SUPREME COURT OF NOVA SCOTIA

Citation: *Seagate v. Halifax Regional Municipality*, 2023 NSSC 176

Date: 20230601
Docket: Halifax, No. 465972
Registry: Halifax

Between:

Seagate Construction

Plaintiff/Defendant by Counterclaim

v.

Halifax Regional Municipality

Defendant/Plaintiff by Counterclaim

DECISION

Judge:	The Honourable Justice John P. Bodurtha
Heard:	May 30, 31; June 1, 2 of 2022, in Halifax, Nova Scotia
Written Decision:	June 1, 2023
Counsel:	James D. MacNeil, for Seagate Construction Randolph Kinghorne, for Halifax Regional Municipality

By the Court:

Introduction

[1] This case involves the construction of the boiler room at the Emera Oval and who bears the responsibility for the installation of the boilers in a manner which did not comply with Code CSA B51 and, therefore, resulted in an alleged breach of contract.

[2] HRM hired DSRA as the Project consultant and they designed the boiler room. DSRA hired M. Lawrence Engineering Ltd. to provide design input related to the boilers installed in the boiler room. Seagate was hired by HRM to build the boiler room and install the boilers.

[3] HRM alleges that Seagate breached the contract. Seagate argues that it built the boiler room and installed the boilers exactly as it was laid out on the design and as they were directed to do by the designers. They cannot be responsible for a design that was not Code compliant with CSA B51.

Facts

[4] After reviewing the evidence of the parties, I have made the following findings of fact.

[5] The Plaintiff/Defendant by Counterclaim, Seagate Construction Inc. ("Seagate"), is a company incorporated under the laws of Nova Scotia and operates a construction contracting business.

[6] The Defendant/Plaintiff by Counterclaim, Halifax Regional Municipality ("HRM") is an incorporated municipality in Nova Scotia, continued and governed by the *Halifax Regional Municipality Charter*, SNS 2008, c 39.

[7] HRM owns the property at 5775 Cogswell Street, Halifax, Nova Scotia (the "Property"). HRM issued Tender No. 15-161 on February 23, 2015 for the construction of a pavilion (the "Project") located at the Emera Oval (the "Oval") on the Property. The intended use of the Project was in support of skating at the Oval by providing public washrooms, a warming rest area, a skate loans counter and hot water from the boiler to heat the pavilion and for the Zamboni to resurface the ice.

[8] Seagate bid on the Project on March 31, 2015 and was awarded the contract on April 28, 2015 (the "Contract"), at a total lump sum price of $2,461,760 (excluding HST). The terms of the Tender became part of the Project Contract. The Contract consisted of the specifications (the Court was not provided with a full set of specifications because the parties agreed there were a number of disciplines that were not relevant to the litigation), CCDC 2 - the Articles, the definitions, the general conditions and the standard form documents, CCDC 41, Exhibit 2 – the purchase order, and Exhibit 3 – Contract provisions (only a portion of the Contract provisions were provided to the Court), the Tender package (the complete Tender package was not before the Court), and Exhibit 1, Tab 14, which contains drawings for the heating details for the Project (the complete set of Contract drawings was not before the Court).

[9] HRM issued a purchase order for the work on May 13, 2015. Seagate assigned Steve Harris as its project manager and HRM assigned Michael MacDonald as its project manager. Included within the Project's scope of work was the construction of a boiler room (the "Boiler Room"). Construction began on the Project on May 18, 2015 with a Contract-stipulated completion date of November 31, 2015.

Construction of the Boiler Room

[10] Prior to issuing the Tender and Seagate's involvement in the Project, HRM had retained DSRA Architecture Incorporated ("DSRA"), a firm of professional architects, to act as the Project consultant. DSRA designed the Boiler Room and M. Lawrence Engineering Ltd. ("Lawrence Engineering") was the mechanical engineer hired by DSRA to provide design input related to the boilers to be installed in the Boiler Room.

[11] DSRA was engaged by HRM to design the Boiler Room prior to Seagate's involvement in the Project. DSRA was the prime consultant for the Project and had the authority to make changes to the details of their documents without requiring HRM to sign off. DSRA was also the intermediary between Seagate and HRM. DSRA instructed Seagate and answered questions on behalf of HRM.

[12] When HRM issued the Tender package for this Project they had already reviewed and signed off on the drawings and specifications by DSRA. The size of the potential building footprint of the Project was limited due to the existing

infrastructure and space at the Oval. DSRA was made aware of these sizing restrictions during their design phases.

[13] As the prime consultant, DSRA would conduct ongoing design work during the Project, along with inspection duties during construction. Approximately every two weeks, DSRA and their sub-consultants, such as Lawrence Engineering, would conduct on-site inspections.

[14] In the Tender Addendums many types of boilers were identified as possible options for the Boiler Room. A later option was approved by DSRA and Lawrence Engineering in advance of installation by Seagate.

[15] On July 3, 2015, Seagate, concerned about the size of the Boiler Room submitted an option for alternate boilers to help create more space in the Boiler Room. Rather than two large boilers as originally specified in the design, Seagate proposed to install four small suitcase boilers. This option was rejected by DSRA and Lawrence Engineering on July 13, 2015 (see Exhibit 1, Tab 34).

[16] After that rejection, Seagate submitted another alternative solution on July 23, 2015 to help create more space in the Boiler Room. Seagate provided a revised layout and piping drawings for stackable boilers. On July 29, 2015, Mark Lawrence, of Lawrence Engineering, passed on to Seagate that this alternative was rejected by Mike MacDonald of HRM because HRM wants side-by-side boilers with independent pumps that were in Lawrence Engineering's original drawings. He advised that he would send the shop drawings back as "rejected" (see Exhibit 1, Tab 35).

[17] Both of these suggestions from Seagate were provided early in the construction process at a time when changes could have been made to the design and Boiler Room layout with minimal costs. The walls for the Boiler Room were not constructed at this point.

[18] DSRA had significant latitude and the authority from HRM to approve or reject Seagate's installation of the boilers that were placed in the Boiler Room. Seagate was required to produce shop drawings that had to be approved by DSRA. DSRA (on behalf of HRM) had the final say on Code compliance and their satisfaction with the shop drawings. DSRA's scope of work was to ensure Code compliance of their design. Shop drawings in the Contract are defined as "drawings, diagrams, illustrations, schedules, performance charts, brochures,

Product data, and other data which the Contractor provides to illustrate details of portions of the Work." (See Exhibit 1, Tab 12).

[19] Seagate would obtain shop drawing information for the boilers. The purpose of the shop drawings is to provide the boiler information to the designers before Seagate obtains approval to buy the boilers. Mark Lawrence, of Lawrence Engineering, would review the shop drawings for compliance with the design intent. He had the authority to accept or reject the shop drawings. In this case, the shop drawings do not dictate the layout of the Boiler Room and are not necessarily Code compliant with CSA B51.

