CITATION: BLDNG BLX Developments Inc. v. The Roasted Nut Inc., 2024 ONSC4633
COURT FILE NO.: CV-20-633938
DATE: August 20, 2024

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ONTARIO
SUPERIOR COURT OF JUSTICE
IN THE MATTER OF the *Construction Act,* R.S.O. 1990, c.C.30

B E T W E E N:	)	
BLDNG BLX DEVELOPMENTS INC. Plaintiff	)	Ian Perry for the plaintiff, Tel.: 416-579-5055, Email: ian@perrysllp.com;
-and-	)	
THE ROASTED NUT INC. and 2641582 ONTARIO INC. Defendants	)	Samuel I. Nash for the defendants; Tel.: 905-526-2106, Email: snash@georgestreetlaw.com;
	)	**HEARD:** March 1, 5, 6, 7, 8 and 27, 2024

Associate Justice Wiebe

REASONS FOR JUDGMENT

I. INTRODUCTION

[1] The reference concerns only this action. The trial in this action concerns the claim for lien of the plaintiff ("BBD") in the amount of $14,091.10, which the defendants deny, and the set-off and counterclaim of the defendant, The Roasted Nut ("TRN"), in the total amount of $386,047.87. The statement of claim contains an additional BBD damage claim in the amount of $20,908.90, but BBD is not pursuing that claim.

[2] The property in issue is a leasehold premise located at 766 and 768 Queens Street West, Toronto ("the Property"), which is at the corner of Bellwoods Avenue and Queens Street West. It was once a convenience store. The landlord is 2641582 Ontario Inc. ("264"). The project in issue

was the conversion of the Property into an establishment that roasted nuts, displayed the roasting of the nuts, sold the nuts, and contained a café for the consumption of the nuts along with associated foods on the premises. This will be called “the Project.”

II. BACKGROUND

[3] Based on the evidence, the following facts appear not to be in dispute.

[4] Huwaida and Victor Rabba are owners of a grocery chain in Toronto and have experience in preparing and selling roasted nuts. They decided to establish TRN for the purpose of leasing the Property, undertaking the Project, and running the business. They made their 27-year-old son, Justin Rabba (“Justin”), a partner in the company and the manager of the Project and the business. Huwaida Rabba kept control over payment.

[5] On October 2, 2018 TRN signed an Agreement to Lease. On November 28, 2018 TRN signed a Commercial Lease for the Property. Justin signed these documents. These documents specified that the lease commenced on February 1, 2019, and that there was a 60-day fixturing period.

[6] Justin was a friend of Jonathan Harvey, the principal of BBD. BBD had experience renovating restaurants. In October, 2018 Justin asked Mr. Harvey for a budget as to the cost of the Project. On November 2, 2018 Jonathan provided what he called a “speculative” budget showing a range of all-inclusive costs from $226,565 to $289,845. When asked for an exact budget, Jonathan provided one on the same day, November 2, 2018, which showed the figure of $287,760.

[7] TRN decided to contract with BBD for the construction of the Project. On December 20, 2018 Mr. Harvey provided Justin with a contract document, drafted by BBD, which specified that BBD would provide construction management services and materials primarily for the construction of the Project. The document also described pre-construction and post-construction responsibilities. The document specified that BBD was to be paid a fee of $10,000 for its work plus its “direct construction costs for labour, equipment and material provided.” It is undisputed that this document forms the governing construction contract. It will be called “the Contract.”

[8] Mr. Harvey’s wife, Megan Harvey, has experience in interior design with a special focus on interior restaurant design. She was brought into the Project by Mr. Harvey in December, 2018.

[9] BBD rendered its first invoice on December 20, 2018 in the amount of $31,640. There was no backup documentation concerning costs incurred. The invoice was paid.

[10] TRN occupied the Property on February 1, 2019. BBD immediately did demolition work. On February 19, 2019 Mr. Harvey submitted a building permit application expecting the Project to be consistent with the zoning. It was not. A zoning change was necessary. BBD had its engineer provide the City with a report in support of the zoning change on March 20, 2019. On March 25, 2019 Mr. Harvey emailed the principal of 264, Sabir Moosa, asking for a month extension to the fixturing period due to the permit issue. Mr. Moosa refused.

[11] BBD rendered its second invoice on March 7, 2019 in the amount of $33,335. Again, there was no backup documentation concerning costs incurred. The invoice was paid.

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[12] On April 8, 2019 the permits (including the HVAC and plumbing permits) were issued. On that day, April 8, 2019, Ms. Harvey also confirmed her agreement with TRN to provide interior design work and support for Justin. She billed TRN for her time based on an hourly rate. BBD started working in several areas.

[13] On April 14, 2019 Huwaida Rabba emailed Megan Harvey confirming that the roasting and mixing machines were arriving in early May, 2019.

[14] On April 18, 2019 BBD encountered an old radiator hidden in the wall at the back of the first floor. They wanted to remove it. Mr. Harvey emailed Mr. Moosa that day asking whether the radiator was connected to a water source. BBD alleges that Mr. Moosa confirmed verbally that the radiator was decommissioned and could be removed. Mr. Moosa denies this. He denies even speaking with Mr. Harvey. BBD removed the radiator and did not cap the cut water lines.

[15] On April 23, 2019 BBD rendered its third invoice in the amount of $57,065. Again, there was no backup documentation concerning costs incurred. The invoice was paid.

[16] Megan Harvey began working on the design in late April, 2019, particularly the roasting room. She began providing layouts. These layouts and the design often changed. BBD continued work in several areas.

