

SUPREME COURT OF NOVA SCOTIA

Citation: *Maplewood Properties Incorporated v. Lindsay Construction Limited*,
2025 NSSC 112

Date: 20250321

Docket: Hfx No. 528326

Registry: Halifax

Between:

Maplewood Properties Inc.

Applicant

v.

Lindsay Construction Limited

Respondent

DECISION

Judge: The Honourable Justice Ann E. Smith

Heard: October 24, 2024, in Halifax, Nova Scotia

Counsel: William L. Mahody, K.C., for the Applicant
Ian Dunbar, for the Respondent

By the Court:

Introduction

[1] On November 8, 2023, Maplewood Properties Inc. (Maplewood) filed this application in Chambers requesting an order appointing Bruce Outhouse as Arbitrator to adjudicate matters raised in a Notice of Arbitration dated October 4, 2023.

[2] Lindsay Construction Limited (Lindsay) filed a Notice of Contest on February 16, 2024, and an Amended Notice of Contest, filed on October 21, 2024.

[3] In its Amended Notice of Contest, Lindsay pleaded, among other things, that:

- “Maplewood’s Application is an abuse of process as there are claims relating to 800ML before Arbitrator Outhouse and the scope of the Arbitrator’s jurisdiction in relation to those claims has not yet been determined” and that the application should be “stayed pursuant to s. 9 of the *Commercial Arbitration Act*, S.N.S. 1999, c. 5, until Arbitrator Outhouse has ruled on the extent of his jurisdiction over matters relating to 800ML”;
- Maplewood has no contractual right to arbitration of the dispute because deficiencies related to construction of the roof assembly at 800 Maplewood were raised at the April 2020 mediation and Maplewood failed to refer the matter to arbitration within 10 working days after the failed mediation, as required under the Contract; and that
- Maplewood’s claims in relation to 800 Maplewood are barred from being the subject of any legal action due to the passage of time.

The Contract

[4] On January 21, 2016, Maplewood and Lindsay entered into a CDCC-2 Stipulated Price Contract (the Contract) whereby Lindsay agreed to build two residential homes located at 770 and 800 Maplewood Lane in Halifax (collectively, the Project) for the contract price of \$12,617,110. 770 Maplewood was to be built upon “Lot 2”, while 800 Maplewood was to be built upon “Lot 4”. Lindsay was to construct the two homes in accordance with design drawings and construction documents prepared by Marmol Radziner AIA (Marmol Radziner), an architectural firm based out of California.

[5] Marmol Radziner acted as “Consultant” under the Contract. The Consultant administers the Contract, interprets the requirements under the Contract documents, and decides any matters in question related to the performance of the work. The Consultant’s role and authority are outlined at GC 2.1 and GC 2.2:

GC 2.1 AUTHORITY OF THE CONSULTANT

- 2.1.1 The *Consultant* will have authority to act on behalf of the *Owner* only to the extent provided in the *Contract Documents*, unless otherwise modified by written agreement as provided in paragraph 2.1.2.

[...]

GC 2.2 ROLE OF THE CONSULTANT

- 2.2.1 The *Consultant* will provide administration of the *Contract* as described in the *Contract Documents*.

...

- 2.2.7 Except with respect to GC 5.1 – FINANCING INFORMATION REQUIRED OF THE OWNER, the *Consultant* will be, in the first instance, the interpreter of the requirements of the *Contract Documents*.
- 2.2.8 Matters in question relating to the performance of the *Work* or the interpretation of the *Contract Documents* shall be initially referred in writing to the *Consultant* by the party raising the question for interpretations and findings and copied to the other party.
- 2.2.9 Interpretations and findings of the *Consultant* shall be consistent with the intent of the *Contract Documents*. In making such interpretations and findings the *Consultant* will not show partiality to either the *Owner* or the *Contractor*.
- 2.2.10 The *Consultant's* interpretations and findings will be given in writing to the parties within a reasonable time.
- ...
- 2.2.12 The *Consultant* will have authority to reject work which in the *Consultant's* opinion does not conform to the requirements of the *Contract Documents*. Whenever the *Consultant* considers it necessary or advisable, the *Consultant* will have authority to require inspection or testing of work, whether or not such work is fabricated, installed or completed. However, neither the authority of the *Consultant* to act nor any decision either to exercise or not exercise such authority shall give rise to any duty or responsibility of the *Consultant* to the *Contractor*, *Subcontractors*, *Suppliers*, or their agents, employees, or other persons performing any of the *Work*.

[6] The Consultant is also responsible for approving the final payment at the conclusion of construction:

GC 5.7 FINAL PAYMENT

- 5.7.1 When the Contractor considers that the *Work* is completed, the Contractor shall submit an application for final payment.
- 5.7.2 The Consultant will, no later than 10 calendar days after the receipt of an application from the Contractor for final payment, review the *Work* to verify the validity of the application and advise the Contractor in writing that the application is valid or give reasons why it is not valid.
- 5.7.3 When the Consultant finds the Contractor's application for final payment valid, the Consultant will promptly issue a final certificate for payment.
- 5.7.4 Subject to the provision of paragraph 10.4.1 of GC 10.4 – WORKERS' COMPENSATION, and any lien legislation applicable to the Place of the

Work, the Owner shall, no later than 5 calendar days after the issuance of a final certificate for payment, pay the Contractor as provided under Article A-5 of the Agreement – PAYMENT.

[7] The Contract contains a mandatory dispute resolution mechanism at part 8, which includes a mandatory arbitration clause. The relevant provisions of the Contract stipulate:

PART 8 DISPUTE RESOLUTION

GC 8.1 AUTHORITY OF THE CONSULTANT

- 8.1.1 Differences between the parties to the *Contract* as to the interpretation, application or administration of the *Contract* or any failure to agree where agreement between the parties is called for, herein collectively called disputes, which are not resolved in the first instance by findings of the *Consultant* as provided in GC 2.2 – ROLE OF THE CONSULTANT, shall be settled in accordance with the requirements of Part 8 of the Generation Conditions – DISPUTE RESOLUTION.
- 8.1.2 If a dispute arises under the Contract in respect of a matter in which the Consultant has no authority under the Contract to make a finding, the procedures set out in paragraph 8.1.3 and paragraphs 8.2.3 to 8.2.8 of GC 8.2 – NEGOTIATION, MEDIATION AND ARBITRATION, and in GC 8.3 – RETENTION OF RIGHTS apply to that dispute with the necessary changes to detail as may be required. [...]