[20] Michael MacDonald, of HRM, testified that the shop drawing review process by Lawrence Engineering is to ensure the boilers meet the design specifications. He assumed that Lawrence Engineering would make sure that the equipment would fit in the Boiler Room. He expected Lawrence Engineering to consider how HRM would perform maintenance around the equipment in the Boiler Room. HRM relied upon DSRA and Lawrence Engineering during the shop drawing process for the clearance requirements on the boilers. HRM expected Lawrence Engineering to know the Regulations and the clearance requirements. Lawrence Engineering did not take into account CSA B51 which addresses Code compliance.

[21] On October 6, 2015, Lawrence Engineering sent an email to Seagate and copied Kevin Reid, DSRA's Project Architect, stating, "There are serious space constraints in the boiler room, due to how that underground piping comes up into the room." (See Exhibit 1, Tab 40). Seagate had relocated the underground plumbing as per prior discussions on August 6, 2015 (see Exhibit 1, Tab 39).

[22] Prior to the boiler's installation, Seagate's subcontractor, McNair Bros. Plumbing & Heating Ltd. ("McNair") created a cardboard template for DSRA and its sub-consultants to review. The cardboard was laid out in the Boiler Room to show exact locations of equipment and required spacing. Jon Baker, from McNair, gave evidence that this was the first and only time they ever considered cardboard layouts because they knew the room was too small. Seagate, as well, had concerns with the Boiler Room size but relied on DSRA and Lawrence Engineering for instructions.

[23] On October 16, 2015, Seagate emailed Lawrence Engineering and Kevin Reid, of DSRA, to advise them that McNair laid out cardboard templates of all of the equipment in the Boiler Room and indicated that, "It looks like everything is

going to fit fine. They are bringing the boilers to site on Monday and will set them in place, if you are available around noon it might be a good idea to come take a look before anything is connected."

[24] Kevin Reid responded to this email on October 16, 2015, stating that no mechanical equipment was to be placed prior to Mark Lawrence's approval of the layout (see Exhibit 1, Tab 42).

[25] McNair had some leeway when trying to position everything in the Boiler Room. They could call Lawrence Engineering and advise that they needed to move things a few feet if they did not have enough room. However, McNair would always check with the mechanical engineer, Mark Lawrence, before a drastic decision was made.

[26] As for the placement of the boilers, I accept Jon Baker's testimony from McNair that there was no room to move the boilers from their location in the design because the room was too small. He further stated, if they had known the clearance amounts and had the permits, the end result would not have changed because the room was still too small. Jon Baker, Michael MacDonald and David Nurse all confirmed that there was no other place in the Boiler Room where the boilers could go. David Nurse has an engineering background and at that time was a boiler inspector for the Nova Scotia Department of Labour ("DOL").

[27] On October 19, 2015, Lawrence Engineering in an email to Seagate and copied to Kevin Reid stated (see Exhibit 1, Tab 43):

> 2. Boiler Room layout. The boilers were temporarily placed in the room such that **they meet the minimum clearance requirements**. We do, however, have an issue in that the electrical MCC[1] does not fit in the location intended. The boilers are a little longer than originally specified, and the water entrance pipe is in the location where the MCC is shown on the electrical drawings. **Admittedly, our design drawing coordination was too tight for this installation**. We have an alternate solution which I will discuss further with you and Bruce/MCW."
>
> [*Emphasis added*]

[28] On October 21, 2015, Lawrence Engineering informed Kevin Reid, of DSRA, and Seagate in an email (see Exhibit 1, Tab 44) that:

[1] MCC stands for Motor Control Center

> … There will be a "tight squeeze" to pass between the boilers and the MCC, but all Code clearances will be maintained. **Seagate** to forward a photo once everything is placed in the boiler room as a mock-up.
>
> [*Underline added*]

[29] Seagate continued to have concerns with the Boiler Room size. In an email dated October 27, 2015, Seagate raised concerns with Lawrence Engineering about the equipment fitting inside the Boiler Room. Seagate felt it was going to be difficult to fit the MCC inside the Boiler Room and requested an onsite meeting with the electrical and mechanical consultants (see Exhibit 1, Tab 46). Seagate was previously told by the consultants that the MCC had to remain in the Boiler Room (see Exhibit 1, Tab 44).

[30] The October 28, 2015 Mechanical and Electrical Commissioning (Cx) On-Site Meeting #4 Minutes (see Exhibit 1, Tab 30), states:

> …
>
> 11) Boiler Room/Garage/Office/Ice Resurfacing Machine Room:
>
> a. More on-site coordination required w.r.t. location of the various motor electrical disconnects and the MCC.
>
> b. Minimum 1 meter clearance in front required for Electrical panels, disconnects, MCC, etc., as per CEC.
>
> c. **It was noted that the Boiler Room will be very congested, as valuable floor space was lost, because of the exterior VRA unit**.
>
> d. Hot water pump accessibility may be less than ideal because of the lost floor space noted above.
>
> **The decisions regarding the exterior VRA unit was decided during the design phase, prior to Seagate's involvement in the Project.**
>
> [*Emphasis added*]

[31] After that meeting, a decision was made to relocate the MCC to another room in order to create more space in the Boiler Room (see Exhibit 1, Tab 42).

[32] Seagate completed all work required under the Contract in a good and workmanlike manner pursuant to the designs and constructed the Boiler Room as it was directed to do.

[33] On December 15, 2015, DSRA, on behalf of HRM, (and on the basis of the review by the Consulting Engineer), issued Seagate a Certificate of Substantial Performance for the work on the Project (see Exhibit 1, Tab 17). Issuing a Certificate of Substantial Performance meant that DSRA, on behalf of the owner, HRM, was satisfied after their review and inspection of the Property that it was ready for use for the purpose intended.

[34] The pavilion was opened to the public that day. There were no complaints received from HRM regarding Seagate's work leading up to or after the Certificate of Substantial Performance was issued.

Compliance Issues Subsequent to Substantial Performance

[35] In February 2016, F.C. O'Neill, Scriven & Associates Limited ("ONSA"), the commissioning consultant on the Project responsible for doing tests and ratings for certain equipment on site, expressed concerns to HRM about the Boiler Room size. In their Observation Report #05, item No. 34 (see Exhibit 1, Tab 120), ONSA stated:

> Unfortunately, this room turned out to be less than ideal! The size of this room should have been at least double what it is. It will be very challenging for HRM's O&M staff to access, maintain and eventually replace the equipment that was jammed in this room.
>
> …
>
> There is a very large vertical "Hubbell" water heater in this room c/w an integral tube bundle heat exchanger. If and when this storage tank/heater fails, HRM will have to remove the Building wall and/or roof in order to get a new one installed.

[36] Seagate was first notified on March 11, 2016 by HRM and Lawrence Engineering that the boilers installed on the Project by the plumbing and heating subcontractor, McNair, required a permit and installation by a certified installer (see Exhibit 1, Tab 67). Neither Seagate, McNair, nor HRM knew of this prior to installation.

[37] In October 2016, the DOL advised that the boilers installed on the Project by McNair required a permit and license. Shortly thereafter, a Stop Work Order was issued by the Province mandating corrections, including the requirement to obtain a Boiler and Pressure Equipment ("BPE") license and permit for the boilers, and the requirement to address non-compliant boiler installation clearances. The

license and permit issue was promptly addressed by Seagate and its subcontractor, McNair.