[17] On May 16, 2019 BBD rendered its fourth invoice in the amount of $36,160. Again, there was no backup documentation concerning costs incurred. The invoice was paid.

[18] On May 17, 2019 Justin emailed Mr. Harvey confirming that the roasting and mixing machines had arrived from Turkey at the Rabba warehouse in Brampton. Justin expressed concern that the roasting room as designed was not big enough to accommodate the machines. Ms. Harvey changed the design accordingly. The roasting room was increased in size by seven feet. The mixer was in fact reordered due to its size. It arrived in late August, 2019.

[19] On June 5, 2019 BBD rendered its fifth invoice in the amount of $53,392.50. Again, there was no backup documentation concerning costs incurred. The invoice was paid.

[20] On June 11, 2019 Justin texted Mr. Harvey asking as to "how we're doing so far in comparison with the budget."

[21] On June 20, 2019 Justin texted Mr. Harvey advising that the roasting machine weighed 2,860 lbs. This was four times what the parties expected. As a result, BBD reinforced the floor under the roasting room in late June and early July, 2019. The roaster was installed on August 10, 2019. A window had to be removed to move the machine to its location in the roasting room.

[22] On July 9, 2019 Justin texted Mr. Harvey advising that his parents were indecisive and that BBD was doing an "amazing job."

[23] On July 10, 2019 BBD rendered its sixth invoice in the amount of $37,233.50. Again, there was no backup documentation concerning costs incurred. The invoice was paid.

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[24] On July 11, 2019 Mr. Harvey delivered a document entitled, "Budget Comparison – Projected and Current." It showed a low budget figure ($229,955) and a high budget figure ($292,105), and the total of $204,247.50 paid to date.

[25] On July 18, 2019 Huwaida Raba emailed Mr. Harvey asking for the invoices behind the BBD invoices and budget to assist TRN with a bank loan. She said she thought these invoices had been provided to Justin and that the bank needed "actual invoices." Mr. Harvey was outraged and refused to comply.

[26] On August 15, 2019 BBD rendered its seventh invoice in the amount of $26,493.25. Again, there was no backup documentation concerning costs incurred. This time, there was an exchange in writing between Huwaida Rabba and Jonathan Harvey about this backup. Ms. Rabba asked Mr. Harvey for backup cost documentation. She emailed Mr. Harvey on August 26, 2019 stating that she had been advised by Mr. Harvey at the outset of the Project that he would provide her with such backup. She qualified this remark by saying that she may have misunderstood the agreement. However, she then advised him to carry on and finish the Project and indicated that the bill would be paid. Mr. Harvey responded insisting that the agreement did not require such backup.

[27] In September, 2019 a coffee machine was added. The BBD electrician and plumber were called back to connect it and were paid by TRN directly for this work.

[28] On October 2, 2019 BBD rendered its eighth and final invoice in the amount of $14,091.10. Again, there was no backup documentation concerning costs incurred. This time, however, the invoice was not paid.

[29] On October 9, 2019 BBD says it finished its work.

[30] In early November, 2019 the landlord turned on the water supply to heat the Property. This caused water to flow through the uncapped pipes that previously led to the radiator, thereby causing water to flow freely down into the basement resulting in a flood in the basement. TRN eventually paid 264, the landlord, $5,479.35 for the water damage that resulted.

[31] On December 4, 2019 BBD registered a claim for lien in the amount of $14,091.10. On January 7, 2020 BBD purported to perfect its lien by commencing this action and registering a certificate of action. On February 14, 2020 the defendants delivered a statement of defence and counterclaim. On March 2, 2020, the plaintiff delivered a reply and defence to counterclaim.

[32] On January 7, 2022 the plaintiff obtained a reference order from Justice F.L. Myers. I issued an order for trial on March 7, 2022, and became seized of the reference when I conducted the first trial management conference on April 11, 2022. I ordered productions, discoveries and a site visit. At the third and fourth trial management conferences on February 27, 2023 and May 15, 2023 I also imposed deadlines for expert reports. At the fifth trial management conference on July 31, 2023 I scheduled a hybrid trial to take place on March 1, 5, 6, 7, 8 and 27, 2024.

[33] At the trial hearing, the defendants were represented by Christopher Merrilees. He has since been replaced by Mr. Nash of the same firm. BBD was represented by Mr. Perry. BBD called five witnesses: Jonathan Harvey, Megan Harvey, Glenn Wargalla (the BBD plumber), Andrey Korolev (the BBD electrician) and Michael Howes (a BBD labourer). The defendants called five witnesses: Huwaida Rabba, Mike Lazaridis (a participant expert), Victor Rabba, Justin Rabba and Sabir Mousa.

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[34] The trial hearing proceeded on March 1, 5, 6, 7, 8 and 27, 2024. I reserved my decision. In preparing these Reasons, I noted that the plaintiff raised an issue in closing argument that had not been clearly raised to that point, namely that the parties by their conduct changed the Contract from a cost-plus contract to a fixed price contract. I became concerned that this issue had not been properly argued. As a result, by email dated July 2, 2024, I required that counsel appear before me again to argue this point. That happened on August 13, 2024.

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III. ISSUES

[35] Based on the evidence and submissions, I find that the following are the issues to be determined:

a) Was the Contract a cost-plus contract?

b) Did the parties amend the Contract, and, if so, how?

c) Is BBD liable for overcharging, and, if so, by how much?

d) Is BBD liable for delaying the Project?

e) Is BBD liable for deficiency corrections costs?

f) Is BBD liable for the flood damage?

IV. WITNESSES

[36] Before I analyze the issues, I will comment on the credibility of the witnesses.

