<u>**IN THE SUPREME COURT OF NOVA SCOTIA**</u>
Citation: DLC Electrical Inc. v. Oxford, 2008 NSSC 157

Date: 20080528
Docket: SK 261492
Registry: Kentville

Between:

D.L.C. Electrical Incorporated

Plaintiff

v.

Murray Oxford and
Valerie Oxford

Defendant

Judge: The Honourable Justice Gregory M. Warner

Heard: January 14 to 18, 2008 at Kentville, Nova Scotia

Final Submission: February 22, 2008

Counsel: Andrew Waterbury, Solicitor for **D.L.C. Electrical Incorporated**, Plaintiff/Defendant by Counterclaim

William M. Leahey, Solicitor for **Murray Oxford** and **Valerie Oxford**, the Defendants/Plaintiffs by Counterclaim

By the Court:

A. Introduction

[1] Murray and Valerie Oxford caused to be designed and constructed a 5,700 square foot luxury residence at Grand Pre, Nova Scotia. DLC Electrical Inc. was hired as the electrical contractor. It claims against the Oxfords for extras, and amounts owed by a verbal change in the contract. The Oxfords deny DLC's claim and counterclaim against DLC for abandoning the job site without cause (requiring the Oxfords to pay another contractor extra to finish), and for causing other damage.

B. Issues

[2] The first and primary issue is the meaning of the contract. What was included and what were extras? The second is whether the contract changed after July 21? The third is whether the contractor or owners breached the contract. To determine this I must determine what was in and what is not in the contract, and whether the contractor was underpaid when he abandoned the site. If DLC improperly abandoned the contract, what portion of the cost to complete its work is DLC liable for? The fourth issue is whether DLC caused damage to the residence, and, if so, whether the claim for damages is reasonable.

C. Background

[3] Murray Oxford is an experienced business executive. For 16 years he has been the president of Jani-King Canada, the Canadian division of a large multinational corporation which operates commercial cleaning franchises. His daily functions include the negotiation, preparation and review of commercial contracts with some of the largest corporations in Canada for cleaning and management of buildings. Before this employment (from1979 to 1985) he worked for Comstock International, a national electrical and mechanical construction contractor. His specific work was as purchasing agent and expediter in the mechanical division. His duties included pricing, acquiring and handling materials as purchasing agent on large nonresidential construction projects such as pulp and paper plants, schools, and near the end of his employment the construction of the Sheraton Waterfront Project in Halifax.

[4] David Isnor has been a journeyman electrician since 1981. In 1993 or 1994 he started DLC Electrical Inc., a small Wolfville electrical contractor owned and managed by him. As an electrical contractor, DLC performs commercial jobs, new home construction, and service calls on existing structures. The number of employees fluctuates with the work available; the average

appears to be seven employees.

[5] Murray Oxford acted as his own general contractor with respect to the construction of his home. He hired an experienced contractor, Wade Flynn, to be his on-site project manager to oversee the trades and a crew of carpenters. Mr. Flynn's speciality was the construction of very expensive residences - in the $500,000.00 to $4,000,000.00 range. Mr. Flynn stated that he worked on "hard and difficult homes, something no one else wanted". He committed himself to the Oxfords for the one-year (the time projected to complete construction of the residence) and started work in April 2005.

[6] Architectural drawings for the Oxfords residence were prepared by Atlantic Home Designs. These plans contained no electrical or mechanical information.

D. First Issue: The Meaning of the Contract

D.1 The Contract

[7] Mr. Oxford approached DLC to submit a price for the electrical portion of the project. Mr. Oxford provided the architectural drawings that contained no electrical or mechanical information. On April 20, 2005, DLC provided a written proposal that reads:

> April 20, 2005
>
> Murray & Valerie Oxford
> Project: New Home
>
> I am pleased to submit the following price for the electrical on the above job as per plans, information provided and by Canada Electrical Code
>
> The price is Thirty-one Thousand - Six Hundred - Five dollars $31,605.00
>
> Note: 15% hst extra on the above price
> Note: Price subject to change after 30 days
> Note: All lighting fixtures, decorative lighting, pot lighting suppled by Owners
> Note: All excavating & trenching done by Owners
> Note: Engineered drawings supplied by Owner
>
> Thank you,
> David B. Isnor

[8] Mr. Oxford and Mr. Isnor did not know each other beforehand. Mr. Oxford states that he asked Mr. Isnor for references and, because he was concerned about the brevity and vagueness of the "Proposal", more details. In response Mr. Isnor provided a short letter dated May 13, 2005 providing the names of three references, and describing the general scope of the work "as

per your request” as follows:

“#1 General Scope of Work
Electrical wire as per drawings received from Mr. & Mrs. Oxford and minimal standards required by Canadian Electrical code
Voice/data & cable installed in each room
Electrical plugs as per electrical code in each room
400 amp underground service for distance of a 110 ft
Note: Yard lighting was not included in the original proposal”

[9] Mr. Oxford checked the references, and was satisfied by his inquiries; however, based on his extensive business experience and particularly his Comstock experience, he was still not satisfied with the particulars contained in the DLC proposal.

[10] He met with Mr. Isnor on May 19, 2005. Mr. Oxford and Mr. Isnor disagree as to what was described as the intended scope of the work. As noted, the architectural drawings contained no electrical or mechanical information. Mr. Oxford made notes of his discussions with Mr. Isnor. He relied on these and other notes made at or shortly after meetings/ phone calls with Mr. Isnor to relay what he says are verbal representations and additions to the written contract. The notes were not provided to Mr. Isnor (until disclosure after litigation commenced). Mr. Isnor relied on a handwritten seven-page list of the items he prepared for the purpose of preparing DLC’s proposal, and which he says he gave to Mr. Oxford. Mr. Oxford denies receiving the list. The list contains reference to the items, such as switches, plugs, cable and outlets, required for each room, but not such contested items as the service panels, service entrance switches, conduit pipe, and heat pumps. One example of their disagreement was in respect of the proposed electrical service entrance. Mr. Isnor believed it was to be entirely within the garage and he drew a sketch (kept by Mr. Oxford) of the layout for the electrical service (Exhibit 2, Page 12) showing this. Isnor and Oxford disagree as to what the sketch means. Mr. Oxford says it was always intended that while the 400 amp switch CT box, splitter and switches would be in the garage, the circuit panels would be in a separate mechanical room. Mr. Isnor says that the circuit panels were to be in the garage.

[11] Mr. Oxford’s notes of the meeting include these points:

1) “could save 3K, allowed for more than basic code in this house”;

2) Oxford had to get an electrical engineer to measure the electrical loads; Isnor provided Oxford with the name of Bruce Thompson, an electrical engineer with whom Mr. Isnor had some previous experience (Mr. Oxford contacted Mr. Thompson in July 2005);

3) Oxford to supply fixtures and DLC the rest;

4) DLC to price electric floor warmers for bathrooms separately;

5) An in-law suite was not separately metered;

6) 2 hot water tanks; and

7) Oxford was to provide the specs for the 15kw/20kw heat pumps to DLC.