[38] On November 8, 2016, McNair provided its BPE license and permit number. As indicated, there were neither delays to the opening of the Oval caused by the requirement that McNair acquire the proper permits and licenses nor did the Oval lose any days of operation.

[39] On November 17, 2016, an onsite meeting was held with representatives from Seagate, McNair, HRM, DSRA, Lawrence Engineering, and the DOL to review the requirements for the boilers. It was confirmed that the DOL does not conduct their first onsite inspection until the boilers are ready for commissioning. Therefore, any clearance issues would not have been identified until installation was complete (see Exhibit 1, Tab 20).

[40] On November 24, 2016, Seagate was advised the Stop Work Order had been lifted and it was agreed that any outstanding minor deficiency issues would be completed after the heating season (see Exhibit 1, Tabs 19 and 76).

[41] On November 30, 2016, Lawrence Engineering provided their opinion to Seagate about the Stop Work Order. In their opinion, Lawrence Engineering felt the boilers did not meet the 24-inch clearance as required by the Code requirements of CSA-B51 but did meet the clearance requirements identified by the manufacturer. Lawrence Engineering also noted that some equipment could be moved to create more space. Seagate forwarded this email to David Nurse (see Exhibit 1, Tab 79). David Nurse responded to these comments by requesting a more detailed plan and drawing of the Boiler Room for what Lawrence Engineering was proposing (see Exhibit 1, Tab 80).

[42] On February 7, 2017, HRM sent an email to DSRA and Seagate stating that they met with the operations staff on site to review the serviceability of the Boiler Room. The operations staff felt that it was not serviceable due to space restrictions (see Exhibit 1, Tab 62).

[43] On February 27, 2017, regarding the February 7th meeting, HRM advised Lawrence Engineering in an email, "… Facility Service staff have identified equipment that cannot be properly and safely serviced and maintained. If it is the design team's opinion the room's current layout allows for the proper servicing of equipment, then a methodology on how the servicing of the equipment can be completed must be provided." (See Exhibit 1, Tab 66).

[44] In March of 2017, after Lawrence Engineering presented the DOL with a detailed variance application, the DOL advised that the variance application was not approved (see Exhibit 1, Tab 83).

Additional Work Performed by Seagate

[45] On or about March 23, 2017, the DOL issued two non-compliance orders to HRM, requiring that HRM demonstrate regulation and Code compliance for the boiler installation clearances. The DOL advised HRM that Seagate had resolved the permit and license issues set forth in the previous Stop Work Order. DOL claimed the Project did not comply with the *Technical Safety Act*, SNS 2008, c 10 (the "*Act*") and the Boiler and Pressure Equipment Regulations enacted under the *Act* (the "Regulations") (see Exhibit 1, Tab 83).

[46] On March 27, 2017, a meeting was held at DSRA's office. In attendance were HRM, DSRA, Lawrence Engineering, and Seagate to discuss the DOL Compliance Order regarding the Boiler Room. At this meeting, Seagate indicated that the room size was discussed during construction and that an option of using stackable boilers was suggested and rejected by HRM. HRM indicated that "**it is the Consultant's responsibility to provide a design that meets clearance and operational & maintenance requirements of the equipment**." [*Emphasis added*] Seagate discovered at this meeting that, at some point during the design phase, the Boiler Room was designed to be larger and a late change to accommodate natural gas service instead of propane resulted in the current smaller dimensions (see Exhibit 1, Tab 32).

[47] On April 18, 2017, HRM wrote to DSRA (see Exhibit 7) regarding the Compliance Order and stated:

> The Orders were issued because the clearance requirements around each boiler unit do not meet the Boilers and Pressure Equipment ("BPE") Regulation and CSA B51 code requirements. **The design provided by DSRA Architects ("DSRA") has resulted in a non-compliant mechanical room. DSRA's design error has created an undersized mechanical room that neither conforms to BPE standards and regulations**, nor allows HRM facility service staff/contractors to safely service and maintain the mechanical and electrical equipment (as is required to operate the facility). The level of expertize [*sic*] provided by **both the mechanical consultant and the mechanical contractor as it relates to identifying and complying with relevant code and regulatory requirements has been disappointing**. **DSRA's design error and Seagate**

> **Construction Inc.'s failure to obtain the required permit has seriously compromised the Pavilion's intended use**.
>
> [*Emphasis added*]

[48] On September 29, 2017, after the scope of work pursuant to the original Contract was complete and HRM was advised of the required modifications to the Boiler Room, HRM requested Seagate perform additional work to make the Boiler Room compliant with the two Compliance Orders issued by the DOL (the "Additional Work").

[49] HRM acknowledged that, by completing the Additional Work, Seagate was not waiving its right to claim that the work was outside of the scope of the Contract. However, HRM made it clear Seagate would not be paid the outstanding amount owed for the work that Seagate had already completed (and which had been completely approved by DSRA), a total of $159,915.29, until the Additional Work was completed by Seagate or, in the alternative, HRM would hire other contractors and chargeback Seagate for the cost of those other contractors. HRM stated that, after the Additional Work was completed, it would fully pay the outstanding amounts owed to Seagate under the terms of the Tender. It is under these circumstances Seagate undertook to complete the Additional Work.

[50] On October 6, 2017, Seagate provided its Request for Change Order setting out the expected costs of $105,547.86 to do the Additional Work (see Exhibit 1, Tab 123 and Exhibit 4).

[51] On October 10, 2017, HRM acknowledged that Seagate accepted to do the Additional Work and intended to claim for the additional costs set out in the October 6, 2017 Request for Change Order (see Exhibit 1, Tab 126).

[52] On November 2, 2017, HRM advised Seagate that the DOL issued a temporary equipment license for the boilers to be used that coming winter season and, as such, the extra work would be postponed until the following spring (see Exhibit 5).

[53] Throughout the Additional Work there were numerous delays, mainly on the part of HRM, DSRA, and Lawrence Engineering. These delays included changes to the Boiler Room design, delays in responding to requests for information, delays in providing instructions and delays in approving certain scopes of the Additional Work.

[54] The Additional Work was completed on or about February 11, 2020. HRM did not make any complaints or raise any concerns with the quality or workmanship in the Additional Work.

[55] The cost of the Additional Work completed in February 2020 totalled $73,856.81. HRM has not paid Seagate for the completion of the Additional Work.

[56] HRM paid Seagate for the contracted cost of the initial work done in 2017 (approximately $159,915.29) on March 25, 2020. No interest was paid to Seagate.

Agreed Statement of Facts

[57] Further to the above facts, the parties agreed on the following facts:

- Seagate is claiming interest on $159,915.29.
- The interest claim is based on Seagate's application for payment on June 30, 2016, until this amount was received by Seagate on March 25, 2020.
- Seagate is claiming a remediation amount of $73,856.51, as of February 11, 2020 when HRM granted final completion.
- HRM disputes Seagate's entitlement to interest and to the remediation claim.

Issues

[58] The issues are as follows:

(a) Did Seagate breach the Contract with HRM in its installation of the boilers?

(b) Did HRM breach the Contract with Seagate in their failure to pay Seagate for their work?

(c) Did HRM owe Seagate anything for the alleged "Additional Work"?