[37] Generally, I found the BBD witnesses more credible. Jonathan Harvey gave his evidence entirely *viva voce*. With Mr. Harvey being the principal of BBD, there was a natural concern that he would be overly biased in favour of the plaintiff. Yet, his attention to detail and corroboration was such that this concern was allayed. In cross-examination Mr. Harvey was grilled over his view of the payment provisions of the Contract. He struggled with this questioning not because of issues of credibility, but because of a genuine discordance between his view and the terms of the Contract.

[38] The other BBD witnesses gave their evidence-in-chief by affidavit. Megan Harvey's affidavit focused on the design changes and was detailed and well corroborated. She withstood cross-examination well. Glenn Wargalla, the BBD plumber, swore a brief affidavit that focused on the flood issue. He swore he did not disconnect the radiator. In cross-examination, he admitted frankly not capping the cut radiator pipes. He also explored his invoicing. Without a stake in this case, he gave his evidence frankly and convincingly. Andrey Korolev, the BBD electrician, swore a brief affidavit and was cross-examined briefly. He focused on his invoices and certain items of his work. Also without a stake in the case, Mr. Korolev was frank and believable. Finally, there was Michael Howes, a BBD general labourer. His affidavit focused on the delay caused by the roaster and mixer delivery. He was cross-examined briefly and admitted candidly that he informed Mr. Harvey verbally of his work hours. I also found his evidence credible.

[39] The defendants' witnesses were much less credible. Their lead witness was Huwaida Rabba, Justin's mother and the one in charge of payment. She gave her evidence entirely *viva voce*. She came

across as a strong personality, but with more interest in lecturing the court on the alleged failures of BBD than on establishing facts. She made only some effort to corroborate her evidence. For instance, she insisted that BBD was provided with the specifications for the roaster and mixer in December, 2018, but did not produce the specifications. She called the agreement to lease the lease when it was not. In cross-examination, she openly expressed her anger at Mr. Harvey for having, she said, taken advantage of Justin. This anger infused her evidence and made it seem part of a vendetta and, therefore, untrustworthy. Also, she openly admitted at one critical juncture to being duplicitous with BBD in her August 26, 2019 email wherein she apologized for expressing concern about the BBD lack of cost backup. She said in cross-examination that this sentiment was not real and that she wrote the email simply to encourage Mr. Harvey to finish the project. Ms. Rabba appeared in the end as one capable of massaging the truth to suit her purposes.

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[40] The other defendants' witness who gave his evidence *viva voce* was Sabir Moosa, the principal of the landlord 264. His credibility was seriously damaged when he brought with him a whole file of documents he described as relevant. 264 had not disclosed these documents in the litigation. They were not included in the 264 affidavit of documents Mr. Moosa swore, an affidavit that listed only one document. I adjourned the trial and ordered that these documents be promptly disclosed and reviewed by Mr. Perry. Then, when the trial resumed, in cross-examination Mr. Moosa said he also had in his possession and had not disclosed photographs and the cut pipes in issue concerning the flood. In the end, I concluded that Mr. Moosa had no respect for or understanding of proper evidence disclosure in this case. This adversely coloured his entire evidence.

[41] The other defendants' witnesses gave their evidence-in-chief by affidavit. The evidence of Victor Rabba, Justin's father, had the same issues as did the evidence of Huwaida Rabba. In his affidavit his comments about the project were largely uncorroborated. The remainder of the affidavit focused on the flood issue. In cross-examination, Victor Rabba easily slid into argument, lecturing the court on how Mr. Harvey "took advantage" of Justin. He also showed a deep and abiding anger towards Mr. Harvey, which undermined his trustworthiness.

[42] Justin Rabba provided one of the more memorable parts of the trial. His affidavit was a litany of complaints against BBD and Mr. Harvey, his former friend, concerning delay and deficiencies, all with limited corroboration. In cross-examination, however, Mr. Perry took Justin through a series of text messages between him and Mr. Harvey on July 9, 2019 wherein Justin heavily criticized his parents and praised Mr. Harvey. When pressed about the inconsistency, Justin blurted out several times that he "lied" in these text messages to encourage Mr. Harvey to finish the project. If true, this assertion showed that Justin is capable of lying to suit himself. But I did not find it true. It was self-serving and incredible, as it was made in the middle of trial and was uncorroborated. Justin's text messages were the truthful statements. The assertion showed the influence Justin's parents had over his evidence. He came across as a "mouthpiece" for his parents.

[43] Finally, there was the evidence of Mike Lazaridis. He was proffered as a participating expert on construction deficiencies. In his affidavit (which he swore on February 14, 2024), Mr. Lazaridis described himself as an experienced developer and contractor; but provided no resume in support. He said he visited the Property on July 14, 2022, which was almost 19 months earlier and three years after the Project completion. He said he did so at the invitation of the Rabba family to comment on deficiencies. He described several deficiencies. But he provided no notes or photographs in support or evidence that he had reviewed the Contract documents.

[44] Mr. Lazaridis then focused on what he called the inadequate basement support for the roasting room and referred to an engineering report in this regard (apparently authored on August 22, 2022). He appended this report to his affidavit. The defendants did not call this engineer as a witness and, therefore, I refused to consider this report as it was hearsay evidence. That Mr. Lazaridis relied upon an inadmissible engineer's report to substantiate his finding on the most critical part of his affidavit seriously undermined his overall credibility. In cross-examination, Mr. Lazaridis also admitted that he was a friend of the Rabba family, that he had limited experience building restaurants and had never built a roastery café like this one, and that he was not aware of the City inspections of the Property. Mr. Lazaridis was indeed a poor witness.