[12] As a result of the May 19, 2005 meeting, DLC submitted on two pages a further "Proposal" and "General Scope of Work" document, that appears to have been "cut and pasted" on a computer from the previous Proposal (April 20, 2005) and General Scope of Work and References (May 13, 2005), with a few changes. The May 24 proposal states:

> " May 24, 2005
>
> Murray & Valerie Oxford
> Project: New Home
>
> I am pleased to submit the following price for the electrical on the above job as per plans, information provided and by Canada Electrical Code
>
> The price is Thirty-one Thousand - Six Hundred - Five dollars $31,605.00
>
> Note: 15% hst extra on the above price
> Note: Price subject to change after 30 days
> Note: All lighting fixtures, decorative lighting, pot lighting supplied by Owners
> Note: Al excavating & trenching done by Owners
> Note: Engineered drawings supplied by Owners
> Note: Add an extra 30 ft of 400 amp service conduit, extra cost for this will be ($1,500.00 plus tax).
>
> Thank-you,
> David B. Isnor"

[13] All the particulars of this proposal are identical to those of April 20 with the exception of the addition of the extra 30 feet of 400 amp service conduit. The "General Scope of Work & References" document is identical to the May 13 letter (except for the deletion the names of the references). No further details or particulars of the scope of work were added as a result of the May 19, 2005 meeting.

[14] By July 2005 construction on the Oxfords residence had progressed to the point where an electrical contractor was required. In early July Mr. Oxford contacted Bruce Thompson. He attended at the site, reviewed the architectural drawings and calculated the electrical service requirements. This is described in his letter to the Oxfords dated July 14, 2005. These requirements included a reference to supplementary baseboard electrical heat and two heat pumps. The supplementary base board electric heat was a recommendation of Mr. Thompson.

[15] Despite a provision in the April 20 and May 25 DLC proposals that engineered drawings be supplied by the owner, engineered drawings were ever prepared in respect of the electrical or mechanical aspects of the construction of the residence, nor provided to the contractor.

[16] In July 2005 the Oxfords awarded DLC the electrical contract. They signed a short one-page contract on July 21, 2005 which contract incorporated, on two pages, the Proposal and General Scope of Work dated May 24, 2005. The contract reads as follows:

> "CLIENT: Murray & Valerie Oxford
> PROJECT: Electrical wire new home - located on Eye Road
>
> WE PROPOSE TO FURNISH MATERIAL AND LABOR COMPLETE IN ACCORDANCE WITH THE ATTACHED PROPOSAL & GENERAL SCOPE OF WORK
>
> ---
>
> PAYMENT TO BE MADE AS FOLLOWS:
> Progress Claims to be submitted the 25th day of each month, Payment to be received on or before the 10th day of the following month
>
> SIGNATURE: "Murray Oxford"
>
> All material is guaranteed to be as specified. Any alterations or deviation from the above specification involving extra costs will become an extra charge over and above the proposal. All agreements are contingent upon accidents and delays beyond our control. Owner is to carry fire, windstorm and other necessary insurance. Our workers are fully covered by the Workers Compensation Board.
>
> **NOVA SCOTIA CONSTRUCTION SAFETY CERTIFICATION**
>
> **ACCEPTANCE OF PROPOSAL**: The above price, specifications and conditions are hereby accepted. You are authorized to do the work specified. Payment will be made as outlined above.
>
> Date of Acceptance: "July 21/05"
> [Signed by both Murray Oxford and David Isnor]

[17] Shortly after the contract was signed, Mr. Isnor and the Oxfords conducted a "walkthrough" of the top floor of the residence, which was then ready for the electrical "rough in" (that is, the running of the wires and cables from the basement to the locations of the various appliances, outlets, plugs and switches in each of the upstairs rooms and the placement of the boxes at the appliances, outlets, switches and plugs). This process was subsequently repeated (without Mrs. Oxford being present) for the first floor, the in-law suite and the basement level when each was ready for the electrical rough in. The walkthroughs lasted between two and three hours. During the walkthrough, the parties discussed what the Oxfords wanted and Mr. Isnor would mark on the location where each appliance, outlet, plug, switch or cable would be placed.

[18] Mr. Isnor and Mr. Oxford disagree as to the effect of these walkthroughs on the contract.

[19] Mr. Oxford states that what was agreed to be done during each walkthrough was what Mr. Oxford understood to be part of the original contract price and not an extra. He further

states that it was part of the original verbal agreement that any extra or change from the original contract would only be made after DLC provided him with a written quote for that work and he was given an opportunity to get other quotes.

[20] In contrast, Mr. Isnor says that, because the drawings provided by the Oxfords to him before he gave his price and signed the contract were architectural drawings with no electrical or mechanical information, and because the Oxfords never provided him with engineered drawings, he could only quote on the minimum standards of the Canada Electrical Code ("CEC"). He says it would be unreasonable for the Oxfords to assume that everything that was asked for and agreed to during the walkthroughs was part of the original contract, since he had no way of knowing until the walkthroughs what the Oxfords wanted. He believed, for example, that their request for tri-level lighting in the kitchen, spot lights in the roof soffits, extra door switches, extra voice/data cable outlets, extra plugs (every six feet versus the CEC standard of twelve feet) would clearly be extra. He says it was only later, when they started having difficulties that Mr. Oxford specified that he was to give a written proposal, and time to get an alternative quote, before that work would become a valid extra. He stated that they did discuss and he agreed to provide proposals for some major additions (such as supplementary baseboard heating, but that no request was made, or agreement reached that every request or agreement for an electrical outlet, plug, switch or appliance required a prior written proposal and approval.

[21] DLC also claims, as extras, items changed by the Oxfords after the walkthroughs, such as the moving and removing of ceiling light outlets in the living room, hallways and master bedroom, and switch and plug boxes.

D.2 The Law

[22] Subject to the Statute of Frauds, a contract may be oral or in writing. It may further be a written contract, or an oral agreement evidenced by a written memorandum; in the latter instance the memorandum need not be entered into at the time of agreement. A written memorandum need not be a single document but may consist of a series of connected documents. *Goldsmith on Canadian Building Contracts*, Fourth Edition, by Immanuel Goldsmith and Thomas Heintzman (looseleaf to release 2 in 2007; Carswell) Chapter 1§2(c).

[23] It is not disputed that a written contract came into existence on July 21, 2005 and that it consisted of three connected documents; the one-page contract signed July 21, 2005, which incorporated the Proposal of May 24 and the General Scope of Work of May 24.

[24] The issue in this case is the interpretation of that contract. Both parties have referred the Court to, and asked the Court to consider, extrinsic or parol evidence in support of their interpretation of the contract.