Analysis

A. Did Seagate breach the Contract with HRM in its installation of the boilers?

[59] In *White v. E.B.F. Manufacturing*, 2005 NSCA 167, the Court of Appeal endorsed the following statement of the role of the Courts in contract interpretation:

> 42 In *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 W.L.R. 896 (H.L.), at page 913, Lord Hoffman summarises the principles of interpretation of a written contract. He says:
>
> > (1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.
> >
> > ...
> >
> > (4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.* [1997] A.C. 749.

[60] In *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, in the context of determining that the standard of review for the interpretation of contracts is reasonableness, the Court touched on the nature of contractual interpretation and the factual matrix:

> [50] … Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.

[61] The Supreme Court of Canada has described a fundamental breach of a contract as occurring "where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of *substantially the whole benefit* which it was the intention of the parties that he should obtain from the contract" (*emphasis in original*). Furthermore, the Court stated, "This exceptional remedy should be available only in circumstances where the foundation of the contract has been undermined, where the very thing

bargained for has not been provided.": *Syncrude Canada Ltd. v. Hunter Engineering Co.* [1989] SCJ No. 23, at para 148.

[62] HRM argues that Seagate breached the contract in two ways: first, due to their subcontractor, McNair, not possessing the proper permits and licenses for the boiler installation, and; second, the Boiler Room constructed was non-compliant with applicable legislation and regulations.

[63] For the first alleged breach, HRM has not been able to prove any financial loss or delay caused by McNair's failure to have the proper permit and license. The evidence is that McNair acted swiftly to acquire the proper permits and licenses once it was brought to their attention. The Stop Work Order was dated October 25, 2016, and McNair obtained the permits on November 8, 2016, approximately two weeks later. HRM suffered no monetary loss in relation to the permit and the boilers were always operational. The Oval remained operational during the entire period. HRM was neither fined nor prosecuted under the *Act* or the Regulations.

[64] For the second breach, Seagate did substantially perform the whole benefit for which HRM was contracted. Seagate was contracted for a specific scope of work—the Project, which was entirely construction-related and did not contain design responsibilities. The Project that HRM bargained for has been provided.

Design Error

[65] The CCDC 2 (2008) standard form stipulated price contract between the parties states that "The *Consultant* will have authority to act on behalf of the *Owner*…"; "The *Consultant* will provide administration of the *Contract* as described in the *Contract Documents*."; and "The *Consultant* will not be responsible for and will not have control, charge or supervision of construction means, methods, techniques, sequences, or procedures, or for safety precautions and programs required in connection with the Work in accordance with the applicable construction safety legislation, other regulations or general construction practice.…" (See Exhibit 1, Tab 12, p. 193, Clauses 2.1.1, 2.2.1, and 2.2.6). The Consultant was in charge of the Project on behalf of HRM and was not responsible for anything related to the construction of the Project.

[66] The CCDC 2 (2008) standard form stipulated price contract between the parties (see Exhibit 1, Tab 12) states that the contractor does not have design responsibility:

PART 3 EXECUTION OF THE WORK

GC 3.1 CONTROL OF THE WORK

…

3.1.2 The *Contractor* shall be solely responsible for construction means, methods, techniques, sequences, and procedures and for co-ordinating the various parts of the *Work* under the *Contract*.

…

3.3.3 Notwithstanding the provisions of GC 3.1 - CONTROL OF THE WORK, paragraphs 3.3.1 and 3.3.2 or provisions to the contrary elsewhere in the Contract Documents where such Contract Documents include designs for Temporary Work or specify a method of construction in whole or in part, such designs or methods of construction shall be considered to be part of the design of the Work and the Contractor **shall not be held responsible for that part of the design or the specified method of construction**. The Contractor shall, **however**, be responsible for the execution of such design or specified method of construction in the same manner as for the execution of the Work.

[*Emphasis added*]

[67] GC 3.1 – CONTROL OF THE WORK is a standalone part of the Contract. Control of the Work means all of the Work, encompassing everything relating to the Project. Clause 3.3.3. refers to Work, not just Temporary Work. This clause applies to everything in the Contract. When considering the factual matrix, the Court has to consider all the meanings of the contractual terms and conditions. In interpreting this clause, the entire Contract matters except if you need to determine responsibility for the design. This clause is where you have the traditional separation between design and construction that must be applied in light of the factual matrix when interpreting the Contract. In doing so, this clause is notwithstanding the other provisions and states that a contractor shall not be held responsible for that part of the design.

[68] In interpreting this clause, the Court also takes into consideration the last sentence which uses the conjunctive adverb “however”. The sentence prior to this indicates that the Contractor is not responsible for that part of the design and the following sentence begins with “however” which explains what the Contractor is responsible for “execution of such design or specified method of construction.” This clause places responsibility on the Contractor for construction, not design.

[69] HRM relies on General Requirements clause 1.2.3 under the heading Scope of Work to establish that Seagate was responsible for Code requirements (see

Exhibit 1, Tab 11) which states that, "The Contractor shall be responsible for compliance by all persons or parties engaged on the work with all laws, **building codes** and ordinances insofar as they apply to work carried out under this contract." [*Emphasis added*]. Seagate's scope of work was to build the Project, it had no role or say in the design of the Project. This clause in the specifications has to be read in conjunction with the "notwithstanding clause" which speaks to the separation of design from construction.

[70] Regarding the construction work, Seagate was required to construct in compliance with the *National Building Code*. Seagate constructed the design based on the design specifications provided by DSRA, the Project consultant, and Lawrence Engineering, the Project mechanical engineer.

[71] I also take into consideration clause 1.2.1 under the same heading Scope of Work which states that "The Contractor shall properly execute and complete all of the work indicated and called for in the plans, drawings and specifications." I interpret this clause as a further indication of the separation of Seagate's work from that of DSRA and Lawrence Engineering. Seagate was required to build in accordance with the design provided.

[72] Both DSRA and HRM were advised of concerns relating to the size of the Boiler Room prior to and during Seagate's construction, but both insisted that the construction work should continue in accordance with the design regardless of any concerns raised (see Exhibit 1, Tab 20).

[73] HRM argues that, aside from the design compliance, there is an obligation on the contractor to vet the design themselves with respect to Code compliance. Based on the evidence before me, I disagree. Placing this obligation on the contractor without clear and strong language in the contract to verify the engineer's work would turn the industry on its head.

[74] In interpreting the contract documents and applying the factual matrix, HRM's argument that Seagate was responsible for verifying the engineer's work is not how this design build was to occur. The parties, including HRM, were all aware that DSRA and Lawrence Engineering would be responsible for design while Seagate would be responsible for building the design. Seagate testified that they were there to construct and follow the design. Michael MacDonald, HRM's Project Manager, agreed with this separation of roles as well (see Exhibit 7).

[75] DSRA is a firm of professional architects hired by HRM to be the prime consultant for the Project and to design the Boiler Room. They were hired by HRM for their expertise in design. DSRA hired Lawrence Engineering to be the mechanical engineer and provide design input related to the boilers for the Boiler Room. Seagate had no contractual authority to second guess or disregard DSRA's or Lawrence Engineering's instructions.