[45] For all these reasons, I decided to prefer the evidence of the BBD witnesses to those of the defendants, wherever the two conflicted.

V. ANALYSIS

a) Was the Contract a cost-plus contract?

[46] There was a disagreement as to whether the Contract was a cost-plus contract. BBD argued in closing argument that, considering the conduct of the parties, the Contract was a fixed price contract with the BBD budget providing the basis for payment. The defendants argued that it was a cost-plus contract.

[47] In a fixed price contract, the parties agree that the work will be done for a fixed price, usually paid at milestones or installments as the work is done. The contractor assumes the risk that its construction costs will exceed the fixed price. In a cost-plus contract the parties agree that the contractor will be paid its reasonable construction costs plus an agreed upon percentage for overhead and profit. Here the contractor does not have a risk of losing money on the project. This distinction was apply described by Master Albert in *Balmoral v. Biggar*, 2016 ONSC 319 at paragraphs 9 and 10.

[48] There was no dispute that the Contract was enforceable and governed the Project. The question is its interpretation. The *Sattva Capital Corp. v. Creston Molly Corp*, 2014 SCC 53 at paragraphs 47, 48 and 57 the Supreme Court outlined the principles of contract interpretation that must be applied: the overriding concern is determining the intention of the parties and the scope of their understanding; the contract must be read as a whole giving the words their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of contract formation; in a commercial contract the court should know the commercial purpose of the contract based on a knowledge of the genesis of the transaction, the background, the context and the market in which the parties are operating; the surrounding circumstances can never to allowed to overwhelm the words of the contract; and the interpretation of a written contract must always be grounded in the text and read in light of the entire contract. Another principle of contract interpretation to be kept in mind is the doctrine of *contra preferentum,* namely the doctrine which specifies that any ambiguity in the contract should be interpreted against the interests of the drafter; see *Smith v. Shernofsky*, 2011 ONSC 3389 (CanLII) at paragraph 26.

[49] It is undisputed that the document dated December 20, 2018 in letter form under BBD letterhead stated as concerning "Construction Management Services," formed the binding Contract between the parties. The document has a detailed description of the construction management work

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BBD was supposed to do during the pre-construction phase, construction phase and post-construction phase. It is undisputed that BBD, though described as the "Construction Manager," acted at least in the construction phase as a general contractor. The document explicitly says so in the sixth paragraph.

[50] Concerning payment there is one section entitled, "Fees." It states the following: "Our fee for this project would be $10,000." HST is stated to be in addition. There are then these two critical sentences: "Please note that the fee does not include direct construction costs for labour, equipment and materials provided. These will be charged in addition to the fee." There is then a section entitled "Terms and Conditions" which specifies that the RTN will be billed periodically as the work is done.

[51] In my view, giving the Contract its ordinary and grammatical meaning, there is no ambiguity here. The words of the Contract are clear. BBD was to be paid a total fee of $10,000 plus HST for its construction management work to be billed periodically as the work was done. BBD would charge in addition its "direct construction costs for labour, equipment and materials provided" also to be billed periodically as the work was done.

[52] This is a cost-plus contract. While BBD provided TRN with estimates prior to the Contract, there is no reference in the Contract to estimates. Furthermore, the evidence showed that Huwaida and Victor Rabba were experienced businesspeople familiar with commercial contracts like this, that Huwaida Rabba was responsible for payment, and that they both were comfortable with and indeed expected the cost transparency that comes with a cost-plus contract.

b) Did the parties amend the Contract, and, if so, how?

[53] The evidence from Mr. Harvey showed that he created the BBD invoices based on his estimates of incurred costs (with no attached proof of actual cost) using the BBD budgets as a guide. Mr. Harvey also used the BBD budgets to satisfy TRN (particularly Justin) that the BBD invoices were reasonable. This resembled the conduct of a contractor under a fixed price contract.

[54] In closing argument, I asked Mr. Perry whether the evidence showed that the parties by their conduct changed the cost-plus contract into a fixed price contract with the fixed price being the BBD original firm budget. He disagreed initially, and then agreed. He proceeded to argue the point.

[55] The conduct in issue was the consistent payment by TRN of the BBD invoices (except the last one). As stated earlier, this seemingly new issue led me to convene counsel for a second round of argument on August 13, 2024 on this issue only.

[56] On August 13, 2024 the defendants objected to the raising of this issue at all, arguing that this was unfair to them, that BBD never raised this issue before, and that they prepared for the trial without this issue in mind. BBD argued that the pleadings should be read generously as including this issue, and that the defendants are not therefore prejudiced by this issue; see *Healthy Lifestyle Medical Group Inc. v. Chand Morningside Plaza Inc.,* 2019 ONCA 6 at paragraph 7.

[57] The Court of Appeal made it clear in *Holmes v. Hatch Ltd.,* 2017 ONSC 880 (ONCA), that, where an issue arises in closing argument like this when it has not been pleaded, there is unfairness to the party that does not raise the issue and should not be allowed. In the *Holmes* case, the case was an employment law case and the motions judge on a motion for summary judgment raised a new issue (not identified in the pleadings) in closing argument, namely that the employer had

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fundamentally breached the termination clause of the employment contract thereby repudiating the contract and entitling the plaintiff employee to notice damages. The judge invited the parties to address this issue in oral argument and with written submissions after the hearing.