GC 8.2 NEGOTIATION, MEDIATION AND ARBITRATION

- 8.2.1 In accordance with the Rules for Mediation of Construction Disputes as provided in CCDC 40 in effect at the time of bid closing, the parties shall appoint a Project Mediator
- .1 within 20 *Working Days* after the *Contract* was awarded, or
 - .2 if the parties neglected to make an appointment within the 20 *Working Days*, within 10 *Working Days* after either party by *Notice in Writing* requests that the Project Mediator be appointed.
- 8.2.2 A party shall be conclusively deemed to have accepted a finding of the *Consultant* under GC 2.2 – ROLE OF THE CONSULTANT and to have expressly waived and released the other party from any claims in respect of the particular matter dealt with in that finding unless, within 15 *Working Days* after receipt of that finding, the party sends a *Notice in Writing* of dispute to the other party and to the *Consultant*, which contains the

particulars of the matter in dispute and the relevant provisions of the *Contract Documents*. The responding party shall send a *Notice in Writing* of reply to the dispute within 10 *Working Days* after receipt of such *Notice in Writing* setting out particulars of this response and any relevant provisions of the *Contract Documents*.

- 8.2.3 The parties shall make all reasonable efforts to resolve their dispute by amicable negotiations and agree to provide, without prejudice, frank, candid and timely disclosure of relevant facts, information and documents to facilitate these negotiations.
- 8.2.4 After a period of 10 *Working Days* following receipt of a responding party's *Notice in Writing* of reply under paragraph 8.2.2, the parties shall request the Project Mediator to assist the parties to reach agreement on any unresolved dispute. The mediated negotiations shall be conducted in accordance with the Rules for Mediation for Construction Disputes as provided in CCDC 40 in effect at the time of bid closing.
- 8.2.5 If the dispute has not been resolved within 10 *Working Days* after the Project Mediator was requested under paragraph 8.2.4 or within such further period agreed by the parties, the Project Mediator shall terminate the mediated negotiations by giving *Notice in Writing* to the *Owner*, the *Contractor* and the *Consultant*.
- 8.2.6 By giving a *Notice in Writing* to the other party and the *Consultant*, not later than 10 *Working Days* after the date of termination of the mediated negotiations under paragraph 8.2.5, either party may refer the dispute to be finally resolved by arbitration under the Rules for Arbitration of Construction Disputes as provided in CCDC 40 in effect at the time of bid closing. The arbitration shall be conducted in the jurisdiction of the *Place of the Work*.
- 8.2.7 On expiration of the 10 *Working Days*, the arbitration agreement under paragraph 8.2.6 is not binding on the parties and, if a *Notice in Writing* is not given under paragraph 8.2.6 within the required time, the parties may refer the unresolved dispute to the courts or to any other form of dispute resolution, including arbitration, which they have agreed to use.

...

Problems with the roof at 770 Maplewood

[8] Construction on the Project was nearing completion in mid-2018. Lindsay constructed the two homes at the same time using common subcontractors.

[9] Maplewood took possession of 770 Maplewood in May 2018 and 800 Maplewood in July 2018, although Lindsay continued work on both homes during the remainder of 2018. Lindsay issued its final invoices for the Project in 2018 after Maplewood took possession of the Properties. Since that time, Maplewood has not paid Lindsay the outstanding Contract balance of \$785,351.75 (before interests and costs).

[10] After Lindsay issued its invoices for the Contract balance, disputes arose between the parties regarding the roof design and construction at both Properties.

[11] The roof system, gutter and eave designs were identical for both 770 and 800 Maplewood Lane. In August 2018, water was observed dripping from the ceiling at 770 Maplewood. This led to multiple investigations into the roof assemblies in both houses. Experts cut access holes into the ceilings and performed moisture scans. Widespread moisture and spray foam installation issues were discovered at 770 Maplewood. According to Maplewood, the investigations did not reveal similar issues at 800 Maplewood. The parties and the Consultant discussed remediation, including the development of a roof replacement plan for 770 Maplewood. Lindsay put its insurer and the spray-form subcontractor on notice of the issues at 770 Maplewood.

[12] The Consultant rejected Lindsay's work at 770 Maplewood and found that the construction of the roof assembly was defective. In June 2019, October 2019, November 2019 and February 2020, the Consultant directed Lindsay to commence remediation work at 770 Maplewood.

[13] In March 2020, a mediator was appointed pursuant to the Dispute Resolution provisions contained in the Contract. The mediation, held on April 9, was not successful.

[14] On April 17, 2020, Maplewood filed a Notice of Arbitration seeking a determination that Lindsay breached the terms of the Contract in relation to the construction of the roof assembly at 770 Maplewood. Maplewood requested an award of damages equal to the cost of removing and replacing the roof assembly at 770 Maplewood in fulfillment of the original design requirements. By agreement, Bruce Outhouse, K.C., was appointed as Arbitrator.

[15] Lindsay filed its Statement of Defence and Counterclaim on July 17, 2020. Lindsay denied that it was negligent in the performance of the work under the Contract or that it breached its contractual obligations. It pleaded that any failures with the roof assembly at 770 Maplewood Lane were caused or contributed to by the improper design of the roof and asked that Maplewood's claim against it be

dismissed. Lindsay counterclaimed for the unpaid Contract balance on the Project (both residences).

[16] According to both sets of counsel at the hearing of this application, Maplewood objected to Lindsay's counterclaim, arguing that it exceeded the scope of the arbitration. Arbitrator Outhouse allowed the counterclaim to proceed and on September 29, 2020, the parties agreed that:

1. Arbitrator Outhouse would have jurisdiction over the issues raised in the counterclaim;
2. the 770 Maplewood roof assembly arbitration ("770 Roof Arbitration") would continue to hearing as a separate matter; and that
3. if an award was made in favour of Maplewood in the 770 Roof Arbitration, Lindsay would be entitled to hold back from that award the amount of its counterclaim, pending resolution of the counterclaim.

[17] Maplewood had not filed a statement of defence to counterclaim at the time of the agreement.

[18] The 770 Roof Arbitration was heard by Arbitrator Outhouse in early February 2021. On June 7, 2021, Arbitrator Outhouse issued a 103-page interim decision on

liability, finding that widespread failure of the spray foam insulation was the main cause of condensation and excessive moisture in the roof assembly. He concluded at page 103:

I find that the failure of the spray foam insulation in the roof of the subject property is sufficiently serious and widespread to justify removal of the upper roofing layers to allow for a complete visual inspection to determine the extent of the failure. I further find that Lindsay, in its capacity as general contractor, is obligated to compensate Maplewood for the reasonable cost of removing the upper layers of the roof and, as well, the reasonable cost of removing and replacing the defective spray foam and all other roofing components which are found to be in a damaged or deteriorated condition as result of the failure of the spray foam or it's removal. However, for the reasons stated in the proceeding section of this interim decision I have decided to postpone making a decision on the issue of damages and reserve jurisdiction to determine them at a later date.

[19] DORA Construction (“DORA”) was selected through a competitive bidding process to perform the remediation work at 770 Maplewood. The removal and replacement of the roof at 770 Maplewood began in April 2021 and was completed in January 2022.

