IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *McMaster Custom Builder Ltd. v 1276770 B.C. Ltd.,* 2026 BCSC 1961

Date: 20261014
Docket: S18248
Registry: Revelstoke

Between:

McMaster Custom Builder Ltd.

Plaintiff

And

1276770 B.C. Ltd.

Defendant

Before: The Honourable Justice Hardwick

Reasons for Judgment

Counsel for the Plaintiff:	M.E.A. Danielson
Counsel for the Defendant:	B.S. Coen
Place and Date of Trial:	Kelowna, B.C. September 1 – 3, 2026
Place and Date of Judgment:	Kelowna, B.C. October 14, 2026

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Introduction

[1] The plaintiff, McMaster Custom Builder Ltd. (“McMaster”), applies pursuant to R 9-7 of the *Supreme Court Civil Rules* [*SCCR*] seeking judgment against the defendant, 1276770 B.C. Ltd. ("127") in the amount of $180,446.45, plus contractual interest at a rate of prime plus 4% per annum on the judgment amount, plus costs of this action (the “Application”). As articulated in McMaster’s written submissions, the specific amount of judgment sought by McMaster inclusive of contractual interest, as at September 1, 2026, is $221,966.21 (plus interest at a per diem rate of $41.77 for each day thereafter).

[2] 127 filed the Application on April 16, 2026, but it only proceeded to hearing before me on September 1 – 3, 2026. This timing is important as there is an 8-day trial scheduled to commence the week of November 30, 2026.

[3] At the outset of the Application, 127 made an oral application pursuant to R 9-7(11)(b) of the *SCCR* to dismiss the Application on the basis that the issues raised in the Application are not suitable for disposition under R 9-7and/or that the Application will not assist the efficient resolution of the proceeding.

[4] Specifically, 127 submitted that the issues raised in the Application are unsuitable for summary determination given 127 claims a “set off” for various alleged damages arising from McMaster’s failure to manage and complete work in a competent and workmanlike manner, delays in completion and claims of improper and/or double billing.

[5] I intentionally put “set off” in quotations as it was subsequently identified by McMaster’s counsel that there is, in fact, no “set off” defence expressly plead in 127’s response to civil claim. However, 127’s counterclaim clearly put McMaster on notice of its cross claims arising from the same factual matrix such that McMaster’s counsel candidly acknowledged there was no ambush in this regard.

[6] After hearing submissions, I allowed McMaster to continue with the Application with the recognition that it is always at the discretion of the presider to

determine suitability for summary determination, even when the parties agree: *Amacon Alaska D.P. v ARC Digital*, 2023 BCCA 34 at para 38 [*Amacon*]. Further, it is rare for the court to make such a preliminary determination of suitability without the benefit of the entire summary trial record: *The Owners Strata, Plan BCS 1165 v National Home Warranty Group. Inc*., 2015 BCSC 1122 at para 13.

[7] Given the Application was scheduled for three days, I did, however, express to McMaster's counsel the risk of an adverse costs award if I ultimately determined the matter was unsuitable for summary determination given that McMaster was electing to proceed in the face of 127's position that all of the claims should proceed to trial (which, unlike certain cases, is not some mere future possibility, but is actually scheduled for approximately two months from the release of these reasons).

[8] In closing submissions, 127 pivoted somewhat and took the primary position that McMaster has not made out its claim, that the Application should be dismissed and that 127's counterclaim should proceed to trial alone in November 2026. The damages claim that 127 intends to advance at trial, and subject to a very strenuous objection by McMaster as to the admissibility of a purported expert report underlying a significant portion of 127's claim, is for $924,172.29, exclusive of pre-judgment and post-judgment interests and carrying costs. In the alternative, 127 continues to maintain that all claims (by McMaster and 127) should proceed to trial.

[9] As a final introductory point, McMaster concedes that if judgment is granted as sought in the Application, it is open to the court to stay execution of said judgment pending the conclusion of the trial of 127's counterclaim or further court order: R 9-7(15)(b) and *F.A. Bernard Inc. v Western Floral Craft Supplies* (1994) Ltd. 1999 BCCA 635 at paras 9-11.

Factual Background

[10] McMaster, a company incorporated pursuant to the laws of British Columbia, has been carrying on business as a general construction contractor since 2006.

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[11] The principal of McMaster is Mr. Christoper Higgins. Mr. Higgins, who has been involved in the construction industry since 1998 and the homebuilding business for 26 years, has a journeyman ticket as a steel building constructor, a Red Seal carpentry designation as a carpenter, and is a “licensed registered builder” in British Columbia.

[12] 127, also a company incorporated pursuant to the laws of British Columbia, is the registered owner of property located at 1950 Sidmouth Road, Shelter Bay, British Columbia (the “Property”). The Property, for context, is located approximately 30 minutes from the city of Revelstoke and approximately 45 minutes from the Revelstoke Mountain ski resort.

[13] At all material times prior to the commencement of litigation, Phil DeBarros was the sole director and majority shareholder of 127. Mr. DeBarros is unfortunately deceased and his involvement in the litigation is primarily limited to text messages and email exchanges between him and Mr. Higgins and Mr. Higgins’ wife, Carolina, who works for McMaster in an administrative/bookkeeping capacity.