[58] The Court of Appeal overturned this ruling on the basis (as indicated in paragraphs 7 and 8) that this issue had not been pleaded and that Hatch therefore had not had an opportunity to lead evidence on this issue. It also held that this unfairness was not remedied by the opportunity given the parties to make submissions on this issue in closing argument. Quoting from its decision in *Rodaro v. Royal Bank* (2002), 59 O.R. (3d) 74 (CA), the Court stated in paragraph 7 that, "a finding of liability and resulting damages against the defendant on a basis that is not pleaded in the statement of claim cannot stand. It deprives the defendant of the opportunity to address that issue in the evidence at trial."

[59] I reviewed the pleadings in this case, and the history of this reference, and conclude that this issue (ie. the theory that the parties allegedly amended the Contract by conduct to be a fixed price contract) was never pleaded or raised by BBD. It was not raised in the statement of claim or the amended statement of claim. The defendants in response expressly pleaded in paragraph 5 of their original statement of defence and counterclaim (delivered on or about February 14, 2020) that the Contract required that the work be paid with a fixed fee plus "the cost of labour and materials." They pleaded that this cost should not be marked up. They then later pleaded, amongst other things, that BBD failed to comply with its obligation to prove its cost. These pleadings were not amended when the defendants later amended their pleading. In its reply, BBD in paragraph 7 just denied "that there was an agreement to provide materials at cost." In short, BBD just denied that the Contract is to be interpreted as a cost-plus contract. There is no alternative pleading that if the Contract is found to be cost-plus, it was amended by conduct or waiver into a fixed price contract. There is nothing that even suggests that theory.

[60] The absence of this theory continued throughout the reference. None of my directions refer to it. It did not come up in opening statements at the trial hearing. Tellingly, the BBD written closing submissions, namely after the trial evidence was done, did not refer to it. As stated earlier, I was the one who raised it in closing oral argument and eventually convened another virtual attendance to address this issue. This all makes this case, in my view, indistinguishable from the *Holmes* case. I, therefore, agree with the defendants that I must follow the Court of Appeal in *Holmes* and not pursue this issue further. The defendants were denied the opportunity to address this alternative theory in the evidence. I will not pursue the issue further.

[61] Suffice it to say here that, had I pursued the issue, I would have had difficulty finding in favour of the plaintiff. First, I was given no authority for the proposition that payment of accounts that conflict with contract requirements *per se* amounts to a waiver of the payer's right to have the invoices conform to the contract. Second, there was in fact evidence that TRN did not accept the BBD invoices and wanted actual cost backup. There were the emails from Huwaida Rabba, the one Mr. Harvey knew was in charge of payment, to Mr. Harvey on July 18, 2019 and August 26, 2019 asking for cost backup. In these emails, Ms. Rabba states that she expected this backup from the beginning. This statement Mr. Harvey did not deny.

[62] Mr. Perry relied upon the decision of the Court of Appeal in *Colautti Construction Ltd. v. City of Ottawa*, 1984 CanLII 1969 (ONCA) where the Court held that, in the face of a contractual requirement that changes to the work be done in writing, the City's behavior in ordering changes not

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in writing and paying for them amounted to an agreed upon amendment of the contract by conduct. That is not the case before me. Here there is no evidence that TRN ever expressly informed BBD that its billing practices were acceptable. Mr. Perry argued that Huwaida Rabba's email to Mr. Harvey of August 26, 2019 was confirmation of TRN's acceptance of the BBD invoicing and amounted to an amendment to the Contract. I do not agree. All she said was, "I think it will be best for now to just finish what we started and continue the Project." That is not a definitive statement of acceptance of a new, fixed price contract; it is a statement deferring the issue of cost backup to the end of Project.

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c) Is BBD liable for overcharging, and, if so, by how much?

[63] As a cost-plus contract, the Contract placed an onerous obligation on BBC to qualify for payment. In *Infinity Construction Inc. v. Skyline Executive Acquisitions Inc. et al.,* 2020 ONSC 77 (CanLII) at paragraph 114 Justice Healey aptly summarized the principals the courts apply to cost-plus contracts. Here are the key ones:

- to be paid for its costs, the contractor must prove its costs and has a heavy evidentiary burden to prove its costs;
- this can be done by accounts that are detailed enough to show the contractor's costs combined with supporting documentation; and
- the contractor must still only charge "within the bounds of reasonableness," and estimates are a useful "guide-post" as to the "bounds of reasonableness."

These were the obligations on BBD. Mr. Harvey's consistent assertion that BBD was not obligated to prove its costs this way was simply contrary to the Contract.

[64] Should the contractor fail to meet its onus of proof of costs, the consequence is severe. In the old and often quoted decision of Master Marriott in *G. T. Parmenter Construction Ltd. v. Sanders,* 1947 CarswellOnt 248, referred to by Justice Healey in *Infinity*, the Master dealt with a cost-plus contract. The Master made it clear in paragraph 10 that the onus on the contractor to prove its costs is "a particularly heavy one." If he meets this onus with accurate accounts and supporting documentation, the defendant can adduce evidence that the records are inaccurate or the costs unreasonable. On the other hand, if the contractor "fails to satisfy the Court that his accounts are accurate and support his claim, or if the Court is left in doubt, he fails."

[65] The accounts do not have to be perfect. In another old decision referred to by Justice Healey in *Infinity, Taylor v. Taylor,* 1954 CarswellOnt 270 at paragraph 9, Assistant Master Bristow stated that the accounts must be sufficiently accurate as to cost "that the person to be charged therewith can readily check and verify the charges." In that case, a secondary document, a breakdown of actual labour cost, was found to be sufficient.