[20] The parties appeared before Arbitrator Outhouse on July 18 and 19, 2022, for a damages hearing. On February 28, 2023, Arbitrator Outhouse rendered a 70-page decision awarding damages to Maplewood in the total amount of \$3,616,214.37. He retained jurisdiction to deal with prejudgment interest and costs if the parties were unable to agree.

[21] By decision dated May 8, 2023, Arbitrator Outhouse ordered costs against Lindsay.

Roof assembly issues at 800 Maplewood

[22] According to Maplewood, before November 2021, the main problem observed at 800 Maplewood was the presence of three large fungal growths in the area of the eaves. Unlike at 770 Maplewood, no water infiltrated the interior of 800 Maplewood.

[23] In November 2021, when DORA's resources became available, Maplewood retained DORA and BRK Engineering Inc. (BRK) to conduct preliminary investigations of the eave/gutter system at 800 Maplewood. This process included cutting a few openings into various locations of the roof from the top side, both above and below the gutter line. DORA and BRK's investigations uncovered similar eave/gutter deficiencies at 800 Maplewood as had been discovered at 770 Maplewood. DORA and BRK opined that the eave/gutter deficiencies were the likely cause of the fungal growths on the eaves at 800 Maplewood.

[24] At Maplewood's request, DORA developed a plan to remediate the eave/gutter deficiencies and the deficiencies and damage downslope of the eaves.

[25] On June 28, 2022, counsel for Maplewood notified counsel for Lindsay about the deficiencies found at 800 Maplewood and advised that Maplewood would be proceeding to remediate and would be presenting those costs to Lindsay for reimbursement.

[26] On June 20, 2023, counsel for Maplewood, William Mahody, K.C., wrote to Arbitrator Outhouse, with a copy to then-counsel for Lindsay, Geoffrey Saunders, as follows:

This is a brief update regarding the pending arbitration in relation to remediation at 800 Maplewood Drive [*sic*]. Maplewood and Dora Construction have entered into a CCDC 3 costs plus contract. A copy of the executed contract is attached.

Remediation activity will commence soon and continue over the next few months. Remediation activity will then pause for the winter months and be completed next spring/summer.

As requested by Mr. Saunders, Maplewood will make the property available for viewing by representatives of Lindsay on dates to be agreed to by the parties.

It might be advisable to set a call with you in October 2023 to discuss remediation status and set hearing dates in the later half of 2024.

[27] The next day, Mr. Saunders wrote to Arbitrator Outhouse, with a copy to

Mr. Mahody:

We were somewhat surprised to receive Bill's letter to you of June 20, 2023. He makes reference to a pending arbitration with respect to remediation at 800 Maplewood Drive [*sic*]. There is no such pending arbitration.

Your appointment as arbitrator with respect to certain issues at 770 Maplewood Drive [*sic*] was confirmed by Bill's email to you of May 20, 2020. I am sending herewith a copy of Maplewood's Notice of Arbitration which accompanied that email. Nowhere in that Notice is there reference to any remediation at 800 Maplewood Drive [*sic*]. You will also recall that when Lindsay filed its counterclaim in that arbitration Maplewood strenuously objected and argued that arbitration dealt solely with the roof assembly at 770 Maplewood. The parties

ultimately agreed that Lindsay's counterclaim would be dealt with by you separately. The counterclaim does not in any way deal with remediation issues at 800 Maplewood.

At no time has Maplewood given Lindsay notice in writing of its intent to refer such remediation issues at 800 Maplewood to arbitration, as required by GC 8.2.6 of the contract. Therefore, and with all due respect, you do not have jurisdiction to deal with the same.

[Emphasis added]

[28] Mr. Mahody responded to Mr. Saunders directly by letter on June 26, 2023:

I write in response to your letter to Bruce Outhouse of June 21.

When 770 Maplewood Lane was remediated, Maplewood observed that the gutter assemblies had not been constructed consistent with the design specifications. On June 28, 2022 Maplewood brought this issue to the attention of Lindsay by way of written correspondence, which indicated:

During the roof remediation at 770 Maplewood, it was noted that the gutter assemblies were constructed in a manner materially different from the design specification. Preliminary investigation at 800 Maplewood indicated that similar gutter deficiencies exist at that residence. That deficiency may explain why the fungal growth occurs at the eaves of 800 Maplewood. Maplewood will be proceeding to remediate 800 Maplewood and present those costs to Lindsay for reimbursement.

In response to the above notice, Lindsay responded:

With respect to the gutter assemblies, Lindsay will certainly want to view the conditions at 800 Maplewood both before and during the remediation. What further information is available with respect to the assemblies at 770 other than the photos and videos taken during the removal of the assembly. Has there been comment from the consultant or other professionals on the construction? When do you expect this remedial work to commence? Thanks.

At Lindsay's request, Maplewood provided a further update in October 2022 regarding 800 Maplewood stating:

Maplewood continues to pursue a quotation to have the gutters at 800 Maplewood repaired per the specification. Given the construction season, it is likely that repairs work will occur in the spring of 2023. I will provide a further update when available.

And Lindsay responded:

Please ensure [Lindsay] will have the opportunity to view the exposed gutters when the work proceeds.

The record in this matter is clear – the deficiencies in the gutter assembly construction were properly brought to Lindsay’s attention upon discovery.

Maplewood’s position is that Mr. Outhouse’s background as the existing arbitrator for the project – pursuant to a single CDCC 2 contract – makes him the most appropriate arbitrator to deal with the gutter assembly issue.

Initiating a separate ADR process for the gutter assembly dispute will add significantly to the legal fees for all parties. All those legal fees will ultimately be borne by the unsuccessful party. If Lindsay requires the initiation [*sic*] separate ADR process, Maplewood will most likely seek to have Mr. Outhouse appointed Arbitrator, and if successful, we will be right back to where we are today.

Maplewood maintains that taking the gutter assembly issue to arbitration (preferably before Mr. Outhouse) is the most commercially reasonable way to address the gutter assembly issue.

I would ask that you please seek instructions on this matter immediately and provide Lindsay’s position.

[29] On July 4, 2023, Mr. Saunders responded to Mr. Mahody as follows:

This is in response to your letter of June 26, 2023. We do not agree with your analysis.

Maplewood became aware of the issues with the eaves at 800 Maplewood Lane in November of 2019. At that time, Dana Wright photographed the fungal growth and forwarded that information to Stephen Wilson of the Xpera Group. The fungus and moisture issues at 800 Maplewood Lane were a subject of Mr. Wilson’s supplemental report of January 8, 2020. That report was sent to Cory Bell on February 3, 2020 by Leo Marmol, with a letter that referenced moisture issues at Lot 2 and Lot 4 and that contained a direction that Lindsay repair and remediate the deficiencies identified by Xpera.

