argues that the evidence is clear that it installed the cooling tower drains according to the plans provided to it and it was only after the Cooling Tower Flood that Bosa took steps to remedy the drainage issues by way of the Mechanical Site Instruction.

[41] The timing and interpretation of the Mechanical Site Instruction may ultimately prove decisive in the litigation. However, I note that Bosa asserts that the Mechanical Site Instruction is to provide "clarification" to the engineering plans. Further, Bosa put forward evidence that purports to show that one mechanical drawing in particular, M-406, indicates that a storm drain was to be included for rainwater and connected to the stormwater drainage pipe and two additional funnel drains for the cooling tower discharge were to be connected to the sanitary drainage line. Mechanical drawing M-406 is dated September 19, 2020, and thus before Faria completed the work and the Cooling Tower Flood.

[42] In addressing Bosa's reliance on drawing M-406 as demonstrating that Faria was obligated to install a funnel drain, Faria provides an affidavit of Victor Faria, the president of Faria, setting out its response:

> 13. Based on my review of the drawings and schematics for the Project, only hydronic schematic M-406 references a single funnel drain next to the cooling tower…Hydronic schematics are typically used to determine the flow of power between mechanical equipment; it is not used for the purpose of installing plumbing drains and M-406 is not clear whether the funnel drain it references is intended to be an addition to the roof drain or not.

[43] In my view, Bosa and Faria have put forward competing evidence that is in conflict as to the engineering drawings and their interpretation regarding the number

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and types of drains Faria was to install in respect of the cooling tower and rooftop drains. I find I am unable to resolve the factual dispute on the evidence before me in this summary trial application. I expect that resolution of the conflict may require expert evidence for the trier of fact to make a determination as to what was required of Faria, what steps Faria took or did not take, and whether those facts give rise to a breach of Faria's obligations under the Contract or amount to negligence and were a cause of the Cooling Tower Flood. In my opinion, these issues remain unresolved on the facts put before the Court on this summary trial application.

[44] The second manner in which Bosa claims that Faria was responsible for the Cooling Tower Flood was that an incident report commissioned after the Cooling Tower Flood alleges that debris, including plastic, foam and cardboard garbage, was found in the access to the drain piping. Bosa claims it was Faria's duty to ensure the pipes were clear of debris. As I will discuss in more detail below, in relation to the Bathroom Flood, Faria contends that it specifically opted out of the contractual obligation to clear drains of debris left by third parties. This dispute engages an interpretation of the Contract which I find raises a triable issue that cannot be resolved summarily.

[45] In respect of Bosa's claim that Faria was a cause of the Bathroom Flood, similar issues to those just discussed regarding the Cooling Tower Flood arise concerning the terms of the Contract. Faria contends it was not responsible for debris in the drains at the Project, which may have caused or contributed to the Flooding Incidents. Faria points to its amendments to the Contract in which it refuses to take on responsibility for debris in the drains related to other parties working on the Project. Specifically, in Appendix B to the Contract under the Trade Specific Inclusions, Faria deleted the following term: "1.69 – Retain third party to scope pipes as to ensure no debris remains in the pipes. Plumber will be fully responsible for all costs arising from floods and cost of insurance deductibles." Faria argues that deleting this term of the Contract clearly evinces that Faria is not liable for debris remaining in the pipes and so it could not be a cause of the Flooding Incidents. In

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other words, Faria argues that it cannot be liable for the flooding caused by debris in the pipes and, therefore, Bosa's set-off defence cannot succeed.

[46] However, s. 4.37 of Appendix B of the Contract under the plumbing scope of work provides that Faria will, "[r]etain third party to scope pipes as to ensure no debris remains in the pipes. Plumber will be fully responsible for all costs arising from floods and cost of insurance deductibles." This section of the Contract is not deleted by Faria and presumably may impose obligations under the Contract upon Faria exposing it to liability for losses suffered by Bosa as a result of the Flooding Incidents. In regard to the Bathroom Flood, I note that in the email dated January 5, 2023, referenced above, Faria references that it discovered that there was concrete slurry from "concrete finishers or whoever is cleaning their buckets" blocking the drain in the loading bay.

[47] A robust ventilation of the facts, including testing the parties' evidence on cross-examination, is required for a trier of fact to make an accurate, and therefore just, conclusion as to whether Faria satisfied its obligations under the Contract. I conclude the resolution of this factual dispute is not suitable for disposition in a summary matter.