[25] In a case involving similar circumstances, **J & P Reid Developments** v. **Branch Tree**

Nursery and Landscaping, 2006 NSSC 226, this Court summarized some of the relevant principles for interpreting construction contracts at ¶¶ 58 to 65, some of which read as follows:

> “60 *Goldsmith on Canadian Building Contracts*, Fourth Edition, by Immanuel Goldsmith and Thomas Heintzman, (Carswell: 1995) summarizes the relevant principles at pages 1-38 and 1-39 as follows:
>
>> “. . . the function of the court in interpreting a contract is to determine the intention of the parties as expressed in their agreement. It is not the actual intention of the parties, but the intention of the parties as they have expressed it, that is the guiding consideration.
>>
>> If the parties have expressed their intention in clear terms, there is no need to resort to rules of interpretation, and in fact it is not permissible to do so.
>>
>> . . . in case of ambiguity the courts will construe a document against the person who prepared it, and every endeavor will be to give some sensible meaning to a document, however difficult this may sometimes be.
>>
>> . . .
>>
>> When the parties have taken the trouble to embody what they consider to be their agreement in a written document, the courts will be very reluctant to come to the conclusion that the document is completely meaningless; but in the last resort, if it is impossible to arrive at a proper construction, the contract may be held to be void for uncertainty.
>>
>> A written contract must be construed as a whole, and, as a general rule by looking at nothing other than the document itself. If the written agreement itself is clear and unambiguous, it is not permissible to ask what the parties in fact intended by the words they used, nor may the surrounding circumstances or the pre-contract negotiations be taken into consideration. There are, however, certain circumstances where such extrinsic evidence may be considered.
>
> 61 Of particular relevance to this case is the rule respect extrinsic evidence. *Goldsmith on Canadian Building Contracts*, at pages 1-40 - 1-42 says:
>
>> Evidence of surrounding circumstances is admissible to explain the meaning of words which are ambiguous or to identify persons or things not clearly defined in a document. The facts which existed at the time when the agreement was entered into and the conduct of the parties may sometimes be helpful in resolving such an ambiguity or clearing up such questions of identification. Such evidence, however, must not contradict or vary the written agreement, and may only be used to clarify any ambiguities or uncertainties. If the words of the agreement in themselves are clear and unambiguous, no such evidence is admissible at all. Nor can extrinsic evidence be admitted to fill a blank which the parties have left in the agreement. This sometimes happens where printed forms are used.

. . .

> It is important to distinguish between extrinsic evidence sought to be adduced for the purpose of construing a contract, and evidence intended to be used for the purpose of showing that no contract in fact exists, or that the contract does not correctly set out the agreement between the parties. The rule against the admissibility of extrinsic evidence applies only in the former situation.

62 The extrinsic or parol evidence rule - that external contradictory evidence is not admissible, is derived from the Supreme Court of Canada decisions in *Hawrish v. Bank of Montreal*, [1969] S.C.R. 515 (S.C.C.), *Bauer v. Bank of Montreal*, [1980] 2 S.C.R. 102 (S.C.C.) and *Carman Construction Ltd. v. Canadian Pacific Railway*, [1982] 1 S.C.R. 958 (S.C.C.).

63 In *Gallen v. Allstate Grain Co.*, 1984 CarswellBC 104 (B.C.C.A.), the British Columbia Court of Appeal seems to have reduced the rule to a presumption that a written contract constitutes the whole of the agreement between the parties.

. . .

65 In *Canadian Newspapers Co. v. Kansa General Insurance Co.*, 1996 CarswellOnt 3227 (Ont.C.A.), the Ontario Court of Appeal allowed extrinsic evidence that did not contradict the written contract. The Court, citing *Gallen*, endorsed admission of extrinsic evidence that illustrates the "factual matrix" of the agreement. In *Canada Deposit Insurance Corp. v. Commonwealth Trust Co.*, 1997 CarswellBC 2175 (B.C.C.A.), the British Columbia Court of Appeal stated that evidence about the "factual matrix" (that is, the surrounding circumstances) is admissible even if the agreement is not itself ambiguous. This decision gives a far broader scope to "factual matrix" than the Ontario Court of Appeal did in *Arthur Andersen Inc. v. Toronto Dominion Bank*, 1994 CarswellOnt 233 (Ont. C.A.), which decision seems to limit such evidence to identifying the purpose of the agreement."

[26] Additional relevant comments from the text writers in *Goldsmith* (the looseleaf version) include a discussion in respect of pre-tender information at Chapter 2§1:

> "It is customary in the case of building contracts for the owner to provide the contractor with certain information as to the character of the work and the nature and condition of the site where the work is to be performed, so as to enable him to submit an intelligent and realistic bid. . . . as a matter of practice it is virtually impossible for a contractor to submit, or agree to, a price without at least some such information. . . . Frequently, the pre-tender information is incorporated in the final contract, in which event any error in such information will amount to a breach of contract . . . A contract may, however, expressly exclude all representations and warranties and seek to relieve the owner from liability for any error in such information"

and at Chapter 2§4 "Specifications", the authors write:

> "The specifications are that part of the contract which sets out in detail the precise nature of the work to be performed. Specifications may be very short, or they may be extremely detailed, . . . The rules of construction applicable to contracts in general apply to specifications."

[27] A significant issue between the parties as to whether there were "extras" and if so, what they were. The seminal decision describing the nature of extras is **Chittick** v. **Taylor**, 1954 CarswellAlta 43 (Alta.S.C.). At ¶¶ 5 to10, the Court described the rules as follows:

> "5 Generally speaking, in my opinion, the following rules should apply:
>
> 6 Rule 1. An item specifically provided for in the contract is not an "extra".
>
> 7 Rule 2. When the plaintiff supplied material of a better quality than the minimum quality necessary for the fulfilment of the contract, without any instructions, express or implied, from the defendant do so, he is not entitled to charge the extra cost as an "extra".
>
> 8 Rule 3. When the plaintiff did work or supplied materials not called for by the contract (plans or specifications) without instructions, express or implied, from the defendant, or the consent of the defendant, he is not entitled to charge this additional work or materials as an "extra". (This was admitted by the plaintiff in evidence.)
>
> 9 Rule 4. When the plaintiff did work or supplied materials not called for by the contract on the instructions, express or implied, of the defendant, he is entitled to charge for additional work or materials as an "extra."
>
> 10 What amounted to instructions from the defendant is dependent on the circumstances relating to each item. If the defendant, without giving definite instructions, knew the plaintiff was doing extra work or supplying extra materials and stood by and approved of what was being done and encouraged the plaintiff to do it, that, in my opinion, amounts to an implied instruction to the plaintiff, and the defendant is liable."

[28] Chapter 4§3 in the looseleaf version of *Goldsmith* deals with extras.