On February 11, 2020, Cory Bell of Lindsay responded by letter to Leo Marmol disagreeing with his interpretation of the contract. That letter was followed up by an email from Cory Bell to Paul Gauthier of February 14, 2020. That email made specific reference to the Xpera report and the fungus growing under the eaves, as well as the cause of the same. These three pieces of correspondence, and the Xpera report, formed the basis of the dispute between the parties which your client referred to the Project Mediator, Mike Ryan, on March 24, 2020.

The dispute was mediated on April 9, 2020. The mediation was unsuccessful and was terminated by Mike Ryan by email at 7:14 that evening.

Pursuant to GC 8.2.6 of the contract, either party may refuse the dispute which had been mediated to be finally resolved by arbitration under the CCDC 40 rules not later than 10 working days after the mediation was terminated. On April 17, 2020, Maplewood referred the issues relating to 770 Maplewood Lane to arbitration. It has never referred the issues relating to 800 Maplewood Lane to arbitration.

As the issues relating to 800 Maplewood Lane have never been referred to arbitration, the arbitration agreement under GC 8.2.6 is no longer binding on Lindsay, pursuant to GC 8.2.7. Therefore, Lindsay is not prepared to arbitrate those issues before Mr. Outhouse or any other arbitrator.

Further, given the Owner was clearly aware of the issues at 800 Maplewood Lane by January 8, 2020, referred them to the mediation which terminated on April 9, 2020, and yet chose not to refer them to the arbitration between the parties that followed, the limitation period for any claim related to those issues expired before your letter of June 28, 2022 (which correspondence and Lindsay's replies were "without prejudice" in any event).

I trust this makes clear Lindsay's position.

[Emphasis added]

[30] Also in July 2023, DORA began the eave/gutter remediation work at 800 Maplewood, which involved opening a large expanse of the roof. According to Maplewood, upon opening the roof, DORA and BRK discovered broader issues with the roof assembly, including extensive cracks and gaps in the spray foam, moisture and rotten wood along the peak ridge of the roof, sawdust entombed in the spray foam and gaps between the members of the 2x6 framing system.

[31] On August 23, 2023, Maplewood wrote to the Consultant pursuant to Clause 2.2.8 of the Contract requesting the Consultant's findings in relation to whether the as-built gutter system, the spray foam in the roof assembly, and the 2x6 framing in the roof assembly at 800 Maplewood complied with the design specifications. On

August 31, 2023, the Consultant issued a letter which found that the gutters and roof assembly were not in compliance with the Construction documents. Leo Marmol at Marmol Radziner wrote:

As we observed at 770 Maplewood Lane, the spray foam at 800 Maplewood Lane is defective, resulting in the poor performance of the existing roof assembly, thereby creating water, thermal, air and vapor problems. With all the information that we now have available to us, it is our opinion that the existing 2x6 roof framing, spray foam and gutters need to be replaced. Unfortunately, the conditions at 800 Maplewood Lane are similar to the defective conditions confirmed at 770 Maplewood Lane.

[32] On September 7 and September 15, 2023, Maplewood’s counsel wrote to Lindsay’s counsel providing a copy of the Consultant’s findings and requesting confirmation that Lindsay was prepared to engage in the negotiation and mediation mechanisms outlined at GC 8.2 of the Contract. Lindsay’s new counsel, Ian Dunbar, responded to Mr. Mahody on September 19, 2023. Mr. Dunbar summarized Lindsay’s position as follows:

As you might expect, we are still in the process of coming up to speed on this file. At this time, I write only in response to your September 7, 2023 email addressed to Mr. Saunders regarding the property at 800 Maplewood Lane (“800ML”) and the correspondence of August 31, 2023 from Marmol Radziner (the “Consultant’s Letter”).

In brief, Lindsay’s position regarding the issue raised in your email is:

Marmol Radziner does not presently have any authority as Consultant under the contract of January 21, 2016 (the “Contract”) to make findings or issue directions regarding 800ML. The Consultant does not retain authority under a CCDC-2 contract to make findings and determinations for an indefinite period, and construction ended many years ago. Lindsay relies on GCs 2.1, 2.2, 8.1, and 8.2 of the Contract in support of this position, and reserves the right to raise and rely on further or other sections of the Contract should this be disputed by Maplewood.

In any event, Maplewood can no longer have recourse to the dispute resolution provisions in the Contract in relation to the matters raised in the Consultant's Letter. Maplewood already submitted claims regarding moisture problems and roofing defects at both residences to mediation in 2020, then failed to pursue an arbitration for such issues in relation to 800ML when the mediation was unsuccessful. Any such claim would now be barred by operation of the Contract, the *Limitation of Actions Act*, SNS 2014, c 35, and common law.

Without derogating from the above, Lindsay also disputes the substantive content of the Consultant's Letter of August 31, 2023. Lindsay takes the position that: (i) Marmol Radziner had insufficient information to make its purported findings; (ii) the roof system, roof assembly, and gutter system are in compliance with the Contract, and are not deficient; and (iii) in any event, Lindsay and its subcontractor(s) did not in any way cause or contribute to any alleged deficiency in either the roof system, roof assembly, or gutter system at 800ML.

I trust the foregoing makes our position clear.

[33] On October 4, 2023, Maplewood issued a Notice of Arbitration requesting that the issues related to the construction of the eave/gutter system and roof assembly at 800 Maplewood be referred to arbitration and proposing Bruce Outhouse, K.C. as arbitrator. Maplewood estimated that the cost of removing and replacing the roof assembly, including the eave/gutter system, would be approximately two million dollars.

[34] Also on October 4, 2023, Maplewood filed a Statement of Defence to Counterclaim which stated, in part:

1. To date, the CCDC-2 Contract has not been closed-out.
2. On multiple occasions over the last two years, Maplewood has attempted to initiate close-out discussions with Lindsay, but Lindsay has refused to engage in close-out discussions.

3. Maplewood states that had Lindsay acted reasonably and engaged in normal contract close-out discussions, the following categories of additional costs incurred by Maplewood would have been addressed:
 - a. Construction defects repaired (or to be repaired) at Maplewood's expense. These defects exist in the bedrooms, office, laundry room, front foyer, stairways, hallways, and washrooms at 770 Maplewood Lane, and the basement floor, roof assembly, eaves/gutters, and window treatments at 800 Maplewood Lane.
 - b. Additional costs incurred by Maplewood due to schedule delays caused by Lindsay's failure to complete performance of the Work by the agreed upon completion date of March 31, 2017;
 - c. Additional project management costs incurred by the Owner.
(“Additional Costs incurred by Maplewood”)
4. Maplewood states that rather than an amount owing to Lindsay as alleged in the Counterclaim, there is, in fact, significant amounts owing to Maplewood from Lindsay.
5. In this Arbitration, Maplewood seeks the following findings from the Arbitrator:
 - a. A determination that Lindsay is responsible for the Additional Costs incurred by Maplewood;
 - b. Dismissal of the Counterclaim;
 - c. Costs in favour of Maplewood; and
 - d. Direction that Lindsay pay to Maplewood all amounts outstanding in relation to the Arbitrator's Award of February 28, 2023.