[76] For HRM to suggest Seagate has a greater responsibility based on their interpretation of the contract provisions is flawed. It would not make sense for there to be a design prepared and vetted by engineers and architects hired by the owner (HRM) to then have the contractor either verify all of the designer's work or ignore the design and build something different on their own initiative. If the contractor has the liberty and ability to ignore the design, it begs the question as to why a designer was hired to develop a design in the process. There is a distinction between the responsibilities of the designer for the design versus the contractor for construction. This was not a design-build contract where Seagate was responsible for both.

[77] In *Edgeworth Construction Ltd. v. N.D. Lea & Associates Ltd.*, 1993 CarswellBC 237, the Supreme Court of Canada ruled that an engineering firm could be held liable if a contractor relied on inaccurate designs even if there was no contract between the parties. In doing so, the Court provided policy consideration on why it makes sense for engineers to shoulder the responsibility for adequacy of design at para. 18:

> 18 One important policy consideration weighs against the engineering firm. If the engineering firm is correct, then **contractors bidding on construction contracts will be obliged to do their own engineering**. In the typically short period allowed for the filing of tenders — in this case about two weeks — **the contractor would be obliged, at the very least, to conduct a thorough professional review of the accuracy of the engineering design and information, work which in this case took over two years**. **The task would be difficult, if not impossible.** Moreover, each tendering contractor would be obliged to hire its own engineers and repeat a process already undertaken by the owner. The result would be that the engineering for the job would be done not just once, by the engineers hired by the owner, but a number of times. **This duplication of effort would doubtless be reflected in higher bid prices, and ultimately, a greater cost to the public** which ultimately bears the cost of road construction. From an economic point of view, it makes more sense for one engineering firm to do the engineering work, **which the contractors in turn are entitled to rely on, absent disclaimers or limitations on the part of the firm**. In

> fact, the short tender period suggests that in reality this is the way the process works; **contractors who wish to bid have no choice but to rely on the design and documents prepared by the engineering firm**. It is on this basis that they submit their bids and on this basis that the successful bidder enters into the contract.
>
> [*Emphasis added*]

[78] I note that there are no disclaimers or limitations in the Contract with respect to Seagate's reliance on DSRA or Lawrence Engineering regarding their design. There is no explicit language advising Seagate that it could not rely on the design and was responsible for reviewing the accuracy of the design.

[79] The caselaw treats the role of an owner and contractor differently when the owner has not hired another party responsible for design unless there is clear and strong language in the contract that places responsibility on the contractor for the design.

[80] In *G. Ford Homes Ltd. v. Draft Masonry (York) Co. Ltd.*, 1 D.L.R. (4th) 262, the plaintiff, a fabricator and installer of residential staircases, orally agreed to supply and install two circular staircases for two homes being built by the defendant. The staircases were installed but did not meet the *Ontario Building Code*. The architect's plans, which indicated what the required headroom was to comply with the *Code*, were available on site and were offered to the plaintiff who chose to ignore them. The appeal court held that the plaintiff was an "expert" in the manufacture and installation of stairs and, therefore, in these circumstances it would be reasonable for the defendant to rely upon the plaintiff to supply and install staircases in compliance with the *Code*.

[81] This case is distinguishable from the case at bar because it involved pure contractor error. There was no separate designer in *G. Ford Homes Ltd.*; there was only the contractor and the owner. It was significant that the plans indicated what was required to comply with the *Code* requirements and this was ignored by the defendant.

[82] *City of Moncton v. Aprile Contracting Ltd.*, 29 N.B.R. (2d) 631 is another case between an owner and a contractor with no designer. The Court, at para. 71, quotes from Goldsmith on *Canadian Building Contracts* (2nd ed. 1976):

> 71 See also Goldsmith on *Canadian Building Contracts* (2nd Ed. 1976) at p. 66:

> Although the owner generally provides the specifications and the contractor is obliged to do his work in accordance therewith, there is no implied warranty by the owner that the work can, in fact, be carried out in accordance with the specifications, and a contractor who undertakes to produce a particular result will be liable, even if he follows the specifications, if that result is not obtained.

[83] *City of Moncton* is distinguishable for the same reasons in *G. Ford Homes Ltd.* with both cases involving a build performed by a contractor for the owner without a separate designer. In the case at bar, HRM hired a designer, DSRA, to design the Boiler Room and an engineering company, Lawrence Engineering, to assist with the design. Seagate was solely responsible for constructing the Boiler Room in accordance with the design.

[84] In *District of Surrey v. Church et al.*, [1977] 2 ACWS 47 (BCSC), a contractor agreed to provide all materials and perform the work shown on technical drawings and described in specifications for a new building. However, the drawings and specifications were based on faulty work done by the architect and engineers, which failed to incorporate a deep soil test. After construction was completed the building settled unevenly resulting in serious damage. The contractor was not held liable for any damage. The architect was held liable based on breach of contract and the consulting engineer was held liable based on their negligence (as there was no privity of contract).

[85] In *Sunnyside Nursing Home v. Builders Contract Management Ltd.*, 1989 CarswellSask 251, the Court dealing with similar issues to the case at bar, stated at para. 117, "… in general, where plans are provided by the owner and the contractor is instructed to build in accordance with the plans, the builder is not expected to be a guarantor of the suitability of the plans and specifications provided by the architect and engineer to the owner."

[86] The current facts before the Court resemble the contractual relationship between the owner, architect, and contractor described in *Sunnyside* at para. 110:

> 110 … That situation will in most cases call for the owner to employ an architect to design a suitable building. **The architect, in so doing, will employ such expertise as is considered necessary but has the prime responsibility to the owner for the integrity of the plans and specifications he provides.** The owner, with the assistance and guidance of the architect, will then put the contract for the construction of the building out to tender and in due course enter into a contract with the successful contractor to construct the building in accordance with the plans and specifications as provided the owner by the architect.

[*Emphasis added*]

[87] In *Sunnyside* the Court focused on the separation of the roles between designer and contractor and stated at paras. 116-118:

> 116 The builder, on the other hand, is responsible to the owner for the provision of due diligence in the construction of the building in accordance with the plans and specifications as provided by the owner.
>
> 117 Obviously, factual distinctions are going to arise, such as in *Brunswick Const. Ltée v. Nowlan*, supra, but in general, where plans are provided by the owner and the contractor is instructed to build in accordance with the plans, **the builder is not expected to be a guarantor of the suitability of the plans and specifications provided by the architect and engineer to the owner.**
>
> 118 Taking the law to be as I have stated for **the usual construction arrangement involving a separation between the architect and the contractor as to the functions they perform,** the question immediately arises as to what difference this case presents when compared to the normal or usual conditions as previously described.
>
> [*Emphasis Added*]

[88] The Court continued at para. 123 advising that it would take clear and strong language which was not in that case and similarly is not present before me (in fact, the evidence suggests otherwise) to indicate a change of the traditional role of designer and contractor:

> 123 The first of the above distinctions relied upon can hardly be maintained on this appeal. I accept there may be more provisions in the contract referring to design input from the contractor than might normally be the case. If that is so, it is explained by the rather unusual nature of this building contract. In this concept, B/S had played a role in determining the type of structure it could build in the most cost effective fashion. It therefore had an interest in seeing the design was not changed unnecessarily, for that would have an impact on the cost of the structure. However, to suggest that it had taken responsibility from the architects and its engineers for structural integrity does not follow. It would take very clear and strong language, which is not present here, to indicate a change in the traditional roles played by these different kinds of experts.