> "It frequently happens during the course of construction that, without substantially altering the nature of the work as originally planned, additional work, not specifically envisaged by either party to the contract, becomes necessary, or that the owner requires additional work to be performed. A contractor is obliged to perform only such work as is included in his contract, and accordingly contracts frequently provide of such a contingency by giving the owner the right to order extra work . . . Such an agreement may be an express contract, or it may be an implied contract to pay for work done at the request of the owner and accepted by him. If no price is fixed for the performance of such work, the court will imply a promise to pay a reasonable amount on a *quantum meruit* basis.
>
> . . .
>
> (a) Nature of Extras
>
> Extras . . . must be distinguished on the one hand from work properly called for by the contract, and on the other, from work which is substantially different from, and wholly outside, the scope of the work contemplated by the contract. . . . Whether a particular item of work is an extra or not must be determined by reference to the terms of the contract, the nature of the work and the surrounding circumstances. . . . In order to be entitled to payment for an extra, the contractor

> must not only comply with any specific provision in the contract relating to extras, but the work must have been carried out at the express or implied instructions of the owner. A contractor who voluntarily and without instructions does additional work not required by the contract is not entitled to any extra payment therefor, ...
>
> (b) Authorization for Extras
>
> . . .
>
> Many building contracts contain express provisions dealing with extra work, specifying what conditions precedent must be complied with to entitle the contractor to payment, . . . If the contract requires a written order as a condition precedent to payment for extra work, a contractor who carries out such work without a written order cannot recover additional payment therefor. Whether or not a written order is a condition precedent to payment is a matter of construction of the contract."

D.3 Analysis

[29] It is not disputed and I agree that the contract consists of the July 21, 2005, one page signed agreement and that it incorporated the May 24, 2005 Proposal and General Scope of Work documents.

[30] Some matters disputed by the parties clearly fall within the written contract; others are not so clear. With respect to those disputed matters that are not clear on a plain reading of the written contract, and for the purposes of establishing the "factual matrix" of the contract, I have considered the extrinsic and parol evidence. Extrinsic or parol evidence that conflicts with what I find to be clear in the contract cannot change the written contract.

[31] The written contract (incorporating the three pages referred to above) was a fixed-price contract of $33,105.00 plus HST, or $38,070.00, and was based on:

a) the plans - which plans were architectural drawings that contained no information as to the electrical and mechanical components of the construction project;

b) information provided (to the extent it did not conflict with the written contract) by oral exchanges before July 21st, and the only written information provided to DLC before the contract, the July 14, 2005, Bruce Thompson documents; and,

c) the Canadian Electrical Code (CEC) which was referenced in both the May 13 version and the May 24 version of the General Scope of Work as the "minimal standards required by Canadian Electrical Code".

[32] The written contract set out the method for dealing with extras: "Any alteration or

deviation from the above specification involving extra costs will become an extra charge over and above the proposal."

[33] I reject the parol evidence tendered on behalf of the Defendants to the effect that the "minimal standards of CEC" was not part of the contract, or, if part of the contract, should be construed in a manner that deviates from the plain meaning of this phrase. I accept that exhibit 6 contains the minimal standards of CEC as applied to this project.

[34] Mr. Oxford suggests that included in the contract price were those items discussed orally between Mr. Isnor and himself leading up to the execution of the contract on July 21, 2005, and the items agreed to between Mr. Isnor and himself during the "walkthroughs" that occurred after July 21, 2005. With respect to the latter, Mr. Oxford and Mr. Isnor would make a "walkthrough" of the portion of the residence ready for the electrical rough in and discuss and agree on what would be done.

[35] I do not accept that the discussions (especially the walkthroughs) that occurred after the July 21, 2005 contract containing the "minimal standards of CEC" phrase, reflects an agreement that DLC would carry out that work for the contract price, but rather reflect an agreement that to the extent that the work requested exceeded the minimal CEC standard, the owner would pay for it as an extra.

[36] I reach this conclusion for several reasons.

[37] Mr. Oxford was a very experienced business man with considerable sophistication in dealing with commercial contracts, and with employment experience as a purchasing agent with one of the national construction firms (negotiating, and dealing in, contracts for the supply of materials for large construction projects). His experience and sophistication far exceed that of Mr. Isnor who was described by Mr. Oxford, and in submissions by the defendants' counsel, as more of a skilled tradesman than a business man, and a person with inadequate "paper work" skills. I do not accept that he was not aware that the May 13 "General Scope of Work" document provided to him by DLC in response to a request for better particulars of DLC's proposal, repeated in the May 24 "General Scope of Work" document (after further discussions between him and Mr. Isnor), and incorporated (by reference) in the July 21 contract, meant; in particular that it meant anything other than "minimal CEC standards". The retention of this simple phrase in the contract negates any suggestion that the contract price included more than the minimal CEC standard. At one point in his direct examination, Mr. Oxford appeared to recognize this when he noted that what Mr. Isnor said and wrote down were different, and this left doubt in his mind as to how it would be handled.

[38] Mr. Isnor stated, and his counsel argued, correctly in my view, that without any electrical or mechanical or engineered drawings and specifications, DLC could not provide a price for anything other than a specific standard, and the specific standard he cited in the written documents that he gave to Mr. Oxford were the "minimal standards of CEC". It would be, Mr. Isnor argued, unreasonable to assume that:

a) DLC, at the request of Mr. Oxford, provide a written proposal on April 30 without any electrical/mechanical information;

b) discuss this proposal with Mr. Oxford;

c) respond with further information in the form of a General Scope of Work on May 13, which specified "minimum CEC standards";

d) then have further discussions (specifically on May 19) and resubmit the Proposal and General Scope of Work documents containing the same terminology;

e) then enter into a contract that specifically incorporates those documents;

and, assume that in the absence of any other electrical/mechanical specifications, that the words were not intended to be a limitation or qualification on the contract price given by DLC to the defendants. Said differently, it would be unreasonable to expect DLC to provide a fixed price for services and materials that were largely unknown.

[39] I accept that the "minimal CEC standards" were the number of outlets (for appliances, lights etc.), switches, plugs and cables that are set out in Exhibit 6 - DLC's handwritten estimates prepared on a review of the owners' architectural drawings.

[40] Having said that, there is no evidence that the CEC standards deal with all aspects of the electrical component of the construction of the residence; that is, the code does not set out what the heating and mechanical components of the house will be and therefore what the "minimal standards of the CEC" would call for in installing, for example, the heating system, and the service entrance. Engineered drawings were required to be supplied by the owner. No such drawings were supplied (except at some point, drawings by Halifax Heating in respect of the heating system, and specifications for calculation of the electrical service requirement by Bruce Thompson).

[41] To determine what information DLC had at the time it entered the contract with the Oxfords, I have considered the parol or oral evidence. The most reliable evidence respecting the heating system is that of Mr. Thompson who received information from Mr. Isnor before his evaluation of the electrical needs of the residence on July 14, 2005 (Exhibit 2, Tab 4). It satisfied me that DLC's price was based on two heat pumps.

[42] With regards to the issue of the service entrance, Mr. Isnor says that it was all to be located within the garage, and Mr. Oxford says that it was to be partly in the garage but the panels were to be in another room eventually designated as the "mechanical room". Both parties rely upon a sketch apparently made by Mr. Isnor on May 19, 2005 to describe his concept of the electrical service entrance, which sketch was kept by Mr. Oxford. I was concerned that the Court did not have access to the original sketch in Mr. Oxford's possession since Mr. Isnor denied inserting the words "SW" and "SWIT" in the location of two rectangles that also had the

words “Panel” written above them. Mr. Isnor says the rectangles represented “panels” as written by him, not switches. The words: “SW” and “SWT”, which were written upside down, were not his writing.

