

CITATION: Benoit Const. v. Bawa and Hard at Work, 2023 ONSC 1678
COURT FILE NO. CV-18-00135657
DATE: 20230314

**ONTARIO
SUPERIOR COURT OF JUSTICE**

IN THE MATTER OF the *Construction Lien Act*, R.S.O. 1990, c. C.30

B E T W E E N:

BENOIT CONSTRUCTION INC.

Plaintiff

- and -

BAWA ORGANIZATION INC. and HARD AT WORK INC.

Defendants

WOODLEY, J.

REASONS FOR DECISION AT TRIAL

OVERVIEW

1. The Plaintiff, Benoit Construction Inc. (“Benoit”) seeks damages for breach of contract against the Defendant, Hard at Work Inc. (“HAW”) relating to work and services provided for the framing and construction of a luxury residential home project located in King City, Ontario (“the property”).
2. Benoit seeks payment in the amount of \$135,199.79, relating to a Revised Customer Contract dated December 12, 2017 (the “Contract”), and related subsequent verbal agreement for the rental of a telehandler (the “Verbal Agreement”), as follows:
 - i. Amount Unpaid from Invoice dated March 16, 2018: \$25,713.79;
 - ii. Equipment rental invoice for Magni telehandler: \$72,320.00;
 - iii. Holdback: \$ 7,157.00;
 - iv. Balance due on the Contract \$30,000.00.

3. HAW submits that Benoit is owed \$30,963.91 on account of the unpaid balance from the March invoice and the holdback and concedes this amount is due - but denies that Benoit is entitled to any other amount claimed.
4. HAW submits that the Contract required Benoit to complete all wood *and* steel framing at the property and denies there was any subsequent Verbal Agreement that HAW would reimburse Benoit for the cost of the Magni telehandler equipment rental fees totaling \$72,320.00.
5. HAW submits that the Contract was properly terminated due to “shoddy workmanship” and “deficiencies” which required HAW to hire another contractor to correct the deficiencies and complete the project. HAW seeks payment by counterclaim of the sum of \$109,610.00, as follows:
 - i. Cost to correct deficiencies in the amount of \$47,821.60; and
 - ii. Cost to complete the scope of work of \$61,788.40.

THE ISSUES

6. The issues to be decided are as follows:
 - i. Did HAW agree to pay for the equipment rental for the Magni telehandler?
 - ii. Was HAW justified in terminating the Contract with Benoit?;
 - iii. Is HAW entitled to recover costs for corrections of deficiencies and to complete Benoit’s scope of work, and if so, what is the amount owing?

THE DETERMINATION OF ISSUES

7. For the reasons for decision herein, the issues are determined as follows:
 - i. HAW agreed to pay the rental of the Magni telehandler;
 - ii. HAW was not justified in terminating the Contract with Benoit; and
 - iii. HAW is not entitled to recover costs for corrections of deficiencies or costs to complete Benoit’s scope of work.

THE FACTS

The Parties and Primary Witnesses at Trial

8. The Plaintiff Benoit, Construction Inc. (“Benoit”) is a family run framing/construction business that carries on business in the Greater Toronto Area. Andre Benoit is the President of Benoit and the primary carpenter, trainer and supervisor of the company.
9. Mr. Benoit has been a carpenter for 35 years. He was trained by his father who was a carpenter for 60 years. Mr. Benoit’s son, Jonathan, is the family’s third generation carpenter. Jonathan is also an officer and director of Benoit.
10. Mr. Benoit testified that on or about December 12, 2017, he negotiated a Contract with HAW for the wood framing of the property and subsequently negotiated a Verbal Agreement for the installation of structural steel beams and reimbursement of rental fees for a Magni telehandler required to install the steel. Mr. Benoit testified that the Verbal Agreement amended the terms of the Contract and required reimbursement of the Magni telehandler rental fees at the end of the Contract as an “Extra” to the Contract.
11. Mr. Benoit, his son Jonathan, and his team attended at the property to complete the wood framing and the installation of the structural steel beams. Mr. Benoit filed several affidavits in the proceeding and was the primary witness at trial for the Plaintiff, Benoit.
12. Mr. Benoit testified in a straight-forward manner, without artifice. He did not seek to exaggerate or testify about matters outside his personal knowledge or expertise. Although Mr. Benoit’s first language is French, he permitted the trial to proceed in English. Mr. Benoit’s evidence was clear, concise and logical. On those occasions when Mr. Benoit had difficulty understanding, he sought clarification – of either the question posed, or the answer provided. I found Mr. Benoit to be a credible witness who provided reliable evidence.
13. Mr. Benoit’s son, Jonathan Benoit, also worked at the property but was not involved in the contract negotiations between Benoit and HAW. Jonathan provided limited evidence regarding the use and operation of the Magni telehandler. Jonathan provided his evidence in a straight-forward manner and did not seek to exaggerate or speak outside his personal experience or area of expertise. I found Jonathan to be a credible witness who provided reliable evidence.
14. Mr. Benoit’s spouse, Manon Frenette, is an officer and director of Benoit. Ms. Frenette runs the office and manages “all of the paper” including communications with clients, contracts, and the issuance and payment of all invoices. Ms. Frenette testified at trial and was present at the HAW office with Mr. Benoit when the Contract and the Verbal Agreement were negotiated. Ms. Frenette provided crucial evidence concerning the Contract and the Verbal Agreement. Ms. Frenette also provided instructive information concerning her interactions and conversations with HAW regarding allegations of deficiencies and the termination of the Contract.

15. Ms. Frenette appeared to be an honest, straight-forward witness. Ms. Frenette did not appear to exaggerate or provide evidence outside of her personal knowledge or expertise. I found Ms. Frenette to be a credible witness who provided reliable evidence.
16. Hard at Work (“HAW”) is a general contracting company that carries on business in the GTA. Peter McCarthy appeared at trial and provided evidence that he is the owner of HAW. Mr. McCarthy testified that he is not a carpenter nor a skilled tradesperson, he is a general contractor. Mr. McCarthy has employees who act as project managers and site supervisors, and these employees hire skilled tradespersons to complete HAW’s projects. Mr. McCarthy provided some evidence about the nature of HAW’s business and his knowledge of the Contract and alleged Verbal Agreement. However, it was apparent that Mr. McCarthy had little personal knowledge regarding the issues in dispute which limited both the relevance and reliability of his evidence.
17. Mr. McCarthy’s spouse, Ellen McCarthy, is a director of HAW and the office administrator. Ms. McCarthy appeared at trial and testified that she manages communications with clients, contracts, and the issuance and payment of invoices. Ms. McCarthy also testified that she was the person who typed the deficiency list and the termination letter to Benoit.
18. While Ms. McCarthy had some personal involvement in the issues that arose between HAW and Benoit, mainly typing and preparing documents based on facts dictated to her, she had no first-hand personal knowledge of the Contract, the Verbal Agreement, or the (alleged) deficiencies.
19. Initially, I had concern about the truthfulness of Ms. McCarthy’s evidence relative to the legitimacy of certain invoices rendered and paid to the replacement framer Vince DaSilva. However, after further consideration and review of the evidence, I have concluded that Ms. McCarthy’s evidence was to *her* knowledge truthful and accurate.
20. Ms. McCarthy did not possess *first-hand* knowledge of many of the matters in dispute. She did not witness nor participate in the contract negotiations, nor did she inspect any completed work. Accordingly, while I find that Ms. McCarthy was a credible witness, I also find that her evidence on crucial issues is *not* reliable as she had little first-hand knowledge of the matters in dispute.
21. Vince Oppedisano is a director of HAW and was the project manager at the property. While not a carpenter or skilled tradesperson, Mr. Oppedisano has worked in construction for the past 25 years: as a project manager for the past 12 years; and formerly working in exterior cladding and stucco. Mr. Oppedisano negotiated the Contract with Mr. Benoit and while he denies any Verbal Agreement existed between HAW and Benoit, he testified that he was present when Mr. Benoit brought a Magni telehandler pamphlet to HAW’s office.
22. Mr. Oppedisano filed an affidavit and was the primary witness for HAW at the trial. Mr. Oppedisano testified that Benoit’s scope of work pursuant to the Contract *included* both the wood framing *and* the installation of the structural steel beams. Mr. Oppedisano denied

that there was a subsequent Verbal Agreement between HAW and Benoit that required HAW to reimburse Benoit for the Magni telehandler rental fees as an Extra to the Contract.