[14] Ms. Davey is Mr. DeBarros’ widow. Ms. Davey is a 49 percent shareholder in 127. Ms. Davey is also the acting director of 127 as the estate administrator for Mr. DeBarros’ estate as Mr. DeBarros passed without a will.

[15] Both Mr. DeBarros and Ms. Davey were involved in a residential construction business for many years in Ontario, including new custom builds and renovations. Specifically, Mr. DeBarros was the founder of a company called INTOR Construction Company. Ms. Davey’s expertise was and remains in interior design.

[16] Mr. Higgins and Mr. DeBarros met in or about February 2022. Mr. DeBarros approached Mr. Higgins about having McMaster construct a home and related improvements on the Property (the "Project").

[17] When Mr. DeBarros approached Mr. Higgins about building the Project, he had already obtained architectural drawings for the Project. Mr. DeBarros provided Mr. Higgins with two sets of architectural drawings prepared by SMPL Design Studio

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("SMPL") with respect to what eventually became the Project. These architectural drawings were subsequently reviewed and reissued for permitting purposes by Syme Structural Engineering Ltd. ("Syme") because SMPL was licensed in Ontario and not British Columbia.

[18] One set of SMPL's drawings generally depict the primary portion of the Project as built (the “House”). The second set of drawings depict a small secondary structure just 694 square feet in size (the "Secondary Structure") which Mr. DeBarros originally planned to build on the Property. However, at an early stage in the budgeting process for the Project, Mr. DeBarros told Mr. Higgins that 127 would not build the Secondary Structure immediately due to financial constraints and would instead build it later.

[19] Given this and based upon an admission made by Mr. Higgins during his examination for discovery, I find McMaster was aware that costing and budgeting was an important consideration for 127.

[20] I pause to note at this juncture, for context, that the evidence before me establishes that the House has a quite unique design, featuring floor to ceiling windows and modern composite exterior building materials. The design of the House further, it appears, was done purposefully to take advantage of both the landscape features of the Property and the location of the Property.

[21] When Mr. DeBarros and Mr. Higgins first met, Mr. DeBarros had already applied for a building permit for the Project. The building permit for the House was eventually issued on July 14, 2022.

[22] Back in February 2022, Mr. Higgins provided Mr. DeBarros with an estimated budget in the amount of $888,317.52 (exclusive of taxes) which provided for construction of the House (the "First Budget"). Inclusive of taxes, this amounts to, I accept, $994,915.62. Several items in the First Budget were left undetermined and for certain other items, I accept, the estimated amounts used "round" numbers as allowances or placeholders until better estimates and/or quotes were obtained. To

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illustrate this point, the First Budget includes a few annotations that denote a line-item cost as “crazy! Out to tender” and “? could be a big range here?”

[23] The First Budget referenced McMaster's "contracting fee" as equivalent to 13 percent of the underlying construction costs. This contracting fee is included in the $888,317.52.

[24] Throughout the spring of 2022, McMaster continued to refine the First Budget based on the quotes and/or estimates received from contractors and suppliers. Throughout this same period, Mr. DeBarros was keeping Mr. Higgins informed regarding his efforts to arrange financing (which is clear from the text messages were evolving).

[25] On or about June 5, 2022, McMaster and 127 entered into a written agreement (the "Agreement"). As a starting point, the Agreement stipulates that McMaster will build the Project on a cost-plus 13% basis, plus applicable taxes.

[26] Pursuant to a consolidated response to a notice to admit delivered by McMaster (the “Notice to Admit”), 127 admits that the Agreement included the following terms:

a) McMaster would construct the House on the Property in accordance with the plans and specifications provided by 127 (the "Work");

b) 127 would pay McMaster for the Work on a cost-plus 13% basis, plus GST and PST (the "Agreement Price");

c) 127 would make all payments owed to McMaster under the Agreement within ten (10) days of receipt of an invoice;

d) 127 would pay McMaster interest at the rate of the prime-lending rate of the Bank of Canada as it may be from time-to-time plus four (4) percent per annum on all monies outstanding from the due dates for payment specified within the Agreement until paid;

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e) 127 agreed to charge the Property for any monies including interest owed to McMaster under the Agreement and agreed that McMaster would have the right to register a charge against the Property claiming this interest;

f) Once the House was ready for occupancy, an inspection was to be arranged between 127 and McMaster (the "Inspection") at which time any omissions or defects would be noted in writing in a deficiency list (the "Deficiency List");

g) 127 would take possession forthwith following the Inspection;

h) The taking of possession and/or occupancy of the House would be deemed to conclusively prove that the House was complete and in full compliance with the Agreement, except as to matters noted on the Deficiency List, if any;

i) The Deficiency List would be remedied within 30 days of the Inspection or such other time period as agreed to by the parties; and

j) If there were any omissions or defects noted on the Deficiency List, the parties would use good faith efforts to determine an amount of the Agreement Price to be held back pending the remediation of the Deficiency List,

(collectively, the “Agreement Terms”).