[66] In short, the secondary documents, the accounts, must be proven to reflect the actual costs. However, simple estimates of costs are not acceptable as there is no way to check on the accuracy of the estimates; see *Parmenter, op. cit.,* paragraph 17.

c.1) Unsupported charges

[67] TRN asserts that BBD did not, and cannot, substantiate the bulk of its invoices, at all. In Mr. Merrilees' written closing submission, TRN claims a back-charge of $199,233.15 in alleged overcharging under the Contract as a result. TRN says that this number is the difference between what BBD billed and what BBD can prove as to its cost.

[68] It is undisputed that BBD issued eight invoices to TRN totaling $289,410.35, that the first seven totaling $275,319.25 were paid by TRN, and that the last one, RN-8 totaling $14,091.10, was not paid. As stated earlier, none of these invoices had cost backup.

[69] Through the discovery and production process, TRN got BBD to disclose what cost backup it had. It was shockingly meagre. BBD produced only 25 invoices from suppliers and subcontractors. There were no other material purchase receipts. There were no accounts showing that BBD kept track of these material costs. But what was most surprising was that BBD produced no record of its labour hours and cost. BBD obviously had labourers assisting Mr. Harvey. The Rabbas referred in their evidence to an older gentleman being on site working for BBD. Mr. Howes was also a BBD labourer. But interestingly Mr. Howes stated that BBD kept no time sheets. Mr. Harvey agreed with that statement. While Mr. Howes added that he verbally told Mr. Harvey what his hours were, this information appears not to have made its way into any accounting record.

[70] Mr. Merrilees tallied the produced 25 invoices and added the fixed price fee of $10,000 to come to the total of what TRN maintains BBD could prove in entitlement to payment for cost and fee, namely $92,493.70 (HST incl.). The figure was not challenged by BBD, although it maintained that its invoices should still be paid. Mr. Merrilees then compared that figure to what he maintained was the total billed by BBD, namely $291,726.85. Frankly, I do not understand that number. Huwaida Rabba was clear in her evidence that BBD billed a total of $289,410.37 and that $275,319.25 of that was paid. The potential overpayment on account of unsupported charges is therefore the difference between the $275,319.25 that was paid and $92,493.70 of costs that was proven, which is $182,825.55.

[71] What of BBD's position that its invoices, being Mr. Harvey's assessment of actual costs, should be accepted as reasonable reflections of the costs incurred by BBD? Had there been cost substantiation that was generally near what was billed in the invoices, I would have warmed to this argument. But there was not that substantiation. In his written closing submission, Mr. Merrilees created a chart that compared the items of work described in the BBD invoices to TRN with the produced BBD cost invoices. There were 31 items of work described in the BBD invoices. 18 of those items had no substantiation, at all. The fixed price fee of $10,000 was one of the remaining items, which I therefore exclude. Of the remaining 12 items, only 5 items (ie. plumbing, electrical, additional plumbing, HVAC and basement – paint, shelving, office) had substantiation that was within 25% of what was billed. In short, there is a huge discrepancy between what BBD billed and what it substantiated.

[72] In the cross-examination of Mr. Harvey, Mr. Merrilees went into considerable detail as to how the BBD invoices related to the produced BBD cost invoices. For instance, Mr. Merrilees showed Mr. Harvey that of the $20,750 that BBD billed for "architecture, engineering and zoning" there was only $5,419.05 in cost substantiation. He showed that of the $15,500 that was billed for "demolition and waste removal" there was only $1,320.41 in cost substantiation. He showed that of

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the $15,500 that BBD billed for "flooring" there was only $5,880 in cost substantiation. Mr. Harvey did not dispute these discrepancies. His consistent response was that there was considerable material and labour that was not captured by these records. But I agree with Mr. Merrilees, that was BBD's obligation under the Contract, namely to create and maintain accurate and supported records of its material and labour costs.

[73] Mr. Perry argued in closing that the BBD budgets create an accurate gauge of what the BBD cost should be, and that, because the BBD invoices fell within the BBD budgets, the invoices should be accepted as accurate reflections of cost. I do not accept that argument. Budgets are estimates. At best, in a cost-plus contract, budgets are gauges of whether proven actual costs are reasonable. But the actual costs must first be proven. This was made clear by Justice Healey in *Infinity, supra,* at paragraph 114. As stated in *Parmenter, op. cit.,* at paragraph 17, estimates cannot be accepted as *per se* reflections of cost for a cost-plus contract as they cannot be verified without actual evidence of cost.

[74] BBD produced no expert evidence of what its actual cost of labour, material and equipment for the Project probably was. This would have been very helpful as it would have provided some professional third-party evidence of actual cost to substantiate the BBD billing. I asked Mr. Perry about this in closing argument. It appears curiously that BBD deliberately chose not to call such expert evidence.

[75] I am, therefore, reluctantly driven to the conclusion that BBD has failed to meet its heavy onus of proving its actual costs other than the above noted $92,493.70. It utterly failed to keep accounts of its labour, material and equipment costs. It provided only limited evidence of the supplier and subcontractor actual costs it incurred, for which it will be compensated. It provided no substantiation for its labour costs. It provided no expert evidence on this issue. This all creates a $182,825.55 overpayment entitlement for TRN.

[76] I fear that this result may create a potential windfall for TRN, namely receipt of labour and materials not paid for. For instance, I am satisfied that there was labour by others than Mr. Harvey. But contract law can create such results if a contractor deviates so radically from a form of contract it itself creates. Another important point - the court cannot mitigate a windfall result in an evidentiary vacuum.