23. Although not a carpenter or a steel worker, Mr. Oppedisano testified “any framer that I would hire would install this steel structure without any problem”. When it was suggested to Mr. Oppedisano that Mr. DaSilva (the replacement carpenter hired by HAW) and Cesar Avero (the Carpenter’s Union Rep) both testified that a carpenter would *not* install the steel structure – Mr. Oppedisano replied that he “knows more” on the subject than either.
24. Mr. Oppedisano appeared as a dedicated employee and a confident witness who was directly involved in all aspects of negotiation of the Contract and alleged Verbal Agreement, the listing of the alleged deficiencies, and the eventual termination of the Contract.
25. Having considered the evidence of Mr. Oppedisano in relation to all other evidence presented at trial, I find his evidence on critical issues was not supported by independent documentary evidence or independent witness testimony. Further, Mr. Oppedisano’s evidence differed markedly from evidence that I do accept as reliable. For these reasons, I find that Mr. Oppedisano’s evidence with respect to critical issues has limited reliability.

The Project

26. Sometime in 2017, HAW secured a contract as General Contractor to build a luxury residential home located at 53 Elizabeth Drive, King City, Ontario (“the property”).
27. In October of 2017, Fabrizio Cichella (“Cichella”) obtained a contract to supply the wood framing, labour and related materials for the property.
28. On October 12, 2017, Benoit provided a quotation to Cichella to Sub-Contract the wood framing, labour and related materials at the property for the sum of \$90,431.64 (“the Sub-Contract”).
29. By the terms of the Sub-Contract with Cichella, Benoit agreed to “supply a reach forklift and temporary stairs” and to “supply labor and nails to frame”.
30. Benoit commenced work pursuant to the Sub-Contract and issued an invoice dated November 7, 2017, in the amount of \$27,129.04. The invoice was paid in full by HAW.
31. Shortly thereafter, Cichella’s contract was terminated effectively terminating Benoit’s Sub-Contract.

Changes to the Build

32. In November of 2017, significant changes were made to the project by the owner, which required that heavy, elongated, structural steel beams and columns be used to construct and install the steel framing of an elevated terrace and associated roof structure on the second floor, at the back of the house. This change was not contemplated in the Sub-Contract.

The Revised Customer Contract: December 12, 2017

33. On December 12, 2017, HAW entered into a contract (“the Contract”) with Benoit to supply the framing work at the property. This is the first time that Benoit had a contract with HAW for any project. Mr. Oppedisano and Ms. Frenette are the signatories to the Contract, and both testified as to the terms, as did Mr. Benoit who was a witness to the Contract.
34. The Contract provided as follows: “Revised contract based on discussion with Engineer as follows: Frame as per blueprint residence @ 53 Elizabeth Drive, 5,928 sqf @ \$14 = \$82,992 includes back framing; includes basement framing; includes basement back framing. Extras: remove part of first floor; remove beam on first floor; other modifications to first floor as per Engineer request. Total extras \$9,000. Any additional extras beyond this agreement will be charged at \$85/hr subtotal \$94,992. Payment as follows: 30% at first floor completion – paid \$24,008 + tax; 30% at second floor completion \$30,742 = tx; 30% once roof completed \$30,742 = tx; 10% following inspection/within 15 days of completion; tax \$12,348.96; Grand Total \$107,340.96; Customer to supply materials & gas for generator. *Benoit Construction to supply labor & nails to frame.* Signed by Vince Oppedisano (HAW) and Andre Benoit.” (*Emphasis added.*)
35. The Contract, on its face, specifically deletes any reference to Benoit supplying a “reach forklift and temporary stairs” but does not otherwise differ markedly from the earlier Sub-Contract. The Contract does not provide for the installation of structural steel beams, nor does it reference that Benoit would supply a crane or Magni telehandler. Instead, the Contract provides that Benoit would supply “labor and nails to frame” which is consistent with a scope of work limited to the wood framing of the property.
36. Mr. Benoit testified that the Contract was for wood framing only and required Benoit to “supply labor and nails to frame”. Mr. Benoit testified that he didn’t have any discussions with the engineer as noted on the Contract, but he did have discussions with Conrad Kijewski, HAW’s site supervisor. Mr. Benoit believes the reference to “engineer” on the Contract means Mr. Kijewski, as it was Mr. Kijewski’s job to speak to the engineer, not his. Mr. Benoit denied receiving any “new” drawings and testified that he reviewed the same Ian Robertson Design drawings used to prepare his earlier quotation for the Sub-Contract. Mr. Benoit testified that he was not shown the Master Steel drawings, nor was there any reason for him to review them prior to entering the Contract, as the Contract was for wood framing only.
37. Mr. Benoit testified that he did *not* have any discussion at the time of the Contract that Benoit would be required to install the structural steel beams. Mr. Benoit testified that Benoit is a carpentry business, and as with all contracts, they were contracted to install the wood framing only. Benoit had *never* previously installed structural steel beams.
38. Further evidence regarding the usual scope of work for carpenters was provided by Mr. DaSilva and by Mr. Avero, the business agent for Carpenter’s Union Local 1030. Both Mr. DaSilva and Mr. Avero testified that carpenters install wood framing, and steel workers install steel structures.

39. During cross-examination, it was suggested to Mr. Benoit that the reference in the Contract to “discussion with Engineer” and “frame as per blueprint residence” evidenced that Mr. Benoit had reviewed the Master Steel drawings in detail and had agreed to install the structural steel beams – as part of the overall framing. Mr. Benoit denied that he had been provided with the Master Steel drawings prior to execution of the Contract and repeated that the Contract was for wood framing only. Mr. Benoit further testified that the square footage attributed to the steel beam structure was not accounted for in his quotation (sq ft x \$14) as Benoit’s scope of work did *not* include installation of the structural steel beams.
40. Ms. Frenette testified that she prepared the Contract based on discussions with Mr. Benoit, who was also present at the signing of the Contract. Prior to her drafting the Contract there were discussions with HAW regarding the scope of work – which *never* included installation of the structural steel beams. The fee charged by the Contract was based on a square footage estimate prepared by Mr. Benoit and (again) did *not* include the square footage of the steel structure or installation of the structural steel beams.
41. Ms. Frenette testified that the Contract was signed on or about December 12, 2017. On this date she attended HAW’s office with Mr. Benoit where, they met with Mr. Oppedisano to review and sign the Contract. No one else was present at the meeting. Ms. Frenette said that the “Extras” recorded on the Contract were “to flip one beam on the first floor”. The original price for this Extra was \$12,000, which was calculated by Mr. Benoit after estimating the time to complete the task. Ms. Frenette testified that Mr. Oppedisano scratched the \$12,000 amount and substituted \$9,000. Mr. Benoit accepted the change and Ms. Frenette initialed the change. Ms. Frenette testified that at no time prior to the Contract being signed did anyone discuss or contemplate that Benoit (a carpentry company) would install the structural steel beams, or that a crane or a Magni telehandler was required to complete the installation.
42. Contrary to the evidence of Mr. Benoit and Ms. Frenette, Mr. Oppedisano testified that the Contract required Benoit to install *both* the wood framing and the structural steel beams. Mr. Oppedisano testified that although the installation of the structural steel beams was not noted on the Contract, it was discussed and agreed upon verbally prior to signature.
43. Mr. Oppedisano testified that the specialized Magni telehandler was not needed and “the only reason we allowed it was because they said they *purchased* it ...it made no sense to hire a Magni when we could have rented a machine for a few days”. When asked about the steel delivery schedule and the sequence of construction (to verify his statement that the machine was only needed for a few days) Mr. Oppedisano responded, “construction starts in the basement and works it way up”. He was not otherwise able to provide any time estimate or sequence for use of the Magni telehandler to establish that it would be needed for “a few days”.