[43] It appeared to the Court that the word “400 amp switch” written in another location by Mr. Isnor may not have been in the same handwriting as the upside down words Mr. Isnor says are not his.

[44] Based on my assessment of the *viva voce* evidence as it relates to the sketch (Exhibit 2, Page 12), I accept Mr. Isnor’s evidence that the contract price and contract were based on the entire service entrance being within the garage. The evidence of Gordon LeBlanc and Carmen Rafuse did not contradict this conclusion. Their involvement began after the contract was signed (and the sketch made), and they had no knowledge or participation in the negotiations.

[45] Mr. Oxford states that he instructed DLC, and that it was a term of the contract, that any extras or changes were to be effected only after DLC provided a written priced proposal, and Mr. Oxford retained the right to get a second price before providing a written approval for the extra. DLC disputes this.

[46] The issue of how extras are to be dealt with is usually covered in the contract. It may be expressed in different ways. If there is nothing in the contract that deals with how extras will be dealt with, then it is clear that a contractor must have the prior express approval of the owner before it is entitled to be paid for anything above and beyond the strict terms of the contract, or he/she risks not being paid.

[47] In the case at bar the contract did contain an express provision respecting extras: “Any alteration or deviation from the above specification involving extra costs will become an extra charge over and above the proposal.”

[48] This clause is different from the most common clause found in commercial construction contracts. As noted in the text, *Goldsmith on Canadian Building Contracts*, contracts which entitle the owner to order extras usually contain a provision to the effect that the contractor will not be entitled to payment without a written order signed by some authorized person. Such was the case in **J & P Reid Developments Ltd.** v. **Branch Tree Nursery & Landscaping Ltd.** *supra*.

[49] There is no requirement in the contract in this case that DLC obtain the prior written approval, or submit a written proposal, before it carried out “extra” work or was entitled to charge for work that was not covered by the contract; on the contrary, the contract specifically provides that any alteration or deviation from the contract specifications involving extra costs will be an extra charge.

[50] While I do not find any ambiguity in the wording of the contract, I carefully listened to all the oral evidence, reviewed the exhibits, and considered the parol evidence. I am not satisfied,

based on either the contract alone, or on the parol evidence, that Mr. Oxford requested, either before or at the time of the contract, that every alteration or deviation from the contract specifications involving extra costs called for a prior written proposal from DLC. I do accept that both before and after the contract was signed, Mr. Oxford and Mr. Isnor did have discussions about some extra items (particularly, more expensive options) and that Mr. Oxford requested a price, and Mr. Isnor provided a price. However, this Court does not accept that discussions with respect to some extras, which resulted in a request for a written price, had the effect of importing a requirement for a written proposal and prior approval as an additional term or condition to the "extras" clause in the contract for all extra work, nor that, if the owners and contractor agreed that the work would be done in a certain way (or changed) after the contract was entered into (for example, during walkthroughs), a prior written proposal from the contractor and prior written acceptance from the owner, was a further prerequisite to the contractor's entitlement to payment.

[51] This conclusion is reinforced by the notes that Mr. Oxford made of his meetings and phone calls with Mr. Isnor. Some of these notes were included in the exhibits tendered by the Oxfords. Whether or not the notes are self-serving, I accept that the notes do reflect some of the discussions between Mr. Isnor and Mr. Oxford in relation to the contract. None of the notes tendered, for the period leading up to or at the time of the contract, refer to any discussion that every alteration or variation from the contract specifications would be valid only if the contractor provided a prior written proposal to the contractor. Some portions of Mr. Oxford's notes are to the effect that Mr. Isnor was requested to get a price for a certain item (for example, for a generator or electrical floor warmers). These notes do not reflect a general requirement that all extras or variations, no matter how small or large, required a prior written proposal and approval.

[52] My conclusion is supported by the evidence of Carmen Rafuse. He has been an electrician for 35 years, the last 10 years with DLC. He was the on-site supervisor or foreperson for DLC throughout this project. He gave his evidence in a straightforward manner, and was the most objective. He appeared to have no agenda, guile, or bias. Recognizing the limitations of assessing credibility on demeanor, I accept his evidence when it conflicted with others. He did not see the contract, and had no involvement before its execution; however, he was present for the walkthroughs, had daily contact with Wade Flynn, and frequent contact with Mr. Oxford. His evidence about who made requests for work to be done (and how), and what changes were requested and made is accepted by me. It confirms that DLC was simply trying to do the job that the owners wanted, and that the owners, directly or through Mr. Flynn, requested and/or approved everything that was done by DLC. What was requested by the owners was more than minimal CEC standards. Mr. Rafuse prepared and provided to DLC's office the record of labour and materials upon which the invoices for "extras" were based. I accept his evidence that it was later in the project ('[Oxford] only started asking for quotes when we were working in the basement') that Mr. Oxford started asking for written proposals for every change or "extra", and, at that time, Mr. Isnor became frustrated and proposed that the contract be changed to a "time and materials" contract.

[53] Further evidence that by inference confirms DLC's interpretation of the contract price of

$33,103.00 ($38,070.00 including HST), was in respect of a previous quote for the electrical work. During cross-examination of Mr. Flynn, he referred to Scott Cochrane Electrical giving a quote of $55,000.00, and having started some work in the site. DLC's counsel appeared unaware of a prior quote until this answer. During examination of Mr. Oxford the next morning, Mr. Oxford testified as to a prior quote from Cochrane Electrical. He suggested that the quote included more work, but did not produce a copy of the quote or what it was based on. On cross-examination, Mr. Waterbury's questions made it clear that the Cochrane proposal had not been disclosed, or provided to DLC's counsel, even though Mr. Oxford acknowledged that he still had it. The fact of the non-disclosure of this relevant evidence until it came out in the cross-examination of Mr. Flynn, and the manner in which Mr. Oxford testified about it (that is, his demeanor) left me with serious doubts as to the accuracy of Mr. Oxford's testimony about the contents and quantum of the Cochrane proposal. In not tendering of the earlier proposal, and with doubts that the information provided to Cochrane Electrical was any different from the information provided to DLC, it is difficult to understand how Mr. Oxford could have understood that the DLC proposal, which was less than 60% of the prior proposal (70%, if the prior proposal included HST), could have included more than "minimal CEC standards".

[54] I conclude that:

1) the owners' original plans contained no electrical or mechanical information. It was on these plans that the owners asked for a quote or proposal. Engineered drawings were the responsibility of the owners. DLC provided a quote or proposal based on minimal CEC standards (exhibit 6).

2) The contract price included no more than minimal CEC standards for those items covered by the standards, together with such basic other requirements not covered by the CEC as were discussed between Mr. Oxford and Mr. Isnor before the contract was signed.