[48] Put simply, the resolution of the cause and the parties' liability in respect of the Flooding Incidents demonstrates that on this summary trial application, the Court is left with two competing versions regarding the causes and liability for the flooding without the facts necessary to resolve the issues. To be clear, I am making no finding of fact as to whether or not Faria was responsible for the work Bosa alleges contributed to the Flooding Incidents, or even if that work caused or contributed to the Flooding Incidents. It may ultimately be that either third parties clogging the drains was not the cause of the Flooding Incidents or that Faria was not responsible to ensure those drains were clear. The purpose of raising these apparent conflicting provisions of the Contract and the need for resolution of the scope of Faria's work on the Project is because it raises a triable issue related to the interpretation of the Contract and the scope of work performed by Faria. Further, the parties' intention

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and understanding of Faria's amending the Contract is also an issue that requires inquiry through a trial process. These issues, in my opinion, cannot be resolved summarily as there are insufficient facts to make a just determination.

[49] In coming to my conclusion, I have considered whether another form of procedure such as cross-examination on affidavits could suffice to find the facts necessary to resolve the issue summarily. I conclude that there would be no efficiencies to be gained in such a process. Further, it would not allow a trier of fact to make findings of credibility and reliability in the same manner as a trial. Indeed, I expect that witnesses from Faria, Bosa and Enersolv will need to testify and be cross-examined as to why each took, or failed to take, certain steps regarding the cooling tower drains and the responsibility for clearing pipes of debris. This factor supports a finding that the matter is unsuitable for summary disposition. Further, the issue of whether and to what extent the Cooling Tower Flood was causally linked to any steps taken or not taken by Faria as interpreted through the lens of Faria's contractual obligations will need to be determined and will require facts that are not before me at this summary trial.

***Unjust to Proceed with Summary Trial***

[50] I have also considered the factors set out in *Gichuru* to determine whether it would be unjust to proceed summarily. To reiterate, a primary reason for my determination that the matter is unsuitable for summary trial is my conclusion that Faria's claim and Bosa's set-off defence are so closely related that there will be no benefit to proceeding summarily and it will amount to litigating in slices resulting in potentially inconsistent outcomes. I recognize that many of the *Gichuru* factors are engaged by virtue of the connection between Faria's claim and Bosa's set-off defence.

[51] In respect of the amount involved in the summary trial application, I note that when the $250,000 deductible for the Cooling Tower Flood is added to the $165,000 of claimed damage related to the Bathroom Flood, Bosa's set-off defence approximates the Holdback Amount claimed by Faria at summary trial. These

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amounts are roughly $500,000, which is not insignificant. This factor supports having the matter heard at trial on a full evidentiary record and that the costs of a trial are not out of proportion with the amounts in dispute.

[52] I also find there is no urgency to resolving the matter summarily. Faria's claim for the Holdback Amount is fully secured by a lien bond posted in court. A ten-day trial is scheduled for October 2025. Even if it could be resolved in a bifurcated process, which it cannot because I do not have the necessary facts, I do not accept that there is urgency in resolving Faria's claim for the Holdback Amount now.

[53] I have considered the prejudice to the parties of not having the matter decided summarily. Given that Faria's claim is secured, other than the passage of time, there is no prejudice to Faria in having the matters adjudicated together. However, if Bosa were ordered to pay the Holdback Amount now, only to be successful in its set-off and counterclaim at trial, it would suffer prejudice because it would be ordered to pay an amount that it is ultimately not obligated to pay and any amounts owing to it from Faria are not secured, thus putting Bosa's collection of its judgment at risk. While not a significant factor for me, I nonetheless find that removing the risk that Bosa may not recover if it is ultimately successful favours dismissing the application.

[54] As should be clear from my conclusion that the facts related to Faria's claim and Bosa's defence all arise out of the parties' scope of obligations under the Contract, I find that there would be no savings or efficiency gained by proceeding with the summary trial. The same issues and evidence will be required at the trial which is set for October 2025. The same issues would need to be litigated twice on the same topics of evidence, which adds expense and complexity.

[55] Even if the Holdback Amount issue was adjudicated summarily, Faria will still need to participate in the trial scheduled to commence in October 2025. As such, this is not the case where there is a discrete issue in a summary trial that, if resolved, might result in a party being relieved from participating in future litigation.

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Indeed, the same issues that arise on this summary trial application will be squarely in issue during the litigation of Bosa's counterclaim.

[56] Faria's application for summary trial results in litigating in slices because even if the Court were able to determine the issue of the Holdback Amount at the summary trial, the Court would still be required to determine the counterclaim at the trial and determine what if any damages are owing to Bosa arising from work performed by Faria or Enersolv on the Project.

## IV. DISPOSITION

[57] I dismiss Faria's application for summary trial. To be clear, any findings of fact I have made on the evidence brought before me in this application shall not be binding on the trier of fact should this matter proceed to trial.

## V. COSTS

[58] Bosa has been successful in defending the summary trial application. As such, it is entitled to its costs of this application at Scale B, in any event of the cause. Enersolv is entitled to its costs of this application in any event of the cause, but any costs sought must reflect Enersolv's limited participation in the application.

## VI. CONCLUSION

[59] I thank counsel for their well-prepared and argued submissions.

"Gibb-Carsley J."

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