The Verbal Agreement

44. As for the Verbal Agreement, Mr. Benoit and Ms. Frenette testified that they were delayed in commencing their framing work, as HAW was having difficulty getting steel workers to erect the steel structure. Mr. Benoit testified that HAW had “nobody at all” and “everything on the site is wrong”. Mr. Benoit testified that Master Steel supplied welders – but sometimes they

showed up at 10:00 a.m. and another day they forgot to bring gas, causing them to leave and return the next day. Mr. Benoit was waiting for the steel beams to be erected so that he could finish framing the first floor. Mr. Benoit testified that he needed to get his work done.

45. After becoming frustrated with the delay, Mr. Benoit reviewed the Master Steel plans, had discussions with various individuals, including experts at Stanmore Equipment Rentals and determined that Benoit could erect the steel structure *if* they had the proper equipment.
46. Based on his discussions, review of the Master Steel plans, and the site conditions that existed at the property, Mr. Benoit determined that the erection of the steel structure *required* the use of a crane or specialized telehandler. Mr. Benoit testified that at the time he did not own this type of machinery, nor was this machinery contemplated by the Contract, as Benoit had *only* quoted for the wood framing.
47. Mr. Benoit testified that he told Mr. Oppedisano he would help him and would agree to install the steel structure for free (as he had never installed a steel structure before), on *one condition*: he required a Magni telehandler for the installation and required HAW to reimburse him for all rental fees associated with use of the machine as an “Extra” on the Contract without markup to be paid at the end of the Contract.
48. A meeting was set up at HAW’s office to discuss. Prior to attending the meeting, Mr. Benoit obtained a pamphlet from Stanmore detailing the particulars of the Magni telehandler and the rental fees associated with the Magni. Mr. Benoit and Ms. Frenette attended HAW’s office and met with Mr. Oppedisano to discuss the matter and brought the pamphlet and rental information. Although Mr. McCarthy was in the office, he was not directly involved in negotiations.
49. Mr. Benoit and Ms. Frenette testified that at this meeting, Mr. Benoit offered to install the structural steel beams at no charge (as he had never erected a steel structure prior). However, although Mr. Benoit would do the “steel for free”, he required HAW to pay for the rental of a Magni telehandler to complete the installation.
50. Mr. Benoit had sourced the Magni telehandler through Stanmore and was ready to proceed with the installation of the steel structure *once* HAW agreed to pay the rental fees.
51. Mr. Benoit testified that although the meeting was with Mr. Oppedisano, Mr. McCarthy was present at the office and at one point walked into the meeting and handed him a sandwich. While Mr. McCarthy was in the room, Mr. Oppedisano told him about Mr. Benoit’s proposal (in front of him) – and they both approved the rental and told him to “go ahead”.
52. Mr. Benoit testified that he did not send an email to HAW confirming the Verbal Agreement as he “is not good with technology, computer, email, not good at all”.
53. Ms. Frenette testified that Mr. Oppedisano specifically agreed that HAW would reimburse Benoit for the rental of the Magni telehandler. Ms. Frenette testified that following Mr. Benoit’s proposal and Mr. Oppedisano’s acceptance of the proposal that Mr. Benoit and Mr. Oppedisano shook hands to seal the deal.

54. In accordance with the Verbal Agreement, Benoit rented the Magni telehandler from Stanmore for a four-month period from January 11 to May 6, 2018. The machine was used to supply work to the Project from January 11, 2018 to April 20, 2018, being the date HAW terminated the Contract, evicted Benoit from the site, and prevented Benoit from returning to complete their scope of work.
55. Ms. Frenette testified that she also did not send an email to Mr. Oppedisano to confirm the Verbal Agreement, as Mr. Oppedisano operated in a “my word is my word” way and “would have taken offence” that Benoit “did not trust him to keep his word”. Ms. Frenette testified “if it was another customer, I would have sent an email confirmation to confirm the conversation” but did not wish to offend Mr. Oppedisano.
56. Although Mr. Oppedisano testified that there was *no* Verbal Agreement regarding the installation of the steel structural beams and payment of the Magni telehandler rental fees, he did recall an occasion when Mr. Benoit attended at HAW’s offices with a brochure for a Magni telehandler. According to Mr. Oppedisano, Mr. Benoit attended HAW’s office with a Magni pamphlet which he showed them and then advised that Benoit Construction had “*purchased* a Magni telehandler”.
57. Mr. McCarthy provided limited evidence on this issue and testified that all he “remembers is coming to the office – Benoit showing him the photo from the pamphlet- and saying – he *bought* the Magni.
58. Mr. Benoit denied that he told HAW that he “*owned, bought or purchased*” a Magni telehandler at the meeting. Mr. Benoit testified that while he *now* owns a Magni telehandler - he purchased it *after* he completed the work at the property. Mr. Benoit noted that the rented Magni telehandler used at the property was yellow - and the Magni that he subsequently purchased is red and they are *not* the same machine.
59. Although there is very limited written evidence to support the Verbal Agreement for the rental of the Magni, the following evidence does exist:
- i. On January 10, 2010, Benoit wrote a cheque to Stanmore for the first month’s rental of the Magni telehandler;
 - ii. On January 11, 2018, Master Steel emailed HAW: specialized equipment is required to receive the steel beams from Master Steel;
 - iii. On January 12, 2018, HAW emailed Master Steel: confirming HAW will have machine to receive the steel; email also contained a complaint that Master Steel had caused delay due to their welders running out of gas and leaving job site;
 - iv. On January 12, 2018, Master Steel emailed HAW: steel beams will be delivered January 15, 2018 between 8 – 9 am with the heaviest beam weighing 2900 lbs; email also responded to delay claim noting that Master Steel had the job scheduled for January 3rd with guys on site ready to work but no one present from HAW.

60. Also filed at trial were videos and photographs taken on January 11, 2018, which depicted Benoit operating the rented yellow Magni telehandler at 53 Elizabeth Street – and installing a steel beam at 53 Elizabeth on this date.
61. While not determinative of any issue, I find that this documentary evidence (the copy of the cheque, the Stanmore pamphlet and invoices, the email exchanges, and the videos and photographs) supports Benoit’s testimony surrounding the background and formation of the Verbal Agreement. Mr. Benoit testified that there were delays at the work site, that HAW had “no one” to erect the steel structure, that there were difficulty with the welders, and that specialized equipment (such as a crane or a Magni) was required to handle the steel structure and it was against this backdrop that Mr. Benoit agreed to install the steel structure and entered into a Verbal Agreement with HAW to reimburse Benoit for the rental of the Magni telehandler.
62. The documentary evidence considered together with the various testimony of the witnesses (that I accept as credible and reliable) weighs heavily towards finding that a Verbal Agreement for the rental of the Magni telehandler existed on the terms testified by Mr. Benoit and Ms. Frenette.
63. Having considered all evidence at trial, I accept the evidence of Mr. Benoit and Ms. Frenette that the scope of work covered by the Contract did *not* include installation of the structural steel beams.
64. I further accept the evidence of Mr. Benoit and Ms. Frenette that following the Contract, the parties entered into a Verbal Agreement, the terms of which are that Benoit would install the structural steel beams at no extra cost, *and* HAW would reimburse Benoit for the rental fees for the Magni telehandler at the end of the Contract without markup as an Extra under the Contract.
65. My reasons for these findings, are in part, as follows:
- i. The Contract on its face specifically deletes any reference to Benoit supplying a “reach forklift and temporary stairs” but does not otherwise differ markedly from the Sub-Contract. Both provide “frame as per blueprint residence @ 52 Elizabeth Drive 5928 sq ft”. The only difference in the general description is the increased cost of \$0.50 per sq ft as contained in the Contract to reflect the fact that Mr. Benoit was now the contractor and not the sub-contractor;
 - ii. As for the specific description of the scope of the work to be undertaken by Benoit, the Contract amended the scope of work to include basement framing and basement back framing. The Contract specifically noted as “Extras” that Benoit was to “Remove part of first floor; Remove beam on first floor; and Other modifications to *first* floor as per Engineer request” for a negotiated cost of \$9,000.
 - iii. The Contract does not mention installation of structural steel beams, *nor* does it require Benoit to supply anything other than “labor & nails to frame”.