3) Anything that DLC did beyond minimal CEC standards was to be paid by the owners as an extra.

4) It was only in the later stages of DLC's work (when they were working in the basement), when differences arose between the owner and the contractor, that Mr. Oxford requested written proposals for <u>all</u> extras or changes from the "minimal CEC standards" contract, but this was after much of this work had been completed.

<u>E. Second Issue - Did the contract change after July 21, 2005?</u>

[55] Mr. Isnor states that, because of the differences between DLC and Mr. Oxford that developed in respect of what was and was not included in the contract, in late August 2005 they discussed and orally agreed to change the contract to a time and materials contract.

[56] Mr. Oxford says there was no such agreement.

[57] I accept that it would have been easier for everyone if the contract had been changed to a time and materials contract (or had been from the beginning) in light of the absence of electrical, mechanical or engineered plans or specifications; however, DLC has not established on a balance of probabilities that the contract did change.

[58] Mr. Isnor states that the discussions with respect to the new contract took place at the construction site and that Mr. Rafuse and Mr. Flynn were present. At trial, neither Mr. Rafuse nor Mr. Flynn testified that they overheard such agreement. Mr. Rafuse stated that the manner in which the contract was carried out did not change after that date. Mr. Isnor appeared to suggest that, while the discussion with regards to time and materials may have taken place in part in the presence of Mr. Rafuse and Mr. Flynn, the agreement was concluded in the proposed office/study when only he and Mr. Oxford were present.

[59] This evidence appears to differ from that given by Mr. Isnor at discovery, when he said the agreement was made in the presence of the others.

[60] His excuse for giving a different answer in discovery was that Mr. Leahey rattled him and he could not think clearly. That may be so, but his conflicting evidence and Mr. Rafuse's evidence negate the probability that a new oral agreement based on time and materials replaced the fixed price contract of July 21, 2005.

[61] The Court acknowledges that effective September 1, 2005 DLC invoiced the Oxfords on the basis of time and materials and did not attempt to differentiate between the work under the original contract price and extras or changes.

<u>F. Third Issue - Who breached the contract?</u>

[62] To answer this question I must determine the contractor's entitlement; that is, what extras or changes DLC was entitled to payment for, and what portion of the work covered by the contract price had been completed, and compare it to the amount paid to DLC.

[63] It became evident during oral testimony that Mr. Isnor identified the work in DLCs invoices in a cryptic and sometimes misleading (to a layman) way; I have considered and accept his explanation as to what work was covered by each invoice.

[64] Exhibit 2 contains a well-organized summary of the categories of invoices that are agreed to and disputed.

[65] Tab 11 contains a summary of five invoices for extras approved and paid by the owners in the amount of $4,222.10. For each, DLC submitted a written proposal accepted by Mr. Oxford.

[66] Tab 7 contains copies and a summary of 24 disputed invoices. Of the disputed invoices, two (#4701 and #4754) were claims made by DLC for work between September 1 and October 8 on the basis of its understanding that the terms of the contract had been changed to a time and materials contract. The invoices total $25,770.00, of which the owners paid $9,700.00 on October 12th.

[67] One invoice (#4752) is a credit in the amount of $1,982.00 to the owners by DLC for materials invoiced but not used.

[68] The remaining 21 invoices are for work that the owners claim were for the most part included in their understanding of the terms of the contract, or were unauthorized extras, or were for some other reason not payable. They total approximately $15,800.00.

[69] There was extensive direct and cross examination with respect to these invoices. Based on my understanding and determination of the contents of the contract, I determine that 16 of the invoices should be paid in full; 3 should be partially paid; and, the remaining two (#4712 and 4720) were either part of the contract price or were paid by another invoice.

[70] The 16 invoices that should have been paid in full are Invoice Numbers 4668, 4694, 4696, 4697, 4698, 4699, 4700, 4719, 4721, 4724, 4725, 4726, 4727, 4728, 4729, and 4742. These invoices total, in round figures, **$3,750.00**.

[71] The following three invoices should have been partially paid: Invoice Number 4695 ($585.00) should be paid in the amount of $300.00 as the work as not completed; Invoice Number 4753 ($4,634.00) in respect of the voice/data lines and installation should be paid in the amount of $2,300.00 as it was partially completed; and, Invoice Number 5104 in the amount of $6,037.00 should be paid in the amount of **$2,000.00**.

[72] The last invoice (#5104) requires an explanation. When the DLC left the job, the owners refused, despite requests and invoices, to return to DLC the temporary service it had installed in order to provide power to the site during construction. The owners and their subsequent contractors continued to use the temporary service to complete the construction of the property. By doing so the owners saved disconnect and reconnect fees from NS Power, and the cost of replacing the temporary service. The owners had no legal basis for arbitrarily keeping and refusing to return the temporary service to DLC. DLC invoiced a weekly fee of $175.00 from October 20, 2005 to May 11, 2006. This rental fee was not agreed to. No evidence of a standard rental fee was produced. The Court heard various evidence as to what the cost of a temporary service was (it varied according to what was included). The Court heard some evidence as to the savings to the owners by reason of not having to disconnect and reconnect power. DLC is entitled to compensation on a *quantum meruit* basis. I determine that **$2,000.00** is a fair

quantum meruit payment for the wrongful conversion of the temporary service.

[73] In summary, of the contested and unpaid invoices for extras or changes, the Court approves, in round figures, $8,400.00, of which $6,400.00 was invoiced before DLC abandoned the site.

[74] Because DLC invoiced its progress claims for work and materials after September 1st on the basis of Mr. Isnor misunderstanding, there is no direct evidence before the Court as to how much of the $25,700.00 invoiced (of which $9,700.00 was paid) was for work beyond the terms of the July 21 contract price. On the basis that the other invoices (approved by the court) constituted approximately 20% of the contract price, I conservatively estimate that 15 % of the $25,000.00 billed after September 1 on the basis of time and materials was also for plugs, switches, outlets and the running of the wiring to those items that were in excess of the minimum standards of the Canadian Electrical Code, which estimate for extras I round to **$3,600.00**.

[75] Having determined the value of "extras" and changes, the second requisite is to determine how much of the contract DLC had completed when it left the job.

[76] The contract price (including HST) was $38,070.00. The owners had paid in three advances the sum of $27,195.00 or about 70% of the contract price.

[77] When the owners refused to pay any more to DLC, DLC determined to cut its losses and leave the job site. When DLC had left the owners retained Alexander Dewar, a professional civil engineer, to estimate the percentage of completion of the electrical contract. Mr. Dewar visited the site on October 21, 2005 for that purpose (he also returned to the property to deal with the damage issue dealt with later in this decision). His summary report is Exhibit 2, Page 3; in it he estimates that the electrical work was between 55% and 65% complete (exclusive of any approved extras).

[78] Applying Mr. Dewar's estimate to the contract price, DLC should have been paid between $21,938.00 and $24,745.00, exclusive of what Mr. Dewar considered approved extras.