[Emphasis added]

Positions of the Parties

[35] Although Lindsay pleaded in its Amended Notice of Contest that Maplewood is barred from bringing a claim in relation to the roof construction at 800 Maplewood because it has not complied with the Contract's dispute resolution provisions and/or the applicable limitation period has expired, the parties agreed prior to the hearing

to argue these issues before an arbitrator at a later date. As a result, the only issue before this court is whether to grant or stay Maplewood's application seeking the appointment of Bruce Outhouse as arbitrator.

[36] Maplewood argues that Bruce Outhouse is the only appropriate choice for an arbitrator because the issue of whether Lindsay breached the Contract in relation to the construction of the eave/gutter system and roof assembly at 800 Maplewood is already before him in the context of the defence to counterclaim. Maplewood says, however, that Arbitrator Outhouse's jurisdiction to award damages for any deficiencies in the construction of both 770 and 800 Maplewood is limited to the \$785,351.75 claimed in the counterclaim. Maplewood submits that appointing Mr. Outhouse as arbitrator would give him the jurisdiction to make an award for the full amount of Maplewood's damages. Maplewood also says it had no choice but to file the new Notice of Arbitration after Lindsay took the position in June 2023 that Arbitrator Outhouse had no jurisdiction over any deficiencies at 800 Maplewood.

[37] Lindsay argues that Maplewood's attempt to bring a separate proceeding in relation to the alleged roof construction deficiencies is an abuse of process because Arbitrator Outhouse already has jurisdiction over the issues that Maplewood is trying to raise in its Notice of Arbitration. Lindsay says that whether it properly carried out its construction work on 800 Maplewood is already before Arbitrator

Outhouse in the counterclaim. Lindsay further notes that Maplewood pleaded in the defence to counterclaim that there are significant amounts owing to Maplewood from Lindsay in excess of the holdback amount. In other words, Maplewood pleaded a new affirmative claim – the same claim it makes in its Notice of Arbitration – by way of the defence to counterclaim. Lindsay says it follows that the exact scope of the arbitrator’s existing jurisdiction, including whether the affirmative claim is properly before him or can otherwise be added to the existing arbitration, must be assessed and determined by the arbitrator before any further steps can be taken.

[38] Lindsay argues in the alternative that if the court determines that Maplewood is permitted to refer its claim regarding the roof construction at 800 Maplewood to a second, separate arbitration, procedural fairness requires that a different arbitrator be appointed to hear that claim.

Issue

[39] Should the court exercise its discretion to appoint Bruce Outhouse as arbitrator?

Evidence

[40] Maplewood filed the affidavits of Paul Gauthier, the owner of Maplewood, sworn January 29, 2024 and February 22, 2024.

[41] Lindsay filed the affidavit of Patrick O'Connor, affirmed February 15, 2024.

[42] Neither affiant was cross-examined on the application.

Law and Analysis

[43] Neither party disputes that the court has the authority under the Contract and the *Commercial Arbitration Act*, S.N.S. 1999, c. 5 (“CAA”) to appoint an arbitrator. Part 8 of the Contract incorporates by reference the CCDC 40 Rules for Mediation and Arbitration of Construction Disputes (“CCDC 40 Rules”). Relevant provisions include:

Commencement of Arbitration

- 7.1 Deemed to Commence – For purposes of the calculation of time under the Rules, the arbitration shall be deemed to have commenced on the later of
- (a) the date the respondent receives the notice under clause 6.1, or
 - (b) the applicable date referred to in the Contract.

Appointment of Arbitrator

- 8.1 Single Arbitrator – Subject to clause 8.2, the arbitration shall be conducted before a single arbitrator who possesses the qualifications specified in clause 8.5.
- ...
- 8.3 Appointment of Single Arbitrator – The parties shall make every reasonable effort to reach agreement on a single arbitrator within 30 days after the arbitration commences.

- ...
- 8.5 Qualifications – An arbitrator must be impartial and independent of the parties and be an experienced and skilled commercial arbitrator and preferably shall reside or conduct business in the jurisdiction of the Place of the Work and have knowledge of relevant construction industry issues.
- ...
- 8.7 No Agreement Possible – If
- (a) an agreement is not possible under clause 8.3 or 8.4(b), or
- (b) a party fails to make an appointment under clause 8.4(a),
- either party may make a written request, with a copy to the other party, to the neutral appointing authority named in the Supplementary Conditions to the Contract or, if none is named, to the Court to appoint an arbitrator as soon as possible.
- 8.8 Considerations – In making an appointment under clause 8.7, the neutral appointing authority or the Court shall give due consideration to the nature of the Contract, the issue in dispute, the required qualifications of the arbitrator and any other aspects which will help to identify an appropriately qualified, independent and impartial arbitrator.

[44] The CAA restricts a court’s power to intervene in matters governed by the Act. Section 8 states:

No court may intervene in matters governed by this Act, except for the following purposes as provided by this Act:

- (a) to assist the arbitration process;
- (b) to ensure that an arbitration is carried out in accordance with the arbitration agreement;
- (c) to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement;
- (d) to enforce awards.

[45] Section 12 of the CAA gives the court the power to appoint an arbitrator in two situations:

- 12 (1) The court may appoint the arbitral tribunal, on the application of a party, if
- (a) the arbitration agreement provides no procedure for appointment of the arbitral tribunal; or

(b) the person with power to appoint the arbitral tribunal has not done so within the time provided in the agreement or after a party has given the person seven days' notice to do so, whichever is later.

[46] Whether the court ought to exercise this authority in the circumstances is a separate issue.

[47] Both parties rely on the same jurisprudence for the proposition that in cases involving an arbitration clause, the court's discretion not to refer a matter to arbitration is circumscribed and should be exercised only where the challenge to an arbitrator's jurisdiction is based solely on a question of law. In *Dell Computer Corp. v. Union des Consommateurs*, 2007 SCC 34, Deschamps J., for the majority, stated:

[48] The Supreme Court of Canada revisited the *Dell* framework in *Uber Technologies Inc. v. Heller*, 2020 SCC 16:

[33] In setting out this framework, *Dell* adopted an approach to the exercise of discretion that was designed to be faithful to what the international arbitration literature calls the “*prima facie*” analysis test as regards questions of fact and questions of mixed fact and law (para. 83). Under this test, the court must “refer the parties to arbitration unless the arbitration agreement is manifestly tainted by a defect rendering it invalid or inapplicable” (para. 75). To be so manifestly tainted, the invalidity must be “incontestable”, such that no serious debate can arise about the validity (para. 76, quoting Éric Loquin, “Compétence arbitrale”, in *Juris-classeur Procédure civile* (loose-leaf), fasc. 1034, at No. 105). Rather than adopting these standards literally, *Dell* gave practical effect to what was set out in the arbitration literature by creating a test whereby a court refers all challenges of an arbitrator's jurisdiction to the arbitrator unless they raise pure questions of law, or questions of mixed fact and law that require only superficial consideration of the evidence in the record (paras. 84-85).