- iv. The reference in the Contract to “Revised contract based on discussion with Engineer as follow: Frame as per blueprint residence” *cannot* be interpreted to mean that Mr. Benoit, a carpenter, agreed to install structural *steel* beams (that he had never previously installed) at no additional cost *and* agreed to pay the \$72,320.00 rental fees for the Magni telehandler and/or purchased a Magni telehandler at a cost of approximately \$500,000.00 in order to complete this project.
 - v. The evidence provided by Mr. Oppedisano regarding the scope of work covered by the Contract was not supported by any other witness, including Mr. DaSilva and Mr. Avero, both of whom were called as witnesses by HAW.
 - vi. The evidence provided by Mr. Benoit and Ms. Frenette flowed logically from the reading of the Contract and was independently supported by the extrinsic evidence of Mr. DaSilva and Mr. Avero as to the “usual and ordinary” scope of work undertaken by carpenters.
 - vii. As the Contract did not contemplate that Benoit would install the structural steel beams common sense dictates that an agreement was required before Benoit would/could install the steel beams. While Mr. Oppedisano denied there was a separate agreement for the rental of the Magni - both he and Mr. McCarthy testified that Mr. Benoit attended the office with a Magni telehandler pamphlet. In my view this concession that Mr. Benoit attended at HAW’s office with a Magni pamphlet and discussed the Magni with them strengthens the evidence of Mr. Benoit and Ms. Frenette and supports a finding that an agreement on the terms described by Ms. Frenette and Mr. Benoit was reached.
66. There was some argument and evidence presented at trial as to whether the Magni telehandler was required at the site. In this regard, Benoit introduced expert evidence from Scott Ibister, a telehandler expert trained in Italy. Through his testimony, Mr. Ibister established that the Magni was the most appropriate machine given the site conditions present at the time of the installation and this evidence was unchallenged. I do note for the record, however, that this question (whether the Magni telehandler was required) is *not* an issue that needs to be determined. The issue is whether there was a verbal agreement that HAW would reimburse Benoit for the rental fees for the Magni, and if so, on what terms.
67. Having considered all of the evidence at trial, I find that a Verbal Agreement was reached between HAW and Benoit in the manner and on the terms described by Ms. Frenette and Mr. Benoit in their evidence.

The Alleged Deficiencies

Phase One: The First Invoice dated November 9/22, 2017

68. Pursuant to the terms of the Sub-Contract, Benoit finished the framing of the first floor and delivered an invoice for the work on November 9, 2017 for \$27,129.04. Following the Contract between Benoit and HAW – the original invoice totaling \$27,129.04 was re-issued on November 22, 2017 to HAW and subsequently paid in full on December 6, 2017.

Phase Two: The Second Invoice dated March 16, 2018

69. On March 16, 2018, Benoit issued a second invoice to HAW for the second-floor completion and Extras noted on the Contract. Benoit also included a welding charge as they were required to hire a welder after the welder hired by HAW ran out of propane and left the job site. The total amount of the invoice sought payment of \$40,713.79.
70. At the date of this invoice, being March 16, 2018, *installation of the second-floor steel structure was complete*. The Contract was 60% completed and moving towards the final phase of installing the trusses and roof. Benoit was moving towards the last phase and sought payment as required by the Contract for the amount due at second floor completion.
71. On March 23, 2018, Ms. Frenette sent Ms. McCarthy the welder invoice as Benoit had paid this amount out of pocket for HAW with a note “Keep me posted when I can pick up a cheque”.
72. On March 27, 2018, HAW issued a cheque for \$15,000.00 to Benoit in partial payment of the outstanding March 16, 2018 invoice. The balance of \$25,713.79 remains unpaid.

Allegations of Inspections by the City Building Inspector and Deficiencies

73. On April 3, 2018, at 12:40 p.m., Ms. Frenette texted Ms. McCarthy as follows, “Hi Ellen, do you have any update on repairs, timing or trusses arrival and balance owing for 2nd floor? Please keep me posted, Thanks Manon”.
74. Ms. McCarthy responded “Still trying to talk to everyone. Vince in meeting. Conrad did not finish inspection. Inspector was sick. Trusses. One week away so far”.
75. Ms. Frenette replied, “Thanks Ellen for the update and coordinating resolution”.
76. Ms. McCarthy replied, “Trying my best” to which Ms. Frenette responded, Appreciated”.
77. Ms. McCarthy later texted, “Inspector says by Tuesday we should have it”. (Emphasis added.)
78. On April 5, 2018, Ms. McCarthy texted Ms. Frenette, “Hi Manon, we had a preliminary framing inspection today by the City inspector and the supervisor on site Conrad was there. The deficiencies will be reported on and emailed to you once we have a copy. Based on the inspectors’ findings he is recommending a further inspection by an engineer. That inspection will take place next week. Can you please provide me with your email and I will send reports”.

to you as soon as I receive them so we can resolve these issues ASAP. Trusses are being delivered within the next week and we would like to know if you will be continuing with us. Thank you”. (Emphasis added.)

79. Ms. McCarthy later texted, “I’m trying to get deficiency list for you and inspector is coming within the next couple of days”. (Emphasis added.)
80. Ms. Frenette responded, “I do not believe some deficiencies justify holding 25K. Can you release a good portion of this amount until you obtain a deficiency list?”
81. Ms. McCarthy replied, “They met today. Inspector should be done by now. Will let you know”. (Emphasis added.)
82. Ms. Frenette replied, “Thanks Ellen, please send the list to andre@bconstruction.ca. I will speak to Andre to see if we have enough time to complete the roof assuming we get the trusses next week. It will be tight however we’ll make every effort to complete the work. Will keep you posted tomorrow. Manon.”
83. With respect to the emphasis added underlined portions of Ms. McCarthy’s above noted emails, I note as follows:
 - i. there is *no* independent reliable evidence that established that a City Building Inspector attended to conduct a framing inspection on April 3, 2018 or April 5, 2018. There is one document produced by HAW from the Building Department that records a “miscellaneous pre-inspection with the engineer” on April 10, 2018 (not April 3 or 5). However, the evidence at trial confirmed that there was *no* separate report or deficiency list generated by the “inspector”. There is also *no* independent reliable evidence that the inspector made any recommendation requiring a further inspection by an engineer. The evidence at trial firmly established that there was *no* deficiency list prepared by *any* inspector or engineer. The only deficiency list prepared was prepared by Mr. Kijewski (who is not an inspector, engineer, carpenter, or framer) and that document was internally generated by HAW. Finally, the document from the Building Department, records that the actual *framing* inspection was completed on June 4, 2018 (two months following Benoit’s termination);
 - ii. Mr. McCarthy and the site supervisor, Mr. Kijewski, testified that the reason the building inspector attended was because Mr. McCarthy telephoned the inspector, Doug Pestill, who is his friend, and requested that he attend the site; and
 - iii. Mr. Averro, the Union representative, testified that it is not typical for an inspector to attend for a “pre-inspection” at 60% completion, as they did in this case. Mr. Averro expects that every job site at 60% completion would have deficiencies, and he has *never* seen an inspection at 60% completion as is alleged to have occurred here.