[27] In 127’s application response filed August 14, 2026, 127 asserts that the Agreement was not a cost-plus contract, but rather a fixed-price contract. This allegation is, I accept, inconsistent with 127’s response to the Notice to Admit, 127’s response to civil claim and 127’s counterclaim. As I will return to, 127 has other arguments to defend against McMaster’s claims, but the submission that the Agreement was a fixed-price contract is, I find, for the purposes of the Application, without merit.

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[28] On June 17, 2022, Mr. DeBarros advised Mr. Higgins that he needed a budget for financing purposes. Importantly, Mr. Higgins deposes that Mr. DeBarros told him that the lender insisted on "fixed price" language in the document. Mr. Higgins followed that phone call with a text message shortly thereafter seeking clarification about whether the lender wanted a "fixed price" contract, or a "fixed price" budget. Mr. DeBarros told Mr. Higgins that his lender needed both documents.

[29] On or about June 20, 2022, Mr. Higgins provided Mr. DeBarros with his requested "fixed price" budget (the "Second Budget"). The amount of the Second Budget was $1,056,658.93, inclusive of taxes. Mr. Higgins never provided Mr. DeBarros with a further "fixed price" contract. Mr. DeBarros' lender was apparently satisfied with the Second Budget.

[30] As with the First Budget, the Second Budget contains many "round" numbers which, I accept, were not based on quotes and estimates received.

[31] 127 highlights that the Second Budget is labelled as Schedule “B” (which it asserts links it to the Agreement) and further submits that the revised sum was intentionally higher than the First Budget to afford McMaster a “contingency buffer” against potential overages “while establishing a binding financial ceiling”. While the former submission has grounding in fact as the Second Budget, which was prepared by McMaster does expressly state “Schedule B” in the “type” code line, the latter submission is clearly an argument based upon a particular interpretation of the evidentiary record as opposed to being grounded upon any particular document or communication.

[32] Ms. Davey was not involved in these negotiations and has admitted that she had not seen the Second Budget prior to the commencement of this litigation.

[33] McMaster built the Project between August 2022 and January 2024. That is a period of approximately 16 months. That is not the nine months contemplated in the Agreement. There is some evidence as to the delays being outside the control of McMaster but not for the entirety of the 16 months. McMaster also relies on the lack

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of any record of any complaint about delay in the written correspondence between Mr. Higgins and Mr. DeBarros. Of further importance in this regard, Mr. Higgins does admit he knew that 127 intended to use the House for a short-term rental business and had rentals lined up for January 2024.

[34] An occupancy permit for the House was issued by Columbia Shuswap Regional District ("CSRD") on December 27, 2023 (the "Occupancy Permit"). 127 queries about how the Occupancy Permit was issued given the alleged deficiencies, but ultimately the documentation confirms that the CSRD, an independent entity tasked with the obligation of objectively confirming that requirements for the issuance of an occupancy permit have been satisfied, granted the Occupancy Permit on said date.

[35] Mr. Higgins' evidence is that Mr. DeBarros and Ms. Davey commenced residing in the House on or about January 3, 2024. This evidence is not materially denied, the response being that owner occupation of the House did not constitute its completion to a standard that allowed it to be a short-term vacation rental. That did not occur until February 14, 2024 (when it began to be rented at a significant rate based upon the damages claimed for the delay in its rentability).

[36] 127's counterclaim for loss of rental venue resulting from the alleged delay in Project completion (asserted to $71,631.22) is not before me for determination, but as far as this claimed "set off" factors into determining suitability for summary determination, it rests on a very shaky evidentiary foundation (notably, a "profit and loss" statement prepared by an unidentified individual without supporting documentation).

[37] From a financial perspective, McMaster invoiced 127 periodically throughout the construction of the House. In total, 15 invoices were rendered. The invoicing process was not monthly as contemplated (but not strictly required) in the Agreement. Rather, the arrangement became, I accept, one that when Mr. DeBarros had funds available, he would advise Mr. Higgins how much money he could transfer and McMaster would render a corresponding invoice to 127.

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[38] With the exception regarding the appropriateness of the cost-plus fee to labour provided by Ox Carpentry Ltd. ("Ox Carpentry"), a non-arm's length company associated with Mr. Higgins, there is no documentary record of any significant pushback from Mr. DeBarros about the amount of McMaster's invoicing up to the issuance of the Occupancy Permit. I reference the documentary record as I accept that much of the communication between Mr. DeBarros and Mr. Higgins was verbal and given Mr. DeBarros' passing, there is no evidence of Mr. DeBarros' version of these discussions. Regarding the Ox Carpentry issue, there is documentary evidence Mr. DeBarros raised this with Mr. Higgins in August 2023, and it was apparently resolved in September 2023 with McMaster removing $53,291.03 in fees attributable to Ox Carpentry's labour from 127's invoice.

[39] On December 29, 2023, McMaster provided 127 with an invoice in relation to the House showing a total cost of $1,417,527.88.

[40] The last payment made by 127 towards McMaster's invoices was on January 19, 2024, in the amount of $200,000. This payment was made following a meeting between Mr. Higgins and Mr. DeBarros on January 19, 2024, wherein they met to review McMaster's billing to the end of November 2023 and discuss the remaining scope of work. Mr. Higgins' evidence is that he and Mr. DeBarros agreed that McMaster would invoice $200,000 to that date and that the remaining balance under the Agreement would be paid in about 30 days to accommodate Mr. DeBarros' tax planning strategy. As there were no other witnesses present at this meeting and no contemporaneous minutes were made, there is nothing to challenge Mr. Higgins' version of events. The fact that 127 made a $200,000 payment on this date is corroborated by the documentary record.