[89] I am not convinced from my interpretation of the contract that Seagate was taking on responsibility for design errors. HRM did not point to any provisions in the Contract that show Seagate accepted responsibility for design errors. The caselaw demonstrates that the general contractor is permitted to rely on what the owner, through its consultants, provides the contractor to build.

[90] Upon my review of the entirety of the Contract and applying the factual matrix to the issues with the Boiler Room, I find this to be a design error. Seagate was entitled to rely on HRM's design specifications. The general contractor, Seagate, is not responsible for this design error. Simply put, Seagate was provided with drawings from which to construct the Boiler Room. Prior to the build, Seagate told HRM that the room was "tight" but was told to build it anyway because it was Code compliant (see Exhibit 1, Tab 44). Seagate did what it was told and built the Boiler Room according to the design. HRM now seeks to recover only from Seagate because the placement of the boilers in the Boiler Room did not meet Code.

[91] This is not a situation where the Contractor was responsible for both the design and the build. In fact, Seagate had no authority to adjust, alter, or amend the design without HRM's approval, which was delegated to its consultants, DSRA and Lawrence Engineering. The responsibilities for the construction of the Boiler Room were divided between design (performed by DSRA and Lawrence Engineering) and build (performed by Seagate and its subcontractors).

[92] This delegation of responsibilities is evident in Lawrence Engineering's email to Seagate on July 29, 2015 (see Exhibit 1, Tab 35), in which they stated:

> I just got off the phone with Mike from HRM and they are not going to accept the stacked boilers as submitted in the last shop drawing. I'll send them back "rejected" later this morning. They want side-by-side boilers with independent pumps, **just like our [Lawrence Engineering] original drawings**.
>
> [*Emphasis added*]

[93] Lawrence Engineering and DSRA rejected Seagate's initial suggestion to stack the boilers on July 23, 2015. Two years later, in May 2017, HRM agreed to stacked boilers that ended up being the solution for the issues with the Boiler Room (see Exhibit 1, Tab 96). At no time did DSRA, Lawrence Engineering, or HRM bring up any Code issues when addressing the proposal for stackable boilers.

[94] Michael MacDonald testified that he expected DSRA and Lawrence Engineering to provide a Code compliant design. He assumed they would have turned their mind to sizing, spacing, and Code compliance when creating the specifications. He agreed that there were three design stages when the designers and engineers should have checked Code, those being the conceptual design stage, the schematic design stage, and the final design stage.

[95] A further example of the parties involved treating the Contract as having separate roles was McNair's cardboard layout in the Boiler Room. Kevin Reid from DSRA advised Seagate not to do anything until Mark Lawrence, the engineer from Lawrence Engineering, comes and reviews it. Mark Lawrence, after turning his mind to Code clearance responded "… all Code clearances will be maintained." (See Exhibit 1, Tab 44). The engineer responsible for the design is telling the contractors to place the boilers where Lawrence Engineering told them to be installed and that all Code clearances will be maintained. There is no evidence before the Court of any modifications to that design.

[96] During meetings that were held, Michael MacDonald, of HRM, raised the issue that the Boiler Room was too small and testified he was never told that the Boiler Room was not Code compliant.

[97] The evidence is clear. At all material times the Boiler Room was designed too small. This fact was consistent in everyone's testimony and the documents that were entered as exhibits. From the outset of the construction, Seagate was attuned to the issues around the Boiler Room size. HRM, through Michael MacDonald, acknowledged that the Boiler Room was too small.

[98] DSRA and Lawrence Engineering admitted fault in their design in an October 19, 2015 email from Lawrence Engineering to Seagate. They stated, "Admittedly, our design drawing coordination was too tight for this installation." (See Exhibit 1, Tab 43).

[99] I find a key factual component in the factual matrix when interpreting the Contract is that HRM's engineer confirmed Code compliance. Mark Lawrence, of Lawrence Engineering, advised that the boilers were Code compliant and directed Seagate to follow the original design. Seagate had no authority to ignore or override Lawrence Engineering's instructions.

[100] Based on the evidence before me, DSRA and Lawrence Engineering were responsible for confirming Code compliance. Seagate was entitled to rely on their design. This was HRM's designer and engineer -- not Seagate's.

[101] David Nurse testified that, in addition to his engineering background, he used to be a designer for 20 years and has significant experience in that position. He testified that CSA B51, which addresses Code compliance, applies to both the designer and the contractor equally. They have the same requirement to meet the exact same Code. He was clear that the Boiler Room Code error was a design

error; by implication it was no fault of Seagate. The Code applied to the designers first. The scope of work of the designers, DSRA, was to ensure Code compliance of their design.

[102] In a February 8, 2017 email (see Exhibit 1, Tab 63), Peter Connell, Manager Director of DSRA, wrote to Lawrence Engineering stating, "We simply need to demonstrate we have provided a reasonable boiler room design, with support from our peers (like CBCL)." I infer from this statement that DSRA and Lawrence Engineering felt a need to defend their design of the Boiler Room (a design Seagate played no role in).

[103] The jurisprudence has established that, where a construction company is employed as the party to carry out a design (created by others), they are not responsible for faulty aspects of the intended design as long as their workmanship is sound: *Mollenhauer Contracting Co. v. CCH Canadian Ltd.* [1971] OJ No. 807, at para. 18, affirmed [1974] SCJ No. 138).

[104] Seagate made no representations as to the design of the Project because design was outside the scope of their Contract; therefore, they are not liable for any design issues if their workmanship is sound. David Nurse confirmed that there were no issues with the operability of the boiler; HRM never lost a single day of use. The boiler was always operational and fit for its intended purpose.

[105] I find that Seagate appropriately relied on DSRA and Lawrence Engineering to ensure all designs were compliant with applicable Codes and Regulations. Seagate is neither responsible for the design nor to verify the work of the designers. Seagate is not responsible for errors in the design. There is no clear and strong language within the Contract placing the obligation and responsibility for the design on Seagate. Clearly, there are faulty aspects with the design but Seagate's workmanship is sound. Seagate provided HRM with the services for which it was contracted and has not breached any contractual obligations.

Permits and Licenses

[106] In the Heating Boilers specifications of the Contract, clause 3.2.1 regarding installation reads (see Exhibit 1, Tab 11):

> Install in accordance with ANSI/AMSE Boiler and Pressure Vessels Code Section IV, regulations of Province having jurisdiction, except where specified otherwise, and manufacturers recommendations.

[107] This references the Regulations of the province having jurisdiction. David Nurse testified that the Regulations mirror CSA B51, which applies equally to the designers. Lawrence Engineering and DSRA were responsible to ensure compliance with the relevant Codes and Regulations. HRM argues that, if McNair had a license, that would be another check and balance. There is no evidence before the Court that having a licence would equate to another check and balance as it relates to Code issues. In fact, none of the parties turned their mind to Code issues other than Lawrence Engineering who stated, "… all Code clearances will be maintained."