84. On April 6, 2018, Ms. Frenette sent a text to Ms. McCarthy as follows “Hi, would you have the repair list? We would like to send labor on Monday to fix. Let me know.”
85. On or about April 10, 2018, HAW obtained an unsigned letter from a private engineering firm, Pinpoint Engineering, retained by HAW to “conduct a visual site inspection of Benoit’s framing work and to document the ongoing framing construction”. The content of the letter comments vaguely on the concrete framing, the steel framing, and the wood framing, and concludes with recommendations that suggest a “third party *wood* framing contractor correct all wood deficiencies”. The final paragraph of the Pinpoint letter is most instructive: “Any use of the information or recommendations provided in this letter by a Third Party, are the responsibility of the Third Party. Pinpoint Engineering Ltd. accepts *no* responsibility for damages, if any, suffered by any Party because of the decision made or actions taken based on this letter.”
86. The Pinpoint letter was allegedly authored by Anthony Petrucci, P. Eng. but remained unsigned to trial. Following a request from the Court, counsel obtained a signed version date stamped May 30, 2022. Mr. Petrucci did not attend at trial. HAW relies upon the Pinpoint letter to support a finding that Benoit’s work was deficient. However, having read and considered the letter, and the provisions of s. 35 of the *Evidence Act*, I do not find that the letter is admissible as a business record. However, even if the letter were admissible based on the surrounding circumstances and the overall content of the letter, I would place *no* weight upon it pursuant to s. 35 (4) of the *Evidence Act*.
87. Neither the Building Inspector, Mr. Pestill, nor the Engineer, Mr. Petrucci, testified at trial.

The Undated Typed Deficiency List

88. On or about April 12, 2018, HAW produced an undated list of alleged deficiencies that they represented as being “from the King City Building Inspector”.
89. At trial Mr. Oppedisano clarified that this list was not created by the Inspector, but by HAW’s site supervisor Mr. Kijewski, who is neither an inspector nor a carpenter. The list was typed by Ms. McCarthy at HAW’s office.

Benoit Attends the Site to Correct Deficiencies

90. On April 13, 2018, Benoit attended the site to correct the alleged deficiencies. Mr. Benoit and Ms. Frenette both testified that approximately 10 employees from Benoit attended at the site and corrected all deficiencies noted. No further list of deficiencies was provided to Benoit following April 13, 2018.

The Ministry of Labour Attends for a “Proactive Inspection”

91. While Benoit’s team was on site completing the corrections, an inspector from the Ministry of Labour attended to complete a “proactive inspection”. The Field Visit Report notes that Benoit’s team were site working on “framing deficiencies from building inspection (posted on board)”. As detailed above, the deficiency list was created internally by HAW. The Labour

Inspector observed three workers without hard hats and one without safety goggles and noted on the Report that compliance with the inspector's warnings occurred while the Inspector was on site. The Labour Inspector did not testify at trial.

92. On April 13, 2018, Ms. McCarthy texted Ms. Frenette, "Today the Ministry of Labour was at 53 Elizabeth as you know they go around often¹, and your guys were not wearing hard hats. This time they were warned next time it's \$250-300 fine. Please advise your guys to follow the rules.
93. Ms. Frenette responded, "Thanks Ellen for sending. Jonathan was on site and communicated everyone had their hard hat. Andre went on site immediately and spoke to the officer, there was no mention of hard hat, she only mentioned they should wear safety glasses when cutting woods. She also mentioned concern regarding the pool area filled with water" (referring to the site conditions).
94. At trial, HAW introduced several photographs taken by HAW's site supervisor, Mr. Kijewski that inadvertently captured images of members of Mr. DaSilva's team working without hardhats, safety goggles, or shirts (all infractions). When asked, Mr. Kijewski could not answer why Benoit's team was treated differently than DaSilva's.

Termination of the Contract by HAW

April 20, 2018: Recorded Telephone Conversation with Ms. Frenette

95. By April 20, 2018, Benoit had completed approximately 60% of the Wood Framing and had attended at the site to complete corrections for all alleged deficiencies. Benoit had also completed 100% of the extra work consisting of the installation of the Steel Framing of the elevated terrace, added by the Verbal Agreement to the Contract as an Extra. Benoit had not, however, been paid for their work as HAW had refused to pay the outstanding amount due by Benoit's March 16, 2018 invoice.
96. Ms. Frenette sought to secure payment of the outstanding amount due and had been in contact with Ms. McCarthy and Mr. Oppedisano to discuss payment.
97. On April 20, 2018, Mr. Oppedisano telephoned Ms. Frenette and surreptitiously recorded the conversation. HAW produced a copy of the transcript from the call and played the recording in court.
98. The conversation is controlled by Mr. Oppedisano throughout who allows few interjections by Ms. Frenette. Mr. Oppedisano began by noting that he and Ms. Frenette "have been talking about getting money for the second floor" (the \$25,000 balance owed from the March 16, 2018 invoice). He advised that he has been "warned against that from the building inspector and the engineer until everything gets fixed".
99. Ms. Frenette interjected, "Sorry, repeat that again, something needs to be fixed?"

¹ It is difficult to accept as "coincidence" the Ministry's attendance the day Benoit returned to site.

100. Mr. Oppedisano then referenced building inspectors, engineers, and the carpentry union having concerns and alleged that “they said, these people are not capable of finishing this house – this is directly coming from them”.
101. Ms. Frenette asked, “Who are these people?”
102. Mr. Oppedisano replied, “Fabian DiLeonardo²”, from the Carpenter’s Union.
103. Ms. Frenette stated she was “surprised” at what he was saying, and Mr. Oppedisano replied, “I am telling you the truth”, “everything written down, we have everything documented”.
104. Ms. Frenette requested the documents so that Mr. Benoit could “see exactly” what was alleged to be deficient.
105. Mr. Oppedisano then advised he is “terminating the contract because it may cost me more to fix the job” and told Ms. Frenette that Benoit is “not permitted to go on site”.
106. Ms. Frenette repeated her request for any further list of deficiencies and stated, “We’re not gonna walk away from \$25,000”.
107. Mr. Oppedisano suddenly stopped talking, apologized, and asked Ms. Frenette to repeat herself.
108. Ms. Frenette repeated, “I mean at some point we’re not gonna walk away from \$25,000”.
109. Mr. Oppedisano responded, “That’s fine that’s fine, you may owe me money at the end of it all. You can do whatever you want.”
110. Mr. Oppedisano then spoke at length and stated, “I have engineers, I have inspectors and the Carpenters Union on side, and so you know what?I have done my research, I have done my research and I know a lot of things about a lot of different situations, take it whichever way you like...But just know I have my ducks in line, do whatever you want, at the end of the day if it goes the other way you might be owing me some money because there is a lot of things that need to be fixed”.
111. Ms. Frenette responded, “Well that’s why yesterday when we spoke you (said) you would tell me what is left”.
112. Mr. Oppedisano replied, “Yes, I asked you yesterday will you be starting the second floor and you said “no, I want my money first”, and then I said okay, let me talk to my people ...let’s see what we are going to do... so you brought me to this”.
113. Ms. Frenette responded, “I brought you to this?”
114. Mr. Oppedisano replied, “You put my back against the wall, and I don’t appreciate that because ... we deal with trust, we have trust in our contractors...see the building inspector a

² None of “these people” (Mr. DiLeonardo, the Building Inspector, or Engineer) testified at trial.

red flag, we see engineers red flags and now another Carpenter, with the Union, Carpenters Union saying these people are not fit for this job get them off! Get new people! This is what we are doing, so good luck!”