[41] On January 22, 2024, Mr. DeBarros sent a text message to Mr. Higgins asking him to send McMaster's final invoice for the House.

[42] Between January 30, 2024 and February 13, 2024, Ms. Higgins, in her administrative capacity on behalf of McMaster, exchanged emails with Mr. DeBarros which can be summarized as follows:

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a) Ms. Higgins provided Mr. DeBarros with copy of the "Cost Summary" for the House which summarizes what McMaster maintains are the actual costs of construction as compared to the Second Budget (the "Cost Summary");

b) Mr. DeBarros advised Ms. Higgins that the amount of the Cost Summary did not correspond with his recollection of what was owed (which is asserted to be $123,500.00 plus "HST"); and

c) Mr. DeBarros acknowledged the Agreement was cost-plus but said that he needed to audit the House to put his mind at ease.

[43] During her examination for discovery, Ms. Davey acknowledged that Mr. DeBarros told her there was a balance remaining after his January 19, 2024 meeting with Mr. Higgins. While Ms. Davey admits she understood that some balance remained owing, she did not know the number.

[44] On February 15, 2024, Mr. DeBarros texted Mr. Higgins asking to review McMaster's latest invoice. Mr. Higgins was away on holidays, however, and did not return to Revelstoke until February 26, 2024.

[45] On February 27, 2024, Mr. Higgins and Mr. DeBarros met with a few other friends/acquaintances at a local establishment in Revelstoke. After leaving the establishment, Mr. DeBarros went missing. Mr. Higgins was notified on February 29, 2024, that Mr. DeBarros had passed away.

[46] Given the timing between Mr. Higgins' return to Revelstoke and Mr. DeBarros' passing, the Inspection never occurred.

[47] After Mr. DeBarros passed away, McMaster issued a final invoice to 127 for $7,898.57, bringing the total amount invoiced by McMaster to 127 for the House to $1,425,446.45 (the "Amount Invoiced"). The Amount Invoiced minus the amount of $1,245,000.00 paid by 127 to date totals $180,446.45 (the "Claimed Outstanding Principal").

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[48] The Amount Invoiced expressly does not include the cost of windows for the House, which cost was paid directly by 127 even though the First Budget contemplated this cost being incurred by McMaster. There is some dispute about the admissibility of the evidence tendered by 127 pertaining to the windows but for the purposes of the Application, I am prepared to accept that the cost, inclusive of GST, was approximately $190,000.

[49] McMaster filed its notice of civil claim commencing this action on March 7, 2024 (“NOCC”). I accept that McMaster did so primarily to file a certificate of pending litigation against the Property given concerns that Mr. DeBarros’ unfortunate passing could complicate matters.

[50] Starting in June 2024, 127 raised several complaints about the House, including unfinished work, cost overruns, procedural irregularities, incomplete accounting, and late completion. 127 advised that it would be holding back payment, if any, until a list of alleged incomplete work and deficiencies was addressed.

[51] On August 22, 2024, 127 filed its counterclaim (the “Counterclaim”).

[52] As part of its submissions at the hearing of the Application, counsel for 127 provided an aide memoir for the court outlining 127’s position as to the “calculation of percentage over budget”. According to 127’s calculations (which factor in 127’s payment for the windows), the invoiced cost for the House exceeds the First Budget by some approximately $690,000 and the Second Budget by some approximately $600,000 – cost overruns of between 59 to 74 percent.

[53] To date, aside from submitting a claim through the new home warranty provider (which resulted in the repair of warrantable defects), the evidence before the Court is that 127 has not repaired any alleged deficiencies with the House.

[54] 127 listed the Property for sale in or about October 2025 and the Property remains for sale at the current date (approximately two years later). The original list price was $1,988,000 but there have been price reductions.

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The Crawl Space/Basement Issue

[55] Before addressing the issue of the admissibility of certain evidence, there is one issue in the factual matrix which I will bring forward.

[56] The engineered drawings for the House provided for a 4-foot crawl space and not a full basement. The Agreement, which was based upon the engineered drawings, contemplated a 4-foot-crawl space.

[57] McMaster instead poured a full basement. Mr. Higgins has provided evidence as to why McMaster proceeded in this manner, but even Mr. Higgins' evidence on this issue is somewhat consistent with 127's position that this was done unilaterally and without its prior consent.

[58] Simply stated, McMaster relies on an assertion that there was an oral discussion between Mr. Higgins and Mr. DeBarros authorizing this change, together with the lack of any contemporaneous written records or communications either rejecting this alteration or complaining of it, knowing that Mr. DeBarros is unavailable to rebut Mr. Higgins' version of the events on this issue.