[79] Mr. Dewar's only information about what the contract price included was what Mr. Oxford told him. Based on Mr. Oxford's views, Mr. Dewar would have assumed that the contract called for more work and material, such as, for example, more plugs, switches and outlets and more connections to more services, than what my determination of the contract price called for. It was the work that was started and not completed (both as contracted and "extras" and changes) that he observed.

[80] Adjusting Mr. Dewar's evidence to take into account my finding that the work that the owners believed was part of the contract price was only about 80% of what I determine DLC performed under the contract, and applying that calculation to Mr. Dewar's opinion as to the percentage of completion, the value of the work completed when DLC left the site was between about $25,125.00 (55%) and $29,694.00 (65%), or taking the median or middle point

approximately $27,400.00. This is very close to the actual amount paid ($27,195.00) by the owners on the contract price as of the time that the contractor abandoned the site.

[81] The July 21 contract provided for progress claims to be submitted the 25th of each month and paid on or before the 10th of the following month. Invoice Number 4701 was dated September 21, 2005 and I therefore assume it was due and payable by October 10, 2005. $9,700.00 was paid on October 12. I have already determined that $27,400.00 was the approximate amount owing on the contract price (minimal CEC standards) as of the time that the contractor abandoned the job. In other words, by paying $9,700.00 on October 12 the owners had paid the contractor what he was due under the contract except for the disputed extras that I have determined were part of the contract but not in the contract price. (Not included in any calculations are the 5 invoices for extras approved and paid by the owners.)

[82] I have determined that the owners owed DLC **$12,000.00** for extras (**$3,750.00, $4,600.00**, and **$3,600.00**), of which **$2,000.00** was the *quantum meruit* debt invoiced after abandonment. If those extras or changes were part of the contract, but not part of the contract price, they should have been paid as part of the progress payments. If they were extras, the authors of the text, *Goldsmith on Canadian Building Contract* at Chapter 4§3, suggest that they are due when the extras have been completed and invoiced. The last "extras" invoice (#4753) was dated October 20. Either way, the extras (except with respect to the temporary service) were due on October 20. Mr. Oxford had clearly declared his intention not to pay them. When DLC abandoned the job site, the owners were in default respecting payments due to DLC.

[83] Even if I am wrong in assigning $3,600.00 of Invoice Numbers 4701 and 4754 as extras, the other $6,400.00 invoiced by DLC when it abandoned the job site should have been paid. The owners were still in default.

[84] In the result, I find that it was the owners who were in breach of the contract by refusing to pay DLC the amount due, when DLC abandoned the site.

[85] For that reason, the fact that the owners hired another electrical contractor to complete the contract and that the cost of completion of the contract was greater than the balance due under the contract to DLC need not be determined.

[86] If I am in error, I note that Corkum's Electrical appears to have completed the job in a manner different from that which DLC contracted for; for example, as noted earlier in this decision, the original contract was based on panels being in the garage and not in a separate "mechanical room", and the number of outlets, plugs, switches to be completed, and consequently the number of wires run between them, exceeded the minimal CEC standard (exhibit 6). I also note that (a) Corkum's Electrical completed the work on a time and materials basis, and not on a fixed price, for $21,050.06, with the owners paying for some additional materials (about $13,000.00), and (b) the total actually paid by the owners for the electrical work was about $61,000.00 - about $2,000.00 less that the Cochrane proposal, if the $55,000 was before HST, or $6,000.00 more, if the Cochrane proposal included HST.

G. Fourth Issue - Whether DLC caused damage and, if so, what are the damages?

[87] The owners claim that in drilling a hole and placing a conduit pipe for a light in the basement cold room, situate under the front entry landing, DLC negligently drilled through the concrete in a location that pierced the water tight membrane under the front entry landing. This caused water to leak into the cold room when it rained. The leaking was not noticed until late November 2005 - several weeks after DLC had left the job. DLC denies that it drilled the hole or placed the conduit.

[88] The owners first attempted to stop the leak by injecting Perma-Seal (a Permacrete product) on January 23, 2006 at a cost of $115.00. This apparently did not work.

[89] The owners consulted Mr. Dewar, the civil engineer. His reports dated December 14, 2005; February 21, 2007; and, November 26th, 2007 were before the Court. His written advice on February 21, 2007 was:

> "In order to repair this leak permanently, the trim panel under the front door must be removed, the concrete slab removed to get proper access to the leak, and the conduit sealed properly so that it doesn't leak in the future. Since the landing slab is a monolithic pour, and the pressed floor patter is staggered, it will be necessary to remove the complete landing and repour it."

[90] On November 26, 2007, he again wrote:

> "On November 9, 2007 I visited the above residence and again observed a small electrical conduit that had been installed under the front door through the outside foundation wall into the basement. I noticed that there was an attempt to seal the leak with Perma-Crete grout, and this grout did not seal the leak. Mr. Oxford sought my advice as to whether there was any other possible remedy available to correct the leaking conduit, which would be less expensive than the alternative of removing the entire slap lying over the conduit. I suggested he attempt the repair with a new product which would be injected under the slab, at a cost of less than $4,000.
>
> This solution was attempted but according to a report I received from Mr. Oxford, it proved to be unsuccessful as the conduit continues to leak. Consequently, I now can see no alternative but to the removal of the slab.
>
> For your information, the new product reference above is known as *Seal Guard*, which is a polyurethane product that is injected into the leak under pressure, and expends substantially as the liquid solidified, usually within 5 seconds."

[91] The record respecting the second attempt at repair is the e-mail from MacNeil Construction to the owners dated January 6, 2008 totaling $502.74.

[92] The owner received two quotes to carry out the recommended repairwork. The first was $16,694.00 from Wade Flynn's company (February 12, 2007) and the second was $18,651.00

from Don Parker (January 9, 2008). The work has not been carried out.

[93] Mr. Dewar's oral evidence was that the leaking (seeping as opposed to weeping) was now "very minor", but that moisture of any kind was not good "environmentally or otherwise".

[94] The evidence respecting liability for the leaking conduit, denied by DLC, can be summarized as follows:

a) Randy Corkum, the electrician who finished the job, did not drill the hole or install the conduit and did not discover it but was asked to reroute the wire. He removed the wire from the conduit and drilled a hole through the cold room wall at the request of, and direction of, Wade Flynn and reinstalled a light in the coldroom.

b) Wade Flynn described the six inch concrete walls (filled with rebar) of the cold room, covered on both sides with three inches of insulation. He described the skills needed to properly drill a hole through such a wall. He was licensed and knew how to do it. He stated that he discussed with Mr. Rafuse and a Mr. Kenney (an employee of DLC with a broken jaw) where the hole should be drilled to put the light in the cold room. It was on the side wall in the location where Randy Corkum eventually put it. Mr. Flynn did not see the hole being drilled or by whom it was drilled. He testified that it was Mr. Oxford who could say that DLC drilled it. He did not recall seeing that DLC had the special concrete or hammer drill with diamond bits that needed in order to drill through concrete. He did not think DLC drilled any of the other holes that were drilled in the basement or through any of the other concrete walls. He did not notice the improperly drilled conduit hole. Mr. Oxford brought it to his attention, two or three or maybe four weeks, after DLC left the site. Referring to the photographs in Exhibits 2B, Pages 7, 8, 9 and 13, and sketches that he drew (Exhibit 8 for Discovery and Exhibit 13 for trial) he showed the location of the drilled hole and how it would have pierced the water tight membrane under the front entry landing.