[34] The doctrine established in *Dell* is neatly summarized in its companion case, *Rogers Wireless Inc. v. Muroff*, [2007] 2 S.C.R. 921, at para. 11:

The majority of the Court held that, when an arbitration clause exists, any challenges to the jurisdiction of the arbitrator must first be referred to the arbitrator. Courts should derogate from this general rule and decide the question first only where the challenge to the arbitrator's jurisdiction concerns a question of law alone. Where a question concerning jurisdiction of an arbitrator requires the admission and examination of factual proof, normally courts must refer such questions to arbitration. For questions of mixed law and fact, courts must also favour referral to arbitration, and the only exception occurs where answering questions of fact entails a superficial examination of the documentary proof in the record and where the court is convinced that the challenge is not a delaying tactic or will not prejudice the recourse to arbitration.

[49] In *EPCOR Power LP v. Petrobank Energy and Resources Ltd.*, 2010 ABCA 378, the Alberta Court of Appeal applied the *Dell* framework in the context of a limitation period challenge. In upholding the decision of Martin J. (as she then was), the panel explained:

[16] As a matter of law and policy, the role of the courts in relation to arbitration has been one of non-intervention. The objective of arbitration legislation and the jurisprudence interpreting it is to promote adherence to agreements, efficiency and fairness and to lend credibility to an important dispute resolution process. Courts are instructed to be mindful of this overarching purpose in any exercise of discretion. The discretion seems to be framed in the negative, as one "not to refer", a distinction intended to emphasize the legislative preference for arbitration.

[17] These parties have agreed that disputes arising from the contract may be submitted to arbitration. Article A11.1 states that any controversy may be submitted, and provides mandatory principles once notice of a controversy has arisen. The chambers judge concluded that the parties had chosen broad language stating that arbitration is available for "any controversy". The controversy here clearly arises under the contract. It is also clear that clause 5.7 dealing with the price mechanism has a mandatory referral to arbitration.

[18] Section 6 of the *Arbitration Act*, RSA 2000, c A-43 sets out when a court may intervene in matters governed by the Act. The starting point is non-intervention, subject to a stated list of fairly narrow and discrete exemptions to be interpreted in accordance with the expressed legislative purpose.

[19] In *Dell*, the Supreme Court of Canada considered this interplay and set out general principles governing it: (1) As a general rule in **any** case involving an arbitration clause, a challenge to the arbitrator's jurisdiction **must** be resolved first by the arbitrator. (2) A court should depart from the rule of systematic referral to arbitration **only** if the challenge to the arbitrator's jurisdiction is based **solely** on a question of law. (3) If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration as arbitrators have for this purpose the same resources and expertise as courts. (4) Where questions of mixed law and fact are concerned, the court hearing the referral application **must** refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record. (5) Even when considering one of the exceptions, the court **might** decide that to allow the arbitrator to rule first on his or her competence would be best for the arbitration process (emphasis added).

[20] It is apparent from the language employed by the Supreme Court of Canada that the discretion available to not refer a matter to arbitration is circumscribed, and applies to narrow circumstances: only on a pure question of law alone that can be readily resolved on superficial material and will expeditiously dispose of the entire dispute between the parties. Even if the court can resolve an issue itself, it may still choose not to do so and instead refer the matter to arbitration.

[21] The appellant submits that whether an arbitration is statute barred is not a question of jurisdiction for the arbitrator, but instead raises the question of whether an arbitration exists at all. This distinction was made in *obiter* in *Autoweld* and by the majority (also in *obiter*) in *The Plan Group v. Bell Canada*, 2009 ONCA 548, 96 OR (3d) 81. The latter issue, whether an arbitration exists at all, the appellant says, must be determined by the court. For the reasons that follow, we reject that proposition.

[22] First, the appellant's interpretation effectively converts a discretion not to refer to arbitration into a legal requirement that rejects arbitration in favour of the courts. In effect, it turns much of the arbitration jurisprudence on its head.

[23] Second, the appellant's argument hinges on the distinction between the jurisdiction of the arbitrator and whether the arbitration exists - the latter, it says, being for the court, and the court only, to decide. However, that distinction and the comments in *Autoweld* must be read in the context of that case. One of the issues in *Autoweld* was whether a settlement agreement had superceded an agreement to arbitrate. In other words, the court was faced with the question of whether the underlying agreement to arbitrate had been extinguished by the terms of the settlement agreement. The comment that the issue was not so much one of the arbitrator's jurisdiction but about whether an arbitration existed at all was made in regard to the lack of the existence of any agreement to arbitrate. The court in *Autoweld* simply stated, in keeping with the principles in *Dell*, that where there is a discrete threshold issue of pure law that can be dealt with easily by a court, a court is not compelled to refer.

[24] The raising of a limitation period, while it may be a threshold question, is rarely a pure question of law. In this case the chambers judge identified a number of issues of mixed fact and law that must be determined before the limitation question can be answered. Moreover, the limitation, to the extent it does apply, does not extinguish the claim or the dispute. At most it will act as a bar to recovery or a defence to the claim or a portion thereof. The dispute over the pricing mechanism on a go forward basis will remain.

[25] Whether some or all of the claim is statute barred is a question of mixed law and fact, and accordingly the determination to refer that question to arbitration was an appropriate exercise of the chambers judge's discretion.

[26] Moreover we find no error in the chambers judge's interpretation of the breadth of the arbitration clause as it pertains to the nature and facts of this dispute. Clause 5.7 specifically requires a dispute regarding a new price reference mechanism to be submitted to arbitration.

[27] A willingness by both parties to seek the court's determination on a "threshold" matter does not oust the court's discretion to refer the matter to arbitration. We find no error in the chambers judge's observation at the outset of the hearing and her subsequent conclusion that the dispute should be referred to arbitration in accordance with the principles in *Dell* and the agreement between the parties.

[Emphasis in original]

[50] The parties also both refer to an arbitrator's power under the CCDC 40 Rules and the CAA to rule on the arbitrator's own jurisdiction. The CCDC 40 Rules state:

10.2 Ruling on jurisdiction – The arbitrator may rule on the arbitrator's jurisdiction.

Section 19 of the CAA provides:

19 (1) An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration and may, in that connection, rule on objections with respect to the existence or validity of the arbitration agreement.

...

(4) A party who objects to the jurisdiction of an arbitral tribunal to conduct an arbitration shall object no later than the beginning of the hearing or, where there is no hearing, no later than the first occasion on which the party submits to the tribunal a statement referred to in Section 27.