[59] Further, the submission that a full basement was actually less expensive than a 4-foot crawl space rests on a shaky factual foundation as McMaster did not obtain a quote for the cost of backfilling to accommodate a crawlspace versus a full basement, and the information upon which this assertion is based comes from responses provided following Mr. Higgins' discovery that have no supporting documentation attached. Nor is such documentation attached to Mr. Higgins' Affidavit #2 affirmed August 26, 2026 ("Higgins Affidavit #2") which briefly summarizes and adopts his discovery request response.

[60] In my view, it strains reasonable belief somewhat that Mr. Higgins and Mr. DeBarros, both knowledgeable individuals in the industry, would not at least have made efforts to obtain a quote to proceed with the planned crawl space (something contained in both sets of engineered drawings) before simply just

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agreeing to pour a full basement and that there would be no written communication between them about this issue prior to the foundation being poured.

[61] From a claim for damages perspective, I recognize that 127 subsequently made the decision to fully finish the basement. That was 127's decision and in so doing, it knowingly incurred costs that would not have been incurred if there was the planned 4-foot crawl space. However, the decision to incur those costs alone does not allow McMaster to escape the possibility of consequences from this material alteration.

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Admissibility Objections to the Affidavit #1 of Ms. Davey

[62] McMaster raises certain preliminary objections to the affidavit evidence tendered by 127 in opposition of the Application. I already briefly touched on the evidence regarding the cost of the windows for the House which were sourced and paid for directly by 127.

[63] More significantly, McMaster raises objection to portions of the Affidavit #1 of Ms. Davey sworn on August 12, 2026 ("Davey Affidavit") on the basis that throughout the Davey Affidavit, Ms. Davey makes statements based on information and belief without stating the source or basis for her belief. In this regard, hearsay evidence may be put forward in summary trial not to establish a fact, but to address appropriateness (including the submission it would be unjust to decide*): Pete v Terrace Regional Health Care Society*, 2003 BCCA 226 at para 12. Here, the focus of McMaster's objection is that Ms. Davey uses the plural pronoun "we" throughout the Davey Affidavit with respect to conversations that she did not have and was not present for. McMaster further submits that the Davey Affidavit contains opinions, descriptions of reactions, argument, and conclusory statements.

[64] Whilst recognizing that Ms. Davey is in a disadvantageous position of replying to Mr. Higgins' affidavit when she was not a party to many key discussions between Mr. Higgins and Mr. DeBarros and of which Mr. DeBarros apparently did not make contemporaneous notes about, that disadvantageous position does not excuse the lack of precision in various paragraphs of the Davey Affidavit that simply refer to

"we" and "us", especially where the evidence is being relied upon to prove a fact and not simply for the purposes of addressing suitability. The other complaints by McMaster about the Davey Affidavit are not without some merit but it is not necessary to specifically identify what is a conclusory statement or argument and disregard it as it is not to the level where it interferes with the ability to review and understand the admissible portion of the affidavit. Further, the same can be said of portions of the Higgins Affidavit #2.

The Timberline Report and the Byl Report

[65] As mentioned above, a significant portion of the Counterclaim is the allegation, simplistically summarized, that there are various defects with the House that will cost $481,700 to repair.

[66] The deficiencies and alleged repair costs are set out in a report by Timberline Solutions Ltd. ("Timberline") dated June 2, 2026 (the "Timberline Report).

[67] McMaster gave notice to 127 of its objections to the admissibility of the Timberline Report prior to the Application. Those objections, which McMaster acknowledges, vary in significance, can be summarized as follows:

a) The Timberline Report does not include a list of every document relied upon by Timberline in forming its opinion. Timberline states that its opinions are "simply based off the observations made on site" and not based on any of the documents provided to Timberline by 127's counsel which are referenced in the originating instruction letter;

b) The factual assumptions on which the opinions in the Timberline Report are based, while included in the instruction letter, are not included in the report;

c) The Timberline Report does not state the issue or issues in the proceeding to which the opinion relates;

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d) The expert's "statement of qualifications" is inadequate in that it does not state the employment and educational experience in the relevant area of expertise. Further, the expert is not qualified to give opinions on the matters expressed in the report.

e) It is unclear:

   i. if and when the expert attended the Property;

   ii. when the photos included in the Timberline Report were taken and by whom they were taken; and

   iii. when and how certain of the alleged deficiencies contained in the Timberline Report were discovered (given that the House has been occupied for about two-and-a-half years);

f) The Timberline Report usurps the court's role in making findings of fact and law;

g) The Timberline Report is not impartial and objective and crosses the line into argument and advocacy;

h) The opinions expressed in the Timberline Report are not responsive to the opinions requested by counsel; and

i) It is unclear as to whether the report was authored solely by Mr. Carson Baer or with assistance or input from others. The author alternates between the first-person singular pronoun "I" and the first-person plural pronoun "we" throughout the Report, in addition to purporting to give "our opinion" (presumably on behalf of Timberline) throughout the Report.

[68] Notwithstanding McMaster's position that the Timberline Report is entirely inadmissible, McMaster commissioned a responding expert report from Dan Byle of 1188133 BC Ltd. dba BC Construction Expert dated August 7, 2026 (the "Byl Report").

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[69] In the Byl Report, Mr. Byl provides his opinion regarding the deficiencies identified in the Timberline Report, how they would be repaired (if repair was required) and provides his estimate of cost of repair.