[108] A summary of the duties of engineers in Canada was provided in *The Canadian Law of Architecture and Engineering*, 3rd edition, McLachlin and Grant, June 24, 2020, at p. 122:

> ... engineers functions include design, cost estimates, working drawings, specifications, field inspections and project administration". Across Canada engineers are required to be registered in accordance with Provincial statues and governing professional counsel. Generally it is recognized in Canadian jurisprudence that **professional engineers have a duty to verify all the dimensions of the building site and all other site information relevant to the building project, whether that be construction, renovation, alteration or demolition. It is the case that an engineer employed by an owner and working under the standard form contract CCDC-2 cannot rely on information supplied by others as to site conditions, apart from "specially trained and retained consultants"**.
>
> [*Emphasis added*]

[109] All of the issues relating to the boiler installation clearances are a result of design and review deficiencies by DSRA and/or Lawrence Engineering. The issues can neither be attributed to Seagate's workmanship nor deemed a breach of their contract.

[110] In closing, on this issue of Permits and Licenses, I refer to clause 1.3.4 of the Regulatory Requirements (see Exhibit 1, Tab 11) which reads:

> 1.3.4 If the Contractor knowingly performs or allows work to be performed that is contrary to any laws, ordinances, rules, regulations or codes, the Contractor shall be responsible for and shall correct the violations thereof; and shall bear the costs, expenses and damages attributable to the failure to comply with the provisions of such laws, ordinances, rules, regulations or codes.

[111] There is no evidence before me that Seagate knowingly had the boilers installed contrary to Code. The evidence is that McNair obtained the required permit and license within two weeks of becoming aware of the issue. HRM has not established any damages resulting from McNair not having a permit or license. The evidence is that the Oval did not miss a day's opening as a result of the boilers being installed without the proper permit or license.

B. Did HRM breach the contract with Seagate in their failure to pay Seagate for their work?

[112] Seagate claims that HRM is in breach of the Contract for its failure to pay Seagate's accounts for the Additional Work completed on the Project.

[113] As described above, a fundamental breach of a contract occurs where a breach by one party deprives the other party of "*substantially the whole benefit* they were meant to obtain from the contract.": *Syncrude*, *supra* at para. 148.

[114] The jurisprudence states that, upon the contractor becoming entitled to payment and the owner's failure to provide payment within the time prescribed in the contract or within a reasonable time, it is in breach of contract (See Wise, Howard M. *The Manual of Construction Law* (Scarborough, On: Carswell, 1994-), § 3:15. The Owner -- Failure to Pay Money Due under the Contract).

[115] In *McVie v. Lombard Insurance Co*, 2010 BCSC 1025 a brief summary of the implications for non-payment of a contract made in construction law was discussed at paras. 184-186:

> 184 In general, the common law surrounding construction law or building contracts provides that, in the absence of contractual terms to the contrary, a contractor is entitled to receive payment for services rendered upon substantial completion of the contracted work: see I. Goldsmith and T.G. Heintzman, *Goldsmith on Canadian Building Contracts*, looseleaf, 4th ed. (Toronto: Thomson-Carswell, 1988) at para. 3§1 [*Goldsmith*]; *Columbia Bitulithic Ltd. v. D.C. Masonry Construction Ltd.*, [1980] B.C.J. No. 1211, 27 B.C.L.R. 220 (B.C. C.A.), at 224. Whether a contract is substantially completed is a question of fact to be determined by the trial judge on the evidence and circumstances of the case: see *Columbia Bitulithic* at 225. …
>
> 185 Where there are defects in the work completed by the contractor, the homeowner may have the right to counter-claim for damages, or set off the amount to be paid, to repair the faulty work, however the liability to pay the contractor the price stipulated in the contract cannot be avoided: *Goldsmith* at

> para. 5§1(a.1); H.M. Wise, *The Manual of Construction Law*, looseleaf (Toronto: Carswell, 1994) at para. 3.5.(a)(i). As stated in *Hutchinson v. Mathias*, [1943] 1 W.W.R. 451 (B.C. S.C.), at 453:
>
> > The law seems clear that in a contract of this sort where the builder has substantially complied with the contract, that is, where all the work to be done has been done, but where it has been done negligently or in an improper manner, the builder is entitled to recover with deductions necessary to complete the work specified in the contract.
>
> 186 As mentioned, it is only in situations where the work of the contractor is so deficient, or the conduct amounts to a refusal to perform the contracted work, that the owner will be entitled to terminate the contract and be relieved of the obligation to pay the contracted sum: *Goldsmith* at para. 6§2(a)(i); *Standard Precast Ltd. v. Dywidag Fab Con Products Ltd.*, [1989] B.C.J. No. 129, 42 B.L.R. 196 (B.C. C.A.).

[116] Lord Denning in *Hoenig v. Isaacs*, [1952] 2 All E.R. 176 (C.A.) at pp. 180-181 stipulated when an employer must make payments:

> ... the first question is whether, on the true construction of the contract, entire performance was a condition precedent to payment. It was a lump sum contract, but that does not mean that entire performance was a condition precedent to payment.
>
> When a contract provides for a specific sum to be paid on completion of specified work, the courts lean against a construction of the contract which would deprive the contractor of any payment at all simply because there are some defects or omissions. The promise to complete the work is, therefore, construed as a term of the contract, but not as a condition. It is not every breach of that term which absolves the employer from his promise to pay the price, but only a breach which goes to the root of the contract, such as an abandonment of the work when it is only half done. **Unless the breach does go to the root of the matter, the employer cannot resist payment of the price**. He must pay it and bring a cross-claim for the defects and omissions, or, alternatively, set them up in diminution of the price.
>
> [*Emphasis added*]

[117] In construction law, "when substantial performance has been achieved and any remaining defects or omissions do not go to the root of the contract, the owner cannot resist payment.": See Halsbury's Laws of Canada (online), Construction Performance: Contractor's Duty to Complete the Work: Substantial Performance" (II.1.(3)) at HCU-37 "Effect on owner's obligation to pay" (2021 Reissue).

Substantial Performance

[118] Michael MacDonald, of HRM, testified that its hired architects and engineers (DSRA and Lawrence Engineering) were responsible for interpreting the Codes and Regulations around the design of the Boiler Room, in addition to ensuring that the work of Seagate was in accordance with the established requirements before issuing Substantial Performance.

[119] HRM's prime consultant, DSRA, issued a Certificate of Substantial Performance Substantial Performance for the contracted work by Seagate. Seagate's position is that they met the contractual requirements. Further, their work was completed without defects. The Code issues were directly attributable to DSRA and/or Lawrence Engineering's failure to provide a design for the Project that complied with the applicable Codes and Regulations.

[120] "Substantial Performance" will always depend on the facts of the case at hand. In this case, Seagate was deprived of the whole benefit for which they contracted: payment by HRM for their work. HRM did not pay all the invoices issued by Seagate for services delivered in accordance with the Contract when the Contract was completed. Despite repeated attempts to have its outstanding account addressed, $159,915.29 plus interest remained due and owing to Seagate for almost three years. The final payment to Seagate from HRM for the original Contract was not made until April 20, 2020.