...

(8) The arbitral tribunal may rule on an objection when the objection is raised or may deal with the objection in an award.

(9) Where the arbitral tribunal rules on an objection as a preliminary question, a party may, within thirty days after receiving notice of the ruling, make an application to the court to decide the matter and the court, when deciding the matter, shall apply the principles set out in Section 8.

(10) There is no appeal from the decision of the court on an application pursuant to subsection (9).

...

[51] While both parties agree on the relevant law, they disagree on how it applies in this case. According to *Maplewood*, the jurisprudence dictates that if the court is satisfied that the claim or dispute is one which the parties intended, under the Contract, would be determined by an arbitrator, then it ought to refer the matter to arbitration, subject only to the limited purposes for which the court can intervene in arbitration under the CAA. *Maplewood* says the dispute about the roof construction is clearly the kind of dispute that the parties intended would be determined by an arbitrator. It submits that the court should therefore refer the matter to an arbitrator, and that the arbitrator should be Bruce Outhouse, because he already has jurisdiction over part of the dispute. *Maplewood* says Arbitrator Outhouse, once appointed, can rule on any preliminary objections raised by Lindsay, including any allegation of bias.

[52] According to Lindsay, the authorities establish that where the parties have agreed to resolve disputes through arbitration, the court should take a “hands off”

approach. Where there are questions about the scope of an arbitrator's jurisdiction, those questions should generally be determined by the arbitrator, not the court. Lindsay agrees that in this case, the scope of the arbitrator's existing jurisdiction over construction deficiencies at 800 Maplewood is unclear and must be determined by the arbitrator before the court can be satisfied that referral of a new Notice of Arbitration to Bruce Outhouse or another arbitrator would not result in an abuse of process.

[53] Lindsay submits that under the CCDC 40 Rules, a party to an existing arbitration can seek leave from the arbitrator to amend its statement of position to add a claim:

- 11.1 Time Limits – The parties shall exchange written statements of their respective positions in the dispute in the following manner:
- (a) the claimant shall give a statement outlining the facts, the matters in issue and the relief or remedy requested not later than 14 days after the procedural meeting is held in clause 9.1;
 - (b) the respondent shall give a statement outlining the response to the claimant's statement and the respondent's counterclaim, if any, not later than 14 days after receiving the claimant's statement;
 - (c) the respondent to the counterclaim shall give a statement outlining the defence to the counterclaim not later than 14 days after receiving the counterclaim.

...

Amendment of Statement – During the proceedings the arbitrator may allow a party to amend or add to any statement made in clause 11.1, including the list of documents, unless

- (a) the amendment or addition goes beyond the terms of the arbitration agreement in the Contract, or

- (b) the other party would be prejudiced by the delay in making the amendment or addition.

[54] Lindsay argues that Maplewood ought to have invoked this process, which would require the arbitrator to consider whether Lindsay would be prejudiced by the delay in adding the claim, rather than trying to sidestep it by commencing this application to have the court appoint an arbitrator in relation to a dispute that is already subject to an ongoing proceeding.¹

[55] In support of its argument that Maplewood's application should be stayed, Lindsay cites *Wackett v. ABN Amro Bank Canada*, 1997 NSCA 108, 1997 CarswellNS 370, where the court held that it is *prima facie* an abuse of process for the same issues to be litigated in two separate court proceedings:

33 The issues in this case are governed by the comments of Jones, J.A., on behalf of this court in *Canadian Life & Health Insurance Compensation Corp. v. Blue Cross of Atlantic Canada* (1997), 156 N.S.R. (2d) 384 (N.S. C.A.), and in particular at p. 388 and 390:

Prima facie it is vexatious and oppressive for a plaintiff to sue concurrently in two courts for the same matter. The relief is simply to stay or strike the second action.

.....

Lis alibi pendens is defined in Black's Law Dictionary, 4th Ed. at p. 1080 as "a suit pending elsewhere". The author's note states:

The fact that proceedings are pending between a plaintiff and defendant in one court in respect to a given matter is frequently a ground for preventing the plaintiff from taking proceedings in another court against the same defendant for the same object and arising out of the same cause of action.

¹The Court notes that this provision refers to an amendment of a statement made under clause 11.1, and not an amendment to the Notice of Arbitration under clause 6.1.

34 Justice Jones referred to *Halsbury's Laws of England*, (4th ed.) vol. 37, paragraph 446, where it is ~

35 There are good reasons for such resolution. Without attempting to be exhaustive, it avoids a multiplicity of court proceedings, the possibility of contradictory judgments, and insulates a defendant from the hardship and expense of defending the same case in more than one jurisdiction.

[56] Lindsay submits that the above comments apply equally to two separate arbitration proceedings.

[57] Lindsay also cites several arbitration decisions indicating that an arbitrator ought not to assume jurisdiction over matters which are the same as, or are subsumed within, a grievance that is already before another arbitrator: *O.P.S.E.U. and O.P.S.S.U. (Re)*, 2004 CanLII 94654 (ON LA), at pp. 282-283; *Util Canada Limited v. Unifor, Local 112*, 2018 CanLII 74228 (ON LA), at paras. 7-10; and *Canadian National Railway Company v. CAW Canada Local 100*, 2012 CanLII 24017 (CA LA), at paras. 47-58.

[58] Finally, Lindsay relies on *NetSys Technology Group AB v. Open Text Corp.*, 1999 CanLII 14937 (Ont. Sup. Ct. J.), which it says establishes that if the scope of the arbitration is unclear, the issue should be determined by the arbitrator and not the court.

[59] In *Netsys*, parties to a commercial arbitration agreement brought competing motions in the context of court and arbitration proceedings having been commenced.

Open Text brought a motion to stay court proceedings commenced by NetSys, while NetSys brought a motion for an injunction to limit the scope of an arbitration commenced by Open Text. NetSys acknowledged that part of the dispute was within the scope of the arbitration clause in their agreement and had filed a defence with counterclaim in the arbitration. However, NetSys asserted that some of the matters which Open Text sought to arbitrate were beyond the scope of the arbitration clause.

[60] The court in *NetSys* held that unless it was clear that matters fell outside the scope of the arbitration agreement, it was appropriate to defer to the arbitrator for the purpose of interpreting the arbitration clause and deciding questions about the scope of the arbitrator's jurisdiction:

[27] Because I cannot say that the issues between the parties clearly fall within the scope of the arbitration clause, I must decide whether, in the first instance, the court or the arbitrator should interpret the clause. ...

...