c) Murray Oxford first noticed the leaking in the cold room in November 2005. It was first raised in his November 23 letter to Mr. Waterbury. I infer that it was discovered after his November 16, 2005 letter to Mr. Waterbury. This is consistent with the general time frame given by Mr. Flynn. There was no evidence that he knew who drilled the hole. He assumed that it was drilled by DLC because it facilitated an electrical wire to a light box.

d) Gordon LeBlanc was an experienced apprentice electrician with DLC who worked on this project from the beginning to the end. He reviewed the photographs. He testified that he did not drill any conduit holes and he did not see any other DLC employee do so. DLC's policy was not to drill any conduit holes below grade. He said DLC would not drill holes on an angle, as shown in the photographs; they would "cut straight". He acknowledged that a co-worker with a broken jaw, Doug Kenney, had worked at the residence and had not worked with DLC since about a year after that contract ended. He was never asked to attempt to contact Mr. Kenney, and was not aware of the allegation respecting the leaking hole and conduit until just before trial. He stated DLC did not have a concrete drill at this site but that Wade Flynn did.

e) Carmen Rafuse recalled a discussion with Wade Flynn about the drilling of a hole through the wall of the cold room to run a conduit for a light switch. It was to be straight through the wall at the location of the switch as this was the easiest route. He recalled similar conversations occurring respecting maybe five other conduit holes. Neither he nor any employee of DLC drilled any of them. When shown the photographs of the leaking conduit, and asked how he knew that his forces did not drill it, his answer was that neither he nor his crew would ever "pinch off" the conduit pipe against the wire as shown in the photographs, or leave the hole looking as sloppy as in the photographs. He stated that he had not been asked to located Doug Kenney, the electrician with the broken jaw, who had worked on the job and whom Mr. Flynn had said was present when he discussed the drilling of the hole.

f) David Isnor stated that DLC's policy was not to drill concrete below ground level and they tried to stay away from walls with rebar because of frequent damage to drill bits that cost $150.00 each. He says that DLC would not drill the hole. He had no personal knowledge as to how the hole was drilled or by whom. If DLC had drilled a hole and placed the conduit, he stated the conduit sleeve would have protruded out further and been strapped and the conduit pipe would not have been pinched on the wire as this could cause overheating and cause the wire become grounded. He had not seen Doug Kenney since he was laid off during a slowdown in work in early 2006. On cross-examination, he acknowledged no personal knowledge about the conduit in dispute. He repeated his position that DLC let general contractors do the drilling (as occurred for the other holes that had to be drilled on this site), because the drill bits were too expensive.

Analysis

[95] The onus is on the owner to establish, on a balance of probabilities, that:

a) DLC drilled the hole through which the conduit and pipe were placed;

b) The drilling of the hole caused the leaking; and,

c) The proposed remedial action was a reasonable solution.

[96] Resolution of this issue caused the Court much difficulty. It is clear that the purpose of the hole to be drilled was for a conduit through which a wire passed to a light box (and a temporary light) in the cold room. While the work was not noticed until about three weeks after DLC left the job, I am satisfied that Randy Corkum did not drill this hole.

[97] There is no other logical explanation of who would have carried out the work of drilling the hole and placing the conduit other than that it was done by DLC as part of their electrical

contract. It is logical to place an evidentiary burden on each party to bring forward any witnesses or evidence that might shed the "best" light on the subject and the most direct evidence. I considered this in my analysis of other issues (for example the failure of Mr. Oxford to disclose and produce the Cochrane quote, and the original sketch respecting the electrical entrance).

[98] It is clear that counsel for the owners wanted to determine the whereabouts of Doug Kenney, the laid off employee of DLC (with the broken jaw), whom Mr. Flynn says was present during Mr. Flynn's discussion with Mr. Rafuse about drilling the hole through the concrete to the coldroom. The owners suggest that it was likely Mr. Kenney who did the work. It appears that counsel for the owners asked DLC to advise them of Mr. Kenney's whereabouts during pre-trial processes. Mr. Isnor made no effort to do so, even though it appears that Gordon LeBlanc may have been able to contact him if he had been asked.

[99] It is of concern to the Court that no effort was made to contact Mr. Kenney when it was possible that he may have some firsthand knowledge as to the circumstances surrounding this issue.

[100] I conclude that, since there was no other reason for drilling of the hole other than the insertion of the conduit and wire for light in the cold room, it was most likely performed by DLC in carrying out its electrical contract. While it is not necessary for this decision, I believe it was most likely done by Mr. Kenney.

[101] I am left with some doubt as to the effect of the drilling of the hole through the water tight membrane on the leaking of water into the coldroom, because the front entry landing had not yet been removed. Nevertheless, there is no evidence of any leaking before the hole was drilled and the conduit and wire inserted, and for that reason I conclude that it was likely that the drilling of the hole through the water tight membrane caused the leaking of water into the cold room.

[102] An equally difficult question is the reasonableness of the claimed remedy. I accept that Mr. Oxford acting reasonably in an attempt to resolve the problem first with the Perma-Crete solution and second with the high pressure grout (Seal Guard).

[103] Nevertheless, the quotations from Mr. Flynn of February 2007 and from Mr. Parker in January 2008 of the steps necessary to implement what Mr. Flynn proposed and Mr. Dewar approved; that is, the providing of temporary alternative support for the overhanging roof, the removal of the entire concrete landing and membrane and the replacing of them, is in both relative and absolute terms a substantial expenditure (between $17,000.00 and $19,000.00). My concern with the cost takes into consideration Mr. Dewar's statement that the present moisture is "very minor". However, no alternative remedy to mitigate the consequences of the leaking and moisture was before the court.

[104] In the absence of any evidence of another remedy, despite the common sense inference that a less expensive alternative remedy might mitigate the consequences, I award damages on

the counterclaim in the amount of **$17,000.00,** in round figures the approximate amount of Mr. Flynn's proposal, recommended by Mr. Dewar.

H. Summary

[105] On DLC's claim, the Court awards the sum of **$12,000.00** for extras and changes not included in the contract price but covered by the contractually agreed to work, together with prejudgment interest from October 20, 2005 to the date of judgment.

[106] On the Oxford's counterclaim, the Court awards damages of **$17,000.00**, but without interest on the basis that work has not yet been carried out.

[107] With respect to costs, unless either party provides to the Court within 20 days from the date of this decision, a copy of a formal offer to settle made pursuant to Civil Procedure Rule 41A, that is more favorable to the other side (or at least as good to the other side) as this decision then my inclination, in light of all of the circumstances of the trial and the divided success on the issues at the trial, is to award no costs.

J.