[121] Substantial Performance in the Contract (see Exhibit 1, Tab 12, at pp. 191 and 200) cross-references the *Builders' Lien Act*, R.S.N.S. 1989, c. 277, s. 13 and is defined as:

> 13(1) Deemed substantial performance
>
> In this Section, a contract under which a lien can arise pursuant to Section 6 is deemed to be substantially performed
>
> (a) when the work or improvement is ready for use or is being used for the purpose intended; and
>
> (b) when the work to be done under the contract is capable of completion or correction at a cost of not more than two and one-half per cent of the contract price.

[122] DSRA, the mechanical engineer HRM hired, signed off and certified the work of Seagate. The work that HRM contracted for was completed in the fall of 2017 and certified as fit for its intended purpose. The Oval was used at all times.

[123] In a November 24, 2016 email from David Nurse to Seagate in regards to violation number 3 of the Stop Work Order (see Exhibit 1, Tab 76), David Nurse stated, "You are correct that the last item is in the hands of the design team (and HRM)." There is no evidence before me that Seagate played any role or part of the design team. In fact, Michael MacDonald, of HRM, testified it was a design issue and that he spent up to eight months dealing with only the designers to come up with a solution to meet the DOL requirements to have the compliance orders lifted. It is significant that HRM spent all that time with DSRA and Mark Lawrence to come up with a design. Seagate was not involved in those meetings. The solution was not simply to have Seagate move things around and achieve clearance; a new design was required.

[124] I find that Seagate is entitled to be paid interest on the Contract of $159,915.29 from June 30, 2016 to March 25, 2020. Interest shall be paid at the Contract rate in Article 5.3 (see Exhibit 1, Tab 12, p. 187).

C. Did HRM owe Seagate anything for the alleged "Additional Work"?

[125] The Additional Work that was required cannot be considered as work to complete the Project because the original scope of work under Seagate's contract was certified as complete, fully operational and fit for its intended purpose. The Additional Work is not deficiency work; there was no damage or deficiency pointed out. It is a complete change in the scope of the work. The initial design required side-by-side boilers and that evidence is uncontradicted. The Additional Work was to stack the boilers in a Code compliant manner. The stacking alone is a complete change in the scope of work. There was a discussion on what could be removed from the Boiler Room to create more space. Seagate argues that removing the equipment and putting it elsewhere is a new scope of work. I find that Seagate was correct to demand a Change Order because HRM asked Seagate to stack the boilers which was changing the scope of work. The evidence does not support HRM's assertion that it was work under the Contract.

[126] To further illustrate Seagate performed Additional Work are the issues with the hot water tank. David Nurse was asked about the hot water tank and confirmed it was subject to the Stop Work Order. Seagate's original scope of work did not include the hatch that had to be built to service the hot water tank. This is new work that comprises Seagate's claim.

[127] The cost of the Additional Work totaled $73,856.81. HRM has not paid Seagate for the completion of the Additional Work. HRM has breached the

contract in failing to pay the amounts set out in the Additional Work Change Order. This is an entirely new contract between Seagate and HRM for new work, for which HRM has failed to pay. This has deprived Seagate of the whole benefit of what they contracted for in the Change Order.

[128] I find HRM's non-payment a fundamental breach of contract where there was no legal basis for withholding payment (see *Midtronics Inc. v. 841712 Ontario Inc.*, (2001) 102 ACWS (3d) 900 (On SCJ) at paras. 19-20). HRM was legally obligated to pay Seagate for their work and claim deductions if they felt that the work was unsatisfactory. Withholding payment amounts to termination of the contract and is only permissible in situations where the contractor's conduct is deficient or amounts to a refusal to perform the contracted work: see *McVie*, *supra*, at para. 186.

[129] Seagate performed all their work in a good and workmanlike manner, and without deficiencies caused by their own actions. I find no breach that goes to the root of the matter.

HRM's Counterclaims

[130] At the hearing, HRM abandoned its claim for liquidated damages but indicated it was still pursuing claims with respect to damages for the hiring of consultants, CBCL and ONSA, arising from the work subsequent to the Stop Work Order. The claim is more particularly defined as a claim for the ONSA invoices related to the recommissioning of the Boiler Room and the CBCL invoices that relate to the safe work plan.

ONSA Invoices

[131] The ONSA invoices require the Court to determine who is responsible for the compliance issues. Seagate does not dispute recommissioning had to occur but argues that the work that led to the recommissioning was clearly a change of scope from the original scope of work and, therefore, cannot be Seagate's responsibility. I accept Seagate's argument and find the recommissioning was clearly the result of design errors (not errors by Seagate) and I dismiss this claim.

CBCL Invoices

[132] David Nurse testified that the Safe Work Plan was helpful, albeit not mandatory and not specifically requested by the DOL. Michael MacDonald

testified that DSRA could have developed a Safe Work Plan, but it would have been an "extra" to their contract. Addressing the Stop Work Order was Additional Work to the Contract. HRM's invoices have not proved any contractual link with Seagate to support their claim that the Safe Work Plan was required as a result of Seagate's error. The evidence is that the Safe Work Plan was not mandatory to fix the compliance issues. I have not been persuaded by HRM that Seagate is liable for any of the CBCL invoices and I dismiss this claim.

Conclusion

[133] The finding of a breach under the *Technical Safety Act* could be a finding of negligence but is not a conclusion I need to reach to determine the issues before me. The evidence before me demonstrates that there may have been a technical breach under that *Act* but there are no damages resulting from the breach. There was not a prosecution under the *Act* and I am not tasked with making a finding under this *Act*.

[134] In interpreting the Contract in light of the factual matrix, it is clear that this is a design error. Multiple witnesses confirm this. Michael MacDonald, of HRM, testified that this was a design error. Seagate had no responsibility for design under the Contract.

[135] I find no breach of contract by Seagate. While Seagate was late in obtaining a permit and license, the permit was obtained within two weeks and did not affect the actual use of the Oval. HRM received what it contracted for -- a working boiler room. When Seagate raised concerns about the Boiler Room design (not necessarily Code compliance concerns), they were either dismissed or received an assurance. HRM refused to listen and continued to rely on the design and advice of its consultants, DSRA and Lawrence Engineering.

[136] In conclusion, I find Seagate did not breach its Contract with HRM and is not liable for any breach of contract associated with the Property because they did not have responsibility for the design of the Property (specifically the Boiler Room) and their work was done in a good and workmanlike manner. Errors in the design by DSRA and Lawrence Engineering is the reason that any Additional Work was required.

[137] I find HRM breached the Contract and is required to make payment to Seagate for the work performed. Seagate is entitled to receive payment for the Additional Work in the amount of $73,856.51, plus interest at the rate laid out in

Article 5.3 of the Contract. In addition, Seagate is entitled to interest on the original amount of $159,915.29 from June 30, 2016 until March 25, 2020, inclusive at the rate laid out in Article 5.3 of the Contract.

[138] HRM's counterclaims are dismissed in their entirety.

[139] Seagate is entitled to its costs plus disbursements. If the parties are unable to agree to costs I will accept written submissions within 30 days of this decision.

Bodurtha, J.