[33] Of particular significance in the present case is Article 16(3) of the Model Law, which provides as follows:

Article 16. Competence of arbitral tribunal to rule on its jurisdiction

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article [i.e. a plea that the arbitral tribunal does not have jurisdiction] either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within 30 days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

[34] Article 16(1) (quoted earlier in these reasons) empowers the arbitral tribunal to rule on its own jurisdiction. Article 16(3) allows a party to ask the court to

“decide the matter” after the arbitral tribunal has ruled on jurisdiction as a preliminary question. The statute therefore expressly contemplates that the arbitral tribunal itself will first decide the matter of its own jurisdiction. On this basis I conclude that at this stage of these proceedings, the court should defer to the arbitrator for purposes of interpreting the arbitration clause and deciding questions about the scope of the arbitrator’s jurisdiction.

[35] Of further assistance on this point is the decision of the British Columbia Court of Appeal in *Gulf Canada Resources Ltd./Ressources Gulf Canada Ltée v. Arochem International Ltd.* (1992), 1992 CanLII 4033 (BC CA), 66 B.C.L.R. (2d) 113 (B.C. C.A.). In that case the court was called upon to consider the British Columbia *International Commercial Arbitration Act*, S.B.C. 1986, c. 14. The sections of that statute, both in numbering and content, more or less replicate the articles of the *Model Law*, with some minor differences.

[36] In the *Gulf Canada* case, the British Columbia Court of Appeal considered the interplay between sections 8(1) and 16 of the British Columbia *Act*, which are comparable to Articles 8(1) and 16 of the *Model Law*. On this subject Mr. Justice Hinkson had the following to say (at pp. 120-121 of 66 B.C.L.R. (2d)):

Considering section 8(1) in relation to the revisions of section 16 and the jurisdiction conferred on the arbitral tribunal, in my opinion, it is not for the court on an application for a stay of proceedings to reach any final determination as to the scope of the arbitration agreement or whether a particular party to the legal proceedings is a party to the arbitration agreement because those are matters within the jurisdiction of the arbitral tribunal. Only where it is clear that the dispute is outside the terms of the arbitration agreement or that a party is not a party to the arbitration agreement or that the application is out of time should the court reach any final determination in respect of such matters on an application for a stay of proceedings.

Where it is arguable that the dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement then, in my view, the stay should be granted and those matters left to be determined by the arbitral tribunal.

[37] In the same case, Madam Justice Southin had the following to say (at p. 124 of 66 B.C.L.R. (2d)):

...[O]nce an arbitration agreement is shown to exist, the court ought not to construe it narrowly with a view to avoiding the operation of section 8.... When it is not plain that the matters in dispute in the action fall outside the arbitration agreement, the question whether they fall within it is not, in the first instance, for the court but for the arbitrator.

[38] I agree with and adopt both of the foregoing statements. I am therefore reinforced in my conclusion that the court should defer to the arbitrator for purposes of interpreting the arbitration clause.

[39] This conclusion applies equally to the motion brought by Open Text for a stay of the court proceedings commenced by NetSys and to the cross-motion by NetSys for an injunction to limit the scope of the arbitration. In either case, the question of the scope of the authority conferred upon the arbitrator by the parties' arbitration clause is to be decided by the arbitrator. It follows that the Open Text motion for a stay of the court proceedings should be granted and the NetSys cross-motion for an injunction limiting the scope of the arbitration should be dismissed.

...

[41] Logically, the stay of the NetSys proceedings should continue at least until the arbitrator has decided all jurisdictional questions. That decision may be forthcoming by way of ruling on a preliminary question, or may form part of the award on the merits: the timing of that decision is a matter for the arbitrator to decide.

[42] In this case there is no question that the parties agreed to submit some of their disputes to arbitration. This is evident from the fact that NetSys has served a defence and counter-claim in the arbitration proceeding.

[43] As a consequence, if the NetSys objection to the jurisdiction of the arbitrator is advanced before and upheld by the arbitrator as a preliminary question, the likely result would be a multiplicity of proceedings between the same parties, some in court and some by way of arbitration. Such a result is undesirable for all the well-recognized reasons, including duplication of effort, increase in expense and inconvenience, and risk of inconsistent decisions, to name a few.

[Emphasis added]

[61] None of the decisions cited by the parties are directly on point. The law is clear, however, that where parties have agreed to resolve their disputes by arbitration, the court's role is a non-interventionist one.

[62] The parties in this case agreed to resolve their disputes by arbitration and have already invoked the arbitration process in relation to construction of the roof assembly at 770 Maplewood. Only Lindsay's counterclaim for the holdback amount of \$785,351.75 remains outstanding.

[63] Both parties rely on the fact that the deficiencies raised by Maplewood in the Notice of Arbitration are already before Arbitrator Outhouse in the counterclaim as the foundation for their positions on this application. According to Maplewood, Arbitrator Outhouse's existing jurisdiction makes him the only appropriate arbitrator to hear the dispute, and the most recent Notice of Arbitration is necessary to give him the authority to make an award that exceeds the amount of the counterclaim. According to Lindsay, the fact that the same deficiencies are already before Arbitrator Outhouse in the counterclaim makes Maplewood's filing of a second Notice of Arbitration an abuse of process.

[64] However, on further probing by the court, Lindsay's counsel stopped short of confirming that Arbitrator Outhouse has existing jurisdiction over the full extent of the roof assembly issues at 800 Maplewood raised in the Notice of Arbitration. When asked by the court if there was any dispute about the components of the September 2020 agreement that Arbitrator Outhouse would have jurisdiction over the issues raised in the counterclaim, Mr. Dunbar responded:

I think there may be a question about what does deficiencies mean in the context of that agreement. Because, at that time, and this is, I think putting yourself in the shoes of other counsel in 2020 is always a difficult proposition, but I think I'm going based just on what Maplewood is saying and, as I understand it, Maplewood is saying, "We didn't know about roof deficiencies... roof assembly deficiencies at 800 Maplewood until, I think it's 2021 or 2022." So certainly, I'm not certain that the September 2020 agreement would include a right to raise deficiencies in relation

to roof assembly issues not even known as of the date of that agreement. So I don't know, My Lady.

[Emphasis added]

[65] In my view, Maplewood's application should be stayed while the parties obtain a ruling from Arbitrator Outhouse on the scope of his existing jurisdiction. In the absence of clarity on this issue, the court cannot determine whether a second Notice of Arbitration is necessary or an abuse of process.

[66] If Arbitrator Outhouse determines that the roof assembly deficiencies raised in the most recent Notice of Arbitration fall outside the scope of the counterclaim and there is no means for the claim to be added to the ongoing arbitration, Maplewood is free to revive its application for the appointment of an arbitrator.

[67] If Arbitrator Outhouse concludes that he does have jurisdiction over the roof assembly deficiencies, but only to the extent of the amount of the counterclaim, the parties and the arbitrator will need to find a path forward that does not involve litigation of the same issue in two separate arbitrations.

Conclusion

[68] Maplewood's application is stayed, pending a decision from Arbitrator Outhouse on the scope of his jurisdiction.

[69] Each party shall bear its own costs of this application.

Smith, J.