[70] Importantly, Mr. Byl accepts that there are certain deficiencies identified in the Timberline Report which he agrees with. Mr. Byl estimates the total remediation costs to be $25,920.

[71] The difference in the estimated cost of repair/remediation work required between the Timberline Report and the Byl Report is thus some $455,780 (emphasis added).

Breach of Building Contract: General Principles

[72] Before delving into the issue of suitability for summary determination, it is of assistance to set out a summary of law regarding breach of contract, specifically a building contract.

[73] In seeking to enforce a building contract, the plaintiff must prove the amounts it claims are properly owing, bears the onus to establish the terms of the contract it relies upon and has the burden to prove that the defendant owes it money: see *Solaris Custom Home Inc. v Trovao*, 2024 BCSC 1831 [*Solaris*], at para 76.

[74] As set out in *Solaris*, the relevant factors for assessing the terms of a building contract, whether the parties agreed to a fixed-price or cost-plus contract, and whether a budget was intended to have contractual effect, include the following:

a) Whether the agreement provided a percentage of the project cost as a fee to the contractor;

b) Whether price was of overriding importance to the owner and whether that was communicated to the contactor;

c) Whether the contractor provided an estimate and whether the owner relied on it;

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d) The knowledge and experience of the party providing the estimate;

e) Whether the owner required the contractor to design a project at a specified cost or sought assurances as to what the project would cost;

f) Whether the contractor paid for materials and labour and then billed the owner on a regular basis;

g) Whether the contractor provided information about the cost of labour and materials;

h) Whether the contractor made it clear they were not assuming any risk that the final price would exceed the estimate; and

i) Whether the owner encouraged the contractor to proceed with construction despite actual or constructive knowledge the estimate would be exceeded.

[75] In *Ace Burger Ltd. v G and I Construction Group Inc.*, 2025 SKCA 82 [*Ace Burger*], the Saskatchewan Court of Appeal recently addressed the test for proving a claim under a cost-plus construction contract. Specifically, at para 32, Justice McCreary set out a three-part test for proving a claim under such a contract. Those steps are as follows:

a) The contractor is required to prove that the charges claimed were for the purpose of completing the work contracted for and those charges were accurate;

b) If that is demonstrated, then the onus shifts to the opposing party to provide evidence to suggest the amounts claimed by the contractor are incorrect, unreliable, wasteful, or economical; and

c) If that is done, then the onus shifts back to the contractor to satisfy the court that its accounts are accurate and reliable.

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[76] On this particular issue, 127 refers in its application response to the decision of this Court in *Shaheen Custom Homes Ltd. v Brennan*, 2022 BCSC 716 [*Shaheen*] as authority for the proposition that a contractor bears a "heavy burden" in proving its claim under a cost-plus contract. *Shaheen* follows a much earlier established line of authority originating, it appears from the jurisprudence, with *G.T. Parmenter Construction Ltd. v Sanders*, [1947] O.J. No. 568 (HCJ), 1947 CarswellOnt 248, and continuing in *Infinity Construction v Skyline Executive Acquisitions Inc.*, 2020 ONSC 77 at para 114.

[77] In respect of the Application, I conclude it is unnecessary to specifically adopt the framework from *Ace Burger* in preference to *Shaheen* (which is persuasive but not binding authority). However, the point that McCreary J.A. makes that this framework is consistent with the Supreme Court of Canada's determination in *F.H. v McDougall*, 2008 SCC 53 at para 53, that there is only one civil standard of proof - proof on a balance of probabilities - is compelling: *Ace Burger* at para 31.

[78] Further, once work on a project is substantially complete, which is a question of fact, a contractor is entitled to be paid even if there are defects in the work. An owner has the right to counterclaim for damages or to set off the amount paid to remedy the defects, but mere allegations, absent an express contractual term to withhold payment due to defective work, does not provide an escape liability for payment of the agreed upon price of the work: *JCB Contracting Ltd. v Blackett*, 2024 BCSC 2091 [*JCB*], at paras 29-31; and *On-Side Restorations et al v Strata Plan NW 1815*, 2005 BCSC 152 (reversed as to costs only 2005 BCCA 562) [*On-Side*].

[79] Although it does not change the above statements of the law which are consistent with other jurisprudence, in *JCB* the parties agreed that the dispute was suitable for summary determination. In *On-Side*, Fisher J. (as she was then) concluded that it was suitable for summary determination as there was no counterclaim and no merit to the defence of set-off as against the plaintiffs [with recognition that there was parallel litigation involving these parties and others arising out of the same factual matrix].

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Suitability for Summary Trial: The Law Generally

[80] As already indicated, the suitability of the Application for summary determination under R 9-7 is expressly challenged by 127.

[81] Rule 9-7(15) authorizes the court to grant judgment, on an issue or generally, unless the court is unable to find the facts necessary to decide the issues of fact, or if it would be unjust to decide the issues on the application.

[82] Rule 9-7(15) makes the judge a gatekeeper. It is a critical role. Notwithstanding the wishes or indeed the often vociferous submissions of counsel, judgment should not be given if the court is unable, on the evidence, to find the necessary facts or if it would be unjust to do so: *Main Acquisition Consultants v Yuen*, 2022 BCCA 249 at para 89.