[77] Given this result, there is no need for me to deal directly with the BBD claim for lien. It is negated by this TRN overpayment entitlement. The BBD claim for lien must be vacated.

c.2) Markup

[78] TRN claims that BBD inappropriately marked up its subcontractor charges. Mr. Harvey did not dispute this proposition, but he claimed that this practice is common in the industry and that the markup covered overhead and profit. Again, BBD did not identify this markup in its billings. TRN claims that overhead and profit were covered by the $10,000 management fee, and that the markup on subcontractor invoices was a double charge. Using the produced subcontractor invoices, Mr. Merrilees identified a total of $5,636.02 in markup concerning the plumbing, electrical work and basement painting and shelving. TRN claims that amount as a further overpayment.

[79] I do not accept the TRN argument. The $10,000 (plus HST) management fee in the Contract was exceedingly low. This was pointed out by Mr. Harvey. He said he made the fee this

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low to engender a good relationship with the Rabbas. The fee was to cover BBD management work. It was only 3% of the budgeted amount for the Project. The Contract does not specify that the fee covered overhead and profit. I am not, therefore, prepared to conclude that the fee covered overhead and profit. I, therefore, find that this is not a double charge and deny this claim.

c.3) Electrical and plumbing charges

[80] TRN claims $6,967.66 for alleged BBD overcharging on account of the plumbing and electrical work. Concerning the plumbing, Mr. Merrilees argued that Mr. Wargalla's final invoices for the plumbing work in his affidavit contained essentially inflated amounts and were not representative of the work done. Mr. Wargalla said that he just updated his previous drafts of invoices to account for all the work he did. As stated earlier, I found Mr. Wargalla credible, and I accept his evidence.

[81] Concerning the electrical work, Mr. Merrilees argued that Mr. Korolev's charges exceeded the amount budgeted for the electrical work and should be reduced accordingly. There was evidence that extra electrical work concerning the roasting machine was required at installation given its unexpected size and weight. Therefore, I do not accept this position. I deny this TRN back-charge.

d) Is BBD liable for delaying the Project?

[82] TRN claims that BBD is liable to TRN for a seven-month delay to the Project and claims damages in the amount of $42,956.59 as a result. The delay is the seven months from the end of the fixturing period on April 1, 2019 until October, 2019 when the TRN establishment opened. The claim is for the rent TRN had to pay during this time, because with the Project not done it had no business income to offset this rent.

[83] The onus rests on TRN to prove this claim as it asserts it. TRN blames BBD for this delay due to two events: a two-month delay from mid-February, 2019 to April 8, 2019 due to a rezoning which caused the building permit to be issued only on April 8, 2019; a three month delay from May 8, 2019 to August 10, 2019 due to the fact that the roasting room was not ready when the roaster arrived.

[84] Having considered the evidence, I find that TRN has not met its onus of proof on this issue for the following reasons:

- The delay in the delivery of the roasting and mixing machines was critical to the completion of the Project. That proposition was not challenged, and it makes sense. This equipment was the centerpiece of the Project, as it occupied the large display room at the back of the roastery café and produced the nuts for sale. The Project could not be completed until this equipment was delivered, installed and functioning.

- The evidence shows that the Rabba were the ones who ordered this equipment, not BBD. They were the experts in nut roasting and had the connection with the Turkish supplier. There was evidence that TRN provided BBD with specifications for the equipment on December 16, 2018. However, TRN never produced these specifications.

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- Whatever specifications were delivered to BBD on December 16, 2018, the evidence indicates that they were clearly inaccurate. The machines arrived at the Rabba warehouse in Brampton on May 8, 2019. Everyone was surprised first at the size of the machines. Huwaida Rabba herself in an email to Mr. Harvey dated May 17, 2019 said that the dimensions in the specifications were inaccurate. In another email that same day, Ms. Rabba said that Justin was "freaking out" about the size of the equipment. On May 17, 2019 Justin sent Mr. Harvey a text stating that he was having a "mild heart attack" about the size of the machines and the need to expand the size of the roasting room.

- Megan Harvey obviously prepared her initial designs based on the provided inaccurate specifications. The unexpected size of the machines forced her to redesign the roasting room and expand it in size by 7 feet. This change in design was not BBD's fault.

- Then there was the unexpected weight of the machines. Once the design was changed, the question was moving the equipment. Again, everyone was surprised at how heavy the roaster was. In a telling text he sent Mr. Harvey on June 18, 2019, Justin advised that the specifications did not identify the weight, that David Reingold, a partner in TRN, thought the weight was 700 lbs. and that Huwaida Rabba was confirming the weight with their Turkish supplier. On June 20, 2019 Justin texted Mr. Harvey advising that the weight was in fact 2,800 lbs., namely four times 700 lbs. On June 21, 2019 Mr. Harvey texted back advising that the floor as a result needed to be reinforced.

- The work of reinforcing the floor of the roasting room was done in late June and July, 2019. The roaster was finally moved into the roasting room on August 10, 2019. The mixer had to be reordered and arrived in late August, 2019. There were electrical issues with this equipment that were dealt with in late August, 2019. The delay caused by the reinforcing work was not BBD's fault given the poor information from TRN about the machine's weight.

- TRN did not complain to BBD about this delay or blame BBD for it at the time of these events. Indeed, in his text exchange with Mr. Harvey on July 9, 2019 Justin complimented BBD for its work. The TRN delay complaint came out only later in the middle of the litigation and was, therefore, not credible.

- The events concerning the roaster and mixer delivery in effect nullified any issue of delay resulting from the delay in the permit. Had the permit been issued by February 1, 2019, namely the day TRN took possession of the premises, the store could not have opened for another seven months due to the delays concerning this machinery, none of which were BBD's fault. I will, therefore, not comment on the TRN allegation of BBD fault concerning the building permit delay as it is immaterial.