115. At this point Ms. Frenette attempted to state that Benoit “did get it done” but was interrupted mid-sentence.
116. Mr. Oppedisano interjected, “No you did not. It’s still, like, you know you are very lucky that they didn’t show up before you guys fixed, you say you fixed because right now they are saying its completely shoddy...”
117. Ms. Frenette repeated her request that Benoit be provided with the opportunity to correct any outstanding deficiencies.
118. Mr. Oppedisano refused saying, “No, you’ve had that chance. I’ve been told not to let you on site because you are not capable. So, I’ve given you that chance; you guys have let me down; and you guys haven’t been there for four days, three days, whatever the case may be, it’s documented”.
119. Ms. Frenette replied, “Because we think everything’s done that was supposed to be done”.
120. Mr. Oppedisano responded, “Well you think wrong because people walk, and *their eyes are saying* they’re looking around taking pictures of deficiencies after deficiencies...So at the end of the day I’m not playing this game and being taken for a fool. Ok, so”. (Emphasis added.)
121. Ms. Frenette replied, “Okay, just send me what you have please email it to me and we’ll take it from there”.
122. Mr. Oppedisano responded, “...absolutely, Manon, ok, thank you, bye”.
123. No further deficiency list, documents, or reports were delivered to Benoit following this conversation.
124. At trial, HAW relied on Ms. Frenette’s comment that Benoit would “not walk away from \$25,000” – which Mr. Oppedisano had her repeat – in support of their claim that there was no Verbal Agreement to reimburse Benoit for the Magni telehandler at the end of the Contract.
125. Ms. Frenette explained that this is *not* what her statement meant. She was focused on collecting the outstanding \$25,000 from the March 16 invoice and had just spoken to Mr. Oppedisano about getting paid. Ms. Frenette did not accept that the Contract had been terminated as all alleged deficiencies had been corrected and no further list was *ever* sent.
126. Having listened to and considered the tone and content of the recording - the call appears to have been an attempt to buttress HAW’s position by surreptitiously recording prepared statements for litigation purposes.

127. Contrary to HAW's submissions, the recording does *not* invite an adverse inference to be drawn from any statement made by Ms. Frenette, as her explanation is entirely logical and believable.
128. However, the recording does invite adverse inferences to be drawn against HAW regarding veracity of the evidence, grounds to terminate the contract, and calculated strategic pre-litigation planning.
129. Many of the statements made by Mr. Oppedisano during the telephone conversation were either not proven at trial or proven to be false. The following specific statements considered in view of the reliable evidence introduced at trial, noted in parenthesis, invites a finding that HAW lacked grounds to terminate Benoit's Contract:
- i. "I have an engineer's report" (*no engineer's report was obtained*);
 - ii. "I brought a carpenter in yesterday which ended up bringing in the Carpenter's Union on site...they were really disappointed with the shoddy work...they took many pictures" (*no carpenter testified that Benoit's work was "shoddy" and the Union representative testified that he has never seen a framing inspection conducted at 60% completion and could not advise whose work he viewed*);
 - iii. "I am terminating our contract because it may cost me more to fix the job" (Mr. DaSilva's evidence did not support this claim);
 - iv. "I got the Union on side saying it might cost you more to fix this job" (the Union representative's evidence did not support this claim);
 - v. "I've been told the house is in a bad state" (no reliable evidence was tendered in support of this claim);
 - vi. "You are pushing to get your money for the second floor but there's tons of work to be done and you guys have already been there once and haven't even fixed everything"; (Benoit fixed the deficiencies alleged by HAW, no further deficiency list was provided, and Mr. DaSilva's evidence did not support the claim);
 - vii. "I have engineers backing me up, I have the city that's documented shoddy work and now I have the carpenter's union saying these people are not capable. Gas company...I have engineers, I have inspectors, and the Carpenters Union on side" (as detailed throughout this decision, no reliable evidence was tendered in support of these claims);
 - viii. "I have done my research, and I know a lot of things about different situations, take it whichever way you like...But just know that I have my ducks in line"; and

- ix. “Do whatever you want, at the end of the day if it goes the other way you might be owing me some money because there is a lot of things that need to be fixed” (no reliable evidence was tendered in support of this claim).

The Termination Letter

130. On April 20, 2018, Mr. Oppedisano, accompanied by a police officer, hand-delivered to Mr. Benoit a letter purporting to terminate the Contract citing alleged deficiencies in Benoit’s wood framing work as grounds for the termination. The termination letter, parts of which are underlined for emphasis, stated as follows:

Further to our conversation today and previous emails, please be advised that we are terminating your contract for the carpentry at the above-noted project.

We have provided you with our list of deficiencies from the King City Building Inspector and report from Pinpoint Engineering. At that time, we advised that we could not move forward with this project until deficiencies were completed to the satisfaction of the Building Inspector. Although you had attended to fix some of the deficiencies, they are not done as per specifications and regulations and we have expert witnesses and reports to substantiate herein. The Carpenters Union Official on behalf of the industry and the Union, attended at the site on April 19th and will be preparing a report along with photos. It is his opinion that we should not allow Benoit Construction to fix or continue working at this site because of the poor workmanship exhibited and he will be documenting his observations.

We no longer trust that the work will be performed correctly and have no other alternative but to end your contract.

131. With respect to those underlined portions contained in the termination letter, I note that the evidence adduced at trial does not support the claims made in the letter, as follows:
- i. No deficiency list was ever prepared by the King City Building Inspector relating to Benoit’s work at the property.
 - ii. No credible or reliable evidence was tendered that a King City Building Inspector attended at the property to perform a framing inspection for Benoit’s work. Instead, the evidence established that the *framing* inspection was completed by a King City Building Inspector on June 4, 2018, two months following Benoit’s termination, after Mr. DaSilva had assumed the project.
 - iii. On April 13, 2018, a team of 10 Benoit employees attended and corrected all deficiencies alleged by HAW’s internally generated typewritten list. No further list of deficiencies, or outstanding deficiencies, was sent to Benoit thereafter. On April 20, 2018, Mr. Oppedisano specifically refused Benoit permission to re-attend the site for any reason including to correct alleged deficiencies.

- iv. HAW claimed Benoit's corrections were "not done as per specifications and regulations" but tendered no evidence (expert witnesses, building inspector, engineer, and/or any report) to substantiate this claim. The only independent credible evidence regarding deficiencies was provided by Mr. DaSilva who testified that the deficiencies were "minor" and expected given the stage of the construction.
- v. The Business Agent for Carpenter's Union Local 1030, Mr. Avero, testified that as part of his duties he is sometimes required to walkthrough a project when one union member departs, and another union member assumes the work. The purpose of the walkthrough is to *mitigate potential disputes between two union members*, not to inspect for deficiencies. Mr. Avero completed a walkthrough on April 19, 2018, when "the house wasn't erected" and when Mr. DaSilva was "in the process of taking over" Benoit's work on the Project. Mr. Avero made *no* deficiency list on this date but did prepare a deficiency list during his May 25, 2018 walkthrough a month following Mr. DaSilva's replacement of Benoit. This May 25th list has zero evidentiary value regarding the issues at trial.

Benoit's Final Invoice: Magni Telehandler Rental and Holdback

- 132. On April 23, 2018, Benoit issued their final invoice to HAW for the framing holdback and Contract Extra Equipment Rental. The total amount owed by the invoice is \$79,477.00.
- 133. A representative from Stanmore attended trial and confirmed that all Stanmore invoices issued to Benoit were legitimate invoices issued for the rental of the Magni.
- 134. On May 2, 2018, Mr. McCarthy sent an email to Benoit denying payment of the invoice as follows: "We did not authorize any equipment rental at 53 Elizabeth, for the following reasons. 1. We own a telehandler and two Genie Lifts; 2. All framers supply their own tools and equipment; 3. As per you contract of October 12, 2017 in the description: "supply reach equipment". We have incurred costs and delays associated with the workmanship at 53 Elizabeth which have been documented by inspectors and engineer and provided to you. We were advised on numerous occasions by the City Inspector and your industry Union representative to terminate your contract because of irreparable damage done."
- 135. With respect to the May 2, 2018 email, I note that the Contract referenced by Mr. McCarthy as being dated October 12, 2017 is the *Sub-Contract* between Cichella and Benoit and *not* the Contract between HAW and Benoit. The *Contract* between HAW and Benoit is dated December 12, 2017. The *Contract* contains *no* reference to "*supply reach equipment*" as this requirement had been deleted from the previous *Sub-Contract*.