[83] As a corollary to this, R 9-7(1) mandates the court must grant judgment if the evidence adduced proves the facts necessary to decide the issues raised in the Application and it is not unjust to do so. It is not a question of whether a full trial could "turn something up" or produce a different result: *Everest Canadian Properties Ltd. v Mallman*, 2008 BCCA 275 at para 34.

[84] As noted above, however, the suitability for summary trial is always a discretionary exercise that turns on the circumstances of a particular application: *Greenleaf Brewing Corporation v Lonsdale Quay Market Corp.*, 2023 BCSC 2005 at paras 19 and 21 [*Greenleaf*], citing *Gill v Gill*, 2022 BCCA 264 at para 56 and *Amacon* at para 38.

[85] As articulated in the now seminal decision of *Gichuru v Pallai*, 2013 BCCA 60 at paras 30 and 31, the factors that a court should consider in determining the suitability of an application for summary trial include:

- the amount involved;
- the complexity of the matter;

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- its urgency and any prejudice likely to arise by reason of delay;
- the cost of taking the case forward to a conventional trial in relation to the amount involved;
- is the litigation extensive and will the summary trial take considerable time;
- whether credibility is a critical factor in the determination of the dispute;
- whether the summary trial may create unnecessary complexity in the resolution of the dispute; and
- whether the application would result in litigation in slices.

[86] Proportionality is relevant to this determination: *Brissette v Cactus Club Cabaret Ltd*., 2017 BCCA 200 at para 26.

[87] Conflict in the evidence *per se* is not necessarily always a reason to render a summary trial application unsuitable: *Greenleaf* citing *MacMillan v Kaiser Equipment Ltd.*, 2004 BCCA 270 at para 22.

[88] However, a court should not decide an issue of fact or law solely on the basis of preferring one conflicting affidavit over another. There must be documentary evidence, evidence of independent witnesses, or undisputed evidence that undermines the affidavit of one of the parties on critical issues or some other basis for preferring one affidavit over another: *Brissette* at para 27, citing *Cory v Cory*, 2016 BCCA 409 at para 10.

[89] When a Rule 9-7 application is made, it is the obligation of the parties to take every reasonable step to put themselves in the best possible position and adduce all evidence they believe is necessary for judgment: *Harrison v British Columbia (Children and Family Development)*, 2010 BCCA 220, at paras 40 and 41.

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[90] In a similar vein, a summary trial is a trial and must be treated as one. Each party must put its best foot forward: *Elworthy Electrical Services Ltd. v Lucava Farms Inc.*, 2022 BCSC 1787 at para 29.

[91] Under R 9-7, judgment can be granted even if there is an arguable crossclaim. Judgment will only be refused where a defendant proves, on a balance of probabilities, a defence to the claim, which must be distinguished from an arguable counterclaim or set-off: see *GL&V Canada Inc. v Deramore Construction Services Inc.*, 2015 BCSC 2534, at para 34; *Panopus PLC v A.I.S. Resources Limited*, 2025 BCSC 1850; and *Strait Construction Ltd. v Odar*, 2006 BCSC 690, aff'd 2007 BCCA 437 [*Strait Construction*].

[92] However, if a counterclaim flows out of and is inseparably connected with the dealings and transactions that give rise to the claim and if the counterclaim goes to the root of the claim, it may be manifestly unjust to allow the plaintiff to enforce its claim without taking into account the counterclaim: *Coba Industries v Millies Holdings Ltd*., 1985 CanLII 144 (BCCA) at p 10; *Faria Mechanical v Bosa Development Corporation*, 2024 BCSC 1946 at paras 32-49 and 51-57; and *Kaspersky Lab, Inc. v Bradshaw*, 2010 BCSC 68 at para 13.

[93] Finally, as it relates to the concern about “litigating in slices”, our Court of Appeal in *Ferrer v 589557 B.C. Ltd*., 2020 BCCA 83, adopted the “intertwined issues approach”: see paras 23-24 [*Ferrer*].

Suitability for Summary Trial: McMaster’s Position

[94] McMaster submits the Application, to closely paraphrase its written submissions, is suitable for summary trial under R 9-7 on the basis that:

a) The matter is not factually or legally complex. The Agreement is a cost-plus construction contract. The parties’ admissions in pleadings, in response to the Notice to Admit, and during examination for discovery establish that McMaster has not been paid for its Work which was invoiced on a cost-plus basis. There is ample evidence that 127 intended to pay

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McMaster, and would have paid McMaster, had Mr. DeBarros not passed away.

b) Credibility is not an important factor. To the extent that there are any "head on" conflicts in the evidence, they may be resolved with reference to the documentary and oral discovery evidence. Mr. Higgins and Mr. DeBarros communicated by text message, so the evidence of most interactions between the parties is before the court. Ms. Davey does not have personal knowledge of much of the content of the Davey Affidavit, which is confirmed by both: (i) her use of the plural pronoun "we" throughout the Davey Affidavit; and (ii) her examination for discovery evidence which confirms that she did not discuss, or did not remember discussing, with Mr. DeBarros matters which seemingly she now says she did.

c) Both Mr. Higgins and Ms. Davey have been examined for discovery. Mr. DeBarros is unfortunately deceased and cannot give evidence at trial. The evidence before the court is, in the circumstances, perhaps as good as it is ever going to be.

d) The judgment sought by McMaster in the Application, which is approximately $200,000, does not justify the cost of a conventional eight (8) day trial. From McMaster's perspective, the cost of the trial might exceed the amount in dispute.

e) Finally, some of the evidence relied upon by 127 in defence of the Application, most significantly, the "Timberline Report" is inadmissible, either in whole or in part.