Cost to Correct: Vince DaSilva, Replacement Carpenter

- 136. As for the evidence regarding alleged deficiencies and the cost to correct, Mr. DaSilva (the replacement carpenter), attended trial and provided evidence about alleged deficiencies, the cost to repair, and the framing/carpentry industry generally.

137. Mr. DaSilva testified that he has been a framer/carpenter for 35 years and has framed over 3500 houses. He replaced Benoit at the work site in April of 2018.
138. Prior to this date, Mr. DaSilva had an ongoing relationship with HAW, and at that time was working for HAW at Ms. McCarthy's personal home.
139. Prior to replacing Benoit at the property, Mr. DaSilva had originally quoted for the Elizabeth Street job, but was unsuccessful. Mr. DaSilva testified that his framing quote was for "wood framing only". He would "not touch the steel as there were too many joints".
140. Mr. DaSilva was approached by Mr. Oppedisano to replace Benoit as the carpenters at the property for the remaining work involving installation of the trusses and roof.
141. Mr. DaSilva testified that contrary to HAW's suggestion that the King City Building Inspector "showed up" in April to complete a framing inspection at the property, framing inspections are *never* completed until *after* the roof is up and HVAC and plumbing are installed. In April of 2018, when Mr. DaSilva replaced Benoit, the trusses were not up, the roof was not on, there was no HVAC or plumbing installed and the property was "no where near inspection stage".

DaSilva's Invoices – Costs to Repair and Complete

Invoice #499 at D17: October 1, 2018

142. As for the alleged deficiencies and the cost to repair, during cross-examination Mr. DaSilva was taken Exhibit D17, invoice #499, dated October 1, 2018, issued by his company Leblon Construction, addressed to HAW, for "framing + back framing, finished basement, correct issues from previous framer". The total fee charged is \$97,000 + HST totaling \$109,610.
143. Mr. DaSilva reviewed the invoice and acknowledged that his company had issued the invoice, and this was the *only* invoice issued by his company for the work. Mr. DaSilva confirmed that he was paid the amount indicated by HAW.
144. Mr. DaSilva was asked to clarify the fees that relate to "correct issues from previous framer" as noted on the invoice. Mr. DaSilva testified that most of the work completed by him was for "Extras" including a room over the garage, finishing the basement, and some work completed at Ms. McCarthy's home (as his men were constantly between the two jobs). Mr. DaSilva testified that the total cost to "correct issues from previous framer" was \$2,794.00 plus HST for a total cost of \$3,157.79.
145. Mr. DaSilva testified that the corrections were minor, and the time needed to complete the corrections was minimal.

Invoice at D14 dated April 30, 2018 (unnumbered/unsigned)

146. During re-examination Mr. DaSilva was taken to Exhibit D-14, which is another invoice purportedly issued by his company Leblon Carpentry dated April 30, 2018 totalling

\$97,000.00 plus HST. This invoice provides a detailed list of items which is titled “correct issues from previous framer”. Mr. DaSilva testified that he “does not recognize this invoice and does not believe it came from his company”.

Invoice at D13 (undated/unnumbered/unsigned)

147. Mr. DaSilva was also taken to Exhibit D-13, which is another form of an invoice purportedly issued by Mr. DaSilva’s company Leblon Carpentry. This invoice is undated and although it contains a signature line for Mr. Oppedisano and Mr. DaSilva - it is unsigned. This invoice also purports to be for work for the project and the total charge is \$97,000. While this invoice does not contain the details noted on the April 30, 2018 alleged invoice – at page 2 – there is a breakdown titled “our work” “framing \$44,000; corrections \$53,000; total \$97,000.00 + HST.” When asked about this invoice Mr. DaSilva testified that he does not recognize this invoice and does not believe it was prepared by his company.

General Evidence Regarding the Scope of Carpenters’ Work and Use of Equipment

148. Mr. DaSilva testified that Ms. McCarthy’s home also had structural steel framing, but he did not install the steel – as he is a wood framer – not a steel erector. Mr. DaSilva testified that when carpenters give written quotes for framing - “framing just means wood framing and does not include steel framing”.
149. Mr. DaSilva testified that in the wood framing/carpentry business – it is not standard for a carpenter to supply machinery. If machinery is to be supplied, it is referenced on the contract. If the machine is not referenced – it is not included in the price.

Credibility and Reliability of Mr. DaSilva’s Evidence

150. Following Mr. DaSilva’s cross-examination, Defence counsel asked that I make an adverse inference regarding Mr. DaSilva’s credibility as Plaintiff’s counsel represented Mr. DaSilva’s company Leblon Drywall (but not Leblon Carpentry).
151. Having observed Mr. DaSilva testify, I find that he provided his evidence in a straight - forward manner, did not hesitate in answering questions, and did not appear to exaggerate or seek to “champion” either parties’ position. Further, the evidence that Mr. DaSilva gave at trial was against his own financial interest (as it was contrary to the Defendant’s stated position and as Mr. DaSilva had “often” worked with HAW) and there was no suggestion of animus between Mr. DaSilva or HAW nor was there any apparent relationship between Mr. DaSilva and Benoit. I do not find any motive to fabricate on Mr. DaSilva’s part, nor do I find that Mr. DaSilva sought to fabricate any part of his evidence. Mr. DaSilva was forthright and unshaken in his testimony. I found Mr. DaSilva to be a credible witness who provided reliable evidence.

THE LAW AND ANALYSIS

152. For the reasons noted above, I find as follows:

- i. There was an agreement between HAW and Benoit that Benoit would install the steel structure at no cost and HAW would reimburse Benoit for the Magni rental fees, without markup at the end of the Contract as an Extra to the Contract.
- ii. HAW terminated the Contract on April 20, 2018 claiming “shoddy workmanship” and “deficiencies” which were not proven at trial. In the circumstances, HAW was *not* justified in terminating the Contract with Benoit.
- iii. The cost to correct the deficiencies was \$2,794.00 plus HST for a total cost of \$3,157.79.
- iv. The cost to complete the scope of work based on Mr. DaSilva’s evidence was \$35,186 plus HST for a total cost of \$39,760.18.

153. The question now arises as to the appropriate disposition of the matter in law given these factual findings.

THE LAW

154. In *D & M Steel Ltd. v. 51 Construction Ltd.*, 2018 ONSC 2171, Perell J. provided a summary of the law regarding damages and *quantum meruit* claims for breaches of construction contracts by contractors and owners, the relevant portions being as follows:

[49] Owner breach: if the owner without justification ceases to make required payments under the contract, cancels it, or through some act without cause makes it impossible for the contractor to complete its work, then the owner has breached the contract and it has no claim for damages, and the contractor is justified in abandoning the work and the contractor is entitled to enforce its claim for lien to the extent of the actual value of the work performed and materials supplied up until that time, and the court may award the innocent contractor damages for breach of contract or damages on a *quantum meruit* basis in lieu of or in addition to damages for breach of contract.

[50] In a *quantum meruit* claim, deficiencies in the work actually performed are deducted from the value of the work done, but no account is taken of the owner’s costs to complete.

[51] Contractor breach: mere bad or defective work or insignificant non-completion will not, in general, entitle an owner to terminate a contract, but

the owner will have an obligation to pay for the work and make a claim for damages for the defective work. An owner will not be able to terminate the contract because of some minor or inconsequential failure to complete, although the owner may have a claim against the contractor for damages for non-completion or for defective workmanship, which will generally be the cost of completing the non-completed items or remedying any defects. If the contractor breaches the contract, an owner who alleges that the work performed or the materials supplied are defective *must provide proper evidence on the basis of which his or her damages can be assessed* [emphasis added].

[52] If there are defects in a contractor's workmanship, but *not enough to amount to a fundamental breach* entitling the owner to terminate the contract, *the contractor should be permitted to remedy the defects and failure by the owner to permit such corrections will disentitle or reduce the amount of damages the owner can claim* to remedy the defects as a result of its failure to mitigate [emphasis added].

[53] Contractor breach: if a contractor abandons the contract, repudiates the contract, fundamentally breaches the contract, or performs the contract in a way that *it is so defective as to amount, in substance, to a failure or refusal to carry out the contract work*, the owner is entitled to terminate the contract, to claim damages for breach of contract, and to be discharged from its obligations to pay including any obligation to pay on a *quantum meruit* or for work already performed [emphasis added].

155. As for the law as it applies to Extras in construction contracts, Perell J. in *D & M Steel Ltd.*, *supra*, provides the following guidance:

[57] A contractor is only obliged to perform and may only charge for work and material included in its contract with the owner. The term, “extra” refers to extra work outside the scope of the contract, for which an additional charge is made by the contractor or subcontractor; an item specifically provided for in the contract is not an extra [emphasis added].

[58] A contract may provide that the owner may order extras and specify a manner of payment but in the absence of such a provision, there must be a new express or implied agreement covering any extras. A contractor or subcontractor may charge for an extra where the owner or contractor expressly or impliedly instructed the contractor or subcontractor to do the extra work or to supply the extra materials. If no price is fixed for the performance of the extra work, the court will imply a promise to pay a reasonable amount on a quantum meruit basis. Conversely, when the contractor or subcontractor does work or supplies materials not called for by the contract (plans or specifications) without instructions, express or implied or without the consent of the other contracting party, the contractor

is not entitled to charge for the additional work or materials [emphasis added].

[60] Notwithstanding that a contract may require formalities in relation to requests for extras, where an owner has *acquiesced in the provision of extras, it may be found to have made an implied promise to pay* for them. An owner or contractor cannot orally request extra work be performed outside the scope of a contract, and then not pay for the work by relying on the written terms of the contract requiring confirmation of extras in writing. Orally requesting extra work outside the contract constitutes waiver by conduct.

THE ANALYSIS: APPLICATION OF THE LAW TO THE FACTS

Effect of Verbal Agreement

156. The evidence established that there was an express agreement that HAW would pay for the Magni rental as an Extra at the end of the Contract. I have detailed the facts that support this finding and accept Mr. Benoit's evidence that he was told to "go ahead" and rent the Magni by HAW to install the steel structure and this agreement was sealed by a handshake. HAW's actions constituted a "promise to pay" the Magni rental fees.
157. On April 23, 2018, Benoit issued an invoice to HAW for the total rental fees incurred over the course of the Contract, without markup, as agreed. Evidence was provided by a Stanmore representative that the monthly rental amounts paid by Benoit were the standard fees for the rental of a Magni. There was no evidence introduced at trial that suggested the rental fees were unreasonable in the context of the erection of the steel. This is especially true given that Benoit installed the steel "for free".
158. In the circumstances, HAW is required to pay Benoit as an Extra under the Contract the rental fees paid by Benoit without markup as detailed by Benoit's invoice to HAW dated April 23, 2018. The total amount of Extras owed for the Magni rental is \$72,320.00.

Effect of HAW's Unjustified Breach of Contract with Benoit

159. The evidence established that the breach of contract was initiated by HAW beginning with HAW's refusal to pay the amounts due to Benoit by the March 16, 2018 invoice. Following installation of the steel structure, HAW began alleging shoddy workmanship and deficiencies. As I have detailed in the fact section of this decision, HAW went to great lengths to get their "ducks in line" before terminating the Contract on April 20, 2018. However, despite HAW's attempts – none of the allegations made by HAW of "shoddy workmanship" or "deficiencies" were proven. Instead, the facts support a finding that HAW sought to terminate the Contract *after* installation of the steel, approached Mr.

DaSilva to complete the framing, and then unilaterally sought to terminate the Contract with allegations of shoddy workmanship and deficiencies, none of which were proven at trial.

160. As detailed in the fact section of this decision, prior to termination, and after being provided with a long list of internally generated deficiencies, Benoit attended the site to correct the deficiencies. Following this date, despite repeated requests, HAW refused to provide any updated list of outstanding deficiencies and instead barred Benoit from the site and terminated the Contract.
161. As per *D & M Steel Ltd. v. 51 Construction Ltd*, HAW's actions constitute a unilateral breach of contract which entitles Benoit to enforce its claim for lien to the extent of the actual work performed and materials supplied up to the date of termination.
162. In addition to seeking costs for the extent of the actual work performed and materials supplied up to the date of termination, Benoit also seeks damages on a quantum meruit basis equal to the cost to complete the Contract of \$30,000.
163. The facts in the present case warrant denunciation such that an award of damages for breach of contract is appropriate.
164. According to the testimony of Mr. DaSilva, the cost to complete the project was \$39,760.18. I find that this is an appropriate amount to award Benoit on a quantum meruit basis for damages arising from the breach.
165. Had damages for breach not been awarded, Benoit may have been entitled to an award on account of punitive damages.
166. Punitive damages are not compensatory and are only awarded in exceptional cases for "malicious, oppressive and high-handed" misconduct that "offends the court's sense of decency", amounting to acts of bad faith and unfair dealing: *Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3, at para. 62.
167. Punitive damages are designed to address the purposes of retribution, deterrence, and denunciation: *Fidler*, at para. 61; *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595, at paras. 36 and 94.
168. In *Fernandes v. Penncorp Life Insurance Co.*, 2014 ONCA 615, 122 O.R. (3d) 192, the Ontario Court of Appeal, in the context of insurance contracts, summarized the law relating to punitive damages and noted that, in addition to the breach of contract, there must be an independent actionable wrong: *Whiten*, at para. 78, and *Fidler*, at para. 63.
169. The additional actionable wrong in the present case is HAW's refusal to pay the funds owed to Benoit from the March 16, 2018 invoice. I have detailed HAW's behaviour leading to the termination of Benoit's contract. If I am mistaken that Benoit is entitled to damages for breach equal to the actual cost to correct, I would otherwise award punitive damages in the same amount.

HAW'S Claim for the Cost to Correct

170. In *D & M Steel, supra*, Perell J. held that a party's damages may be limited, reduced, or denied if it failed to mitigate its damages.
171. In *J.R. Jones Builders Ltd. v. Gossen* (1978), 40 N.S.R. (2d) 286 (N.S. Co. Ct.) MacLellan J. held that an owners' decision to remedy deficiencies on items under warranty without giving the contractor an opportunity to rectify same constituted a failure by the owners to mitigate their damages and their claim for the cost to correct was *disallowed*.
172. Applying these considerations to the present case, I find that HAW's refusal to permit Benoit to make any required corrections disentitles HAW from receiving any amount for the cost to correct which according to Mr. DaSilva's evidence totaled \$3,157.79.

HAW's Claim for the Cost to Complete

173. The evidence established that the cost to complete the Benoit's work was \$39,760.18 calculated as follows: Mr. DaSilva's total invoice \$97,000 - Extras \$59,000 - minus corrections \$2,794.00 plus HST = \$39,760.18.
174. Given that HAW terminated the Contract without justification they are not entitled to be paid the cost to complete the Contract.

CONCLUSION AND ORDER

175. For the foregoing reasons for decision, HAW shall pay Benoit the total sum of \$144,950.97 inclusive of HST, plus interest, as follows:
- i. \$25,713.79 on account of the March 16, 2018 invoice;
 - ii. \$79,477.00 on account of the April 23, 2018 invoice; and
 - iii. \$39,760.18 for damages for breach of contract.
176. HAW shall pay to Benoit its costs of this action, as may be agreed between the parties and failing agreement as fixed by this Court.
177. In the event the parties are unable to agree on the quantum to be paid on account of costs, Benoit shall, within 30 days of the date herein, serve and file its costs submissions, limited to three pages with a Bill of Costs and Costs Outlines attached.
178. HAW shall serve and file its Reply within 45 days of the date herein, limited to three pages with a Bill of Costs and Cost Outline attached.

179. Benoit's Reply, if any, shall be limited to one page and shall be served and filed within 50 days of the date herein.



Justice Susan J. Woodley

March 14, 2023