Suitability For Summary Determination: 127's Position

[95] 127 submits that McMaster's claim for judgment pursuant to the Application and the Counterclaim rests on an inseparable factual foundation that requires a single, consolidated hearing with *viva voce* evidence and cross-examination.

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[96] 127 further submits that allowing McMaster to "split" the action would result in duplicate proceedings, risk inconsistent findings and ultimately would be manifestly unjust to allow McMaster to obtain judgment without taking into consideration 127's Counterclaim.

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Suitability for Summary Determination: Analysis

[97] Consistent with my initial refusal to summarily dismiss the Application and the level of review of the evidence, certain aspects of which I have specifically highlighted in these reasons for judgment, I am satisfied that I made all necessary efforts required under R 9-7 to find the facts necessary to adjudicate upon the Application on its merits in a manner consistent with the jurisprudence, which clearly encourages proceeding by summary determination where it is possible to do so: *Hryniak v Mauldin*, 2014 SCC 7 at paras 1, 2 and 4. Such efforts further accord with the fundamental principles underlying the *SCCR* of the just, speedy and inexpensive determination of actions on their merits: R 1-3.

[98] Upon consideration of R 9-7, the relevant caselaw and the submissions of the parties, both oral and written, however, I ultimately conclude that the Application is not suitable for summary determination and that it would be unjust to grant the judgment in favour of McMaster as sought.

[99] This, as articulated, is a discretionary decision which required a balancing of the relevant factors which pulled, to some extent, in opposite directions. My reasons for exercising my discretion as such are as follows:

a) Litigating in slices is a very real concern, even applying the "intertwined issues" approach required by *Ferrer*;

b) This matter is more factually complex than McMaster submits. Specifically, I find there is a real concern about making findings of fact necessary to grant judgment for McMaster as sought in the Application which might be inconsistent with findings of fact made by the trial judge at the hearing of the Counterclaim;

c) Related to the foregoing, I am not satisfied that the passing of Mr. DeBarros renders the evidence before the court "as good as it's ever going to be". Although the concerns of credibility are not overwhelming, there are aspects of the record before me that are potentially rife for cross-examination;

d) McMaster relies strongly on its objection to the admissibility of the Timberline Report. The Timberline Report, I will candidly state, has certain identifiable defects, some of which can be attributed to the fact that its author (recognizing McMaster's point about the vagueness of who this is) is very obviously not a "professional expert" (namely, an individual in the regular practice of writing reports for court purposes). However, the fact that an individual is not a "professional expert" does not preclude them from being properly qualified to give the expert opinion preferred. I am unprepared to simply exclude this report in its entirety for the purposes of the Application when considering suitability;

e) The provisional admissibility of the Timberline Report for the purposes of determining suitability notably raises consideration of the "amount involved" factor. I recognize that McMaster has acknowledged that I can grant judgment as sought in the Application and stay it as set out in para 8 of these reasons for judgment, but 127's position is that McMaster owes more than $900,000. I need not go into the calculations of contractual interests and pre-judgment/post-judgment interest to highlight that this dispute has real financial significance to both McMaster and 127;

f) The cost of this litigation is a very real concern but, in the circumstances, the Application does not obviate the need for trial of the Counterclaim, the length of which trial I am not satisfied will be materially reduced granting judgment in favour of McMaster;

g) There is no issue of urgency – the trial date is approximately two months away; and

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h) There is no issue of prejudice of delay given – as just stated – the trial date is approximately two months away and McMaster has a CPL registered on title to the Property.

Conclusion on Relief Sought

[100] The Application is dismissed on the basis that it is unjust to grant the judgment in favour of McMaster as sought.

[101] For clarity of the record, I confirm I am also clearly not satisfied that McMaster has not made out its claim on the balance of probabilities such that the Application should be dismissed and that 127's Counterclaim should proceed to trial alone in November 2026.

[102] The result shall be that the claims of McMaster in the NOCC and the claims of 127 in the Counterclaim shall proceed to trial together.

Costs

[103] Costs, pursuant to the *SCCR*, are awardable at the discretion of the presiding justice. Subject to said judicial discretion, the general principle is that costs are awarded to the successful party: see R 14-1(9).

[104] "Success", as it is defined for the purposes of costs, means substantial success. This is the same for trials and summary trials.

[105] Having persuaded this Court that it would be unjust to grant the relief sought in the Application, 127 was substantially successful and is presumptively entitled to its costs.

[106] I am satisfied that the appropriate order is that 127 is entitled to costs in any event of the cause, but not payable forthwith. Those costs shall be assessed, if necessary, on Scale B.

"Hardwick J."

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