[85] For these reasons, I reiterate that I find that TRN has failed to meet its onus of proving BBD's liability for delay.

e) Is BBD liable for deficiency correction costs?

[86] TRN also claims $125,774.50 in deficiency correction costs. This figure is composed of three items: a charge of $1,356 to install venting in November, 2019; a charge of $3,000 to replace the

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espresso bar in April, 2020; and a charge of $121,418.50 for items identified by Mike Lazaridis in his February 14, 2024 affidavit.

[87] TRN has the onus to prove that BBD failed to meet the standards of workmanship required by the Contract for these items of work. Based on the evidence, I find that TRN has failed to meet this onus. The following are my reasons.

[88] Concerning the replacement of the espresso bar, Justin's affidavit states that he hired a professional carpenter to "fix" the espresso bar in 2020 and 2021. Justin gave no detail as to what this "fix" involved. He attached an April 6, 2020 invoice to TRN from one, Massimo Addeo, in the amount of $3,000. The invoice did not describe any deficiency with the original espresso bar, just the work of replacing it. Mr. Harvey testified that BBD originally installed the countertop with a swinging countertop, and that TRN later after the Project changed it to a U-shaped countertop to take advantage of the window on the side of the building for business during the pandemic in 2020. As stated earlier, I found Mr. Harvey more credible than Justin, and I accept Mr. Harvey's evidence here. I find that this was a change after the Project and not a deficiency item.

[89] Concerning the venting charge, Justin's affidavit states that HVAC and gas companies were hired "to fix drain issues." He then attaches an invoice dated November 25, 2019 to TRN from Parke Aire Systems Inc. in the amount of $1,356. The work described is, "installing venting." Mr. Merrilees argued in his written submissions that this represented work not finished by BBD. I do not accept this argument. If this was truly unfinished BBD work, TRN would have, and should have, at that time required that the work be done by BBD. This was one month after BBD ceased working, and before the BBD claim for lien was registered. The Contract was not terminated. Under the Contract, BBD had the obligation to complete the specified scope. The fact that Justin provided no evidence that TRN approached BBD to complete this item makes me suspicious that this was in fact extra work after the Project, and not a deficiency. As stated earlier, I generally found that Justin lacked credibility. I, therefore, find that TRN has failed to prove this deficiency.

[90] Concerning the charges described by Mike Lazaridis in his affidavit, I have already commented on my concerns about this witness' credibility. I will reiterate them here. Mr. Lazaridis said in his affidavit that he is a developer and contractor but provided no resume to allow the court to assess that experience. He admitted to having only limited experience building restaurants, and to having no experience building a roastery café like this one. He admitted to being a friend of the Rabba family. In his affidavit, he said he attended the Property on July 14, 2022, which was 19 months before he swore the affidavit, and recalled what he saw. He provided no notes or photographs to substantiate his stated observations. This all severely undermined his credibility.

[91] Mr. Lazaridis described a variety of issues: holes in the drywall; inadequate basement support for the machines in the roasting room; exposed and disorganized electrical wiring; inadequate materials used for the retail counter causing it to collapse; ineffective sneeze guard; non-functioning bathroom lighting resulting from improper installation and a water leakage from the top floor; non-functioning handicap button; and inadequately anchored roasting room swing door. He attached a quotation dated July 20, 2022 that Mr. Lazaridis said he gave to TRN for the work of correcting the alleged deficiencies. The document described eleven items and totaled $121,418.50 (HST incl.).

[92] There were further issues with this evidence. In cross-examination, Mr. Lazaridis conceded that the bathroom lighting was not related to the Project. In his affidavit, Mr. Lazaridis tied his

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opinion on the basement support for the roasting room to an appended engineer's report obtained by TRN in August 22, 2022, evidence that was rendered inadmissible as hearsay when TRN failed to call the engineer as a witness. As for the other items, Mr. Lazaridis maintained that they dated from the Project and were the fault of BBD. This despite the glaring fact that the TRN business had been in operation for three years before he made his observations. I was not convinced by Mr. Lazaridis, as these items appeared, given the absence of supporting evidence and the length of the time since the Project, to be as likely the result of use or abuse as to the original construction. I also note that since Mr. Lazaridis' site visit on July 14, 2022, TRN has apparently done nothing to correct these deficiencies other than hire Mr. Lazaridis to deal with some electrical issues and joist supports. This shows a level of TRN acceptance of these "deficiencies" that must be taken into consideration.

[93] I conclude that TRN has failed to meet its onus of proving that BBD is liable to TRN for the claimed deficiency correction costs.

f) Is BBD liable for the flood damage?

[94] TRN also claims the $5,479.35 in damages it paid to the landlord, 264, for the flood repair.

[95] The following facts are undisputed. There was a flood in early November, 2019 that emanated from pipes that led from the boiler in the basement to a radiator in the bathroom at the back of the establishment on the first floor. This radiator had been concealed behind drywall prior to the Project. On April 18, 2019, during demolition, BBD discovered this radiator. Mr. Harvey emailed Mr. Moosa that day asking whether the radiator was connected to a water source. There is no email response.

[96] Mr. Harvey's evidence was that then he talked with Mr. Moosa, who advised that the radiator was inactive and could be removed. Mr. Wargalla stated in his affidavit that Mr. Harvey instructed him to remove the radiator, that he saw that the landlord had previously cut the pipes leading to the radiator and that the pipes were left uncapped. He removed the radiator. In cross-examination Mr. Wargalla admitted he did not cap the pipes as he said that that was the responsibility of the landlord's contractor who had cut the pipes. Mr. Moosa said in cross-examination that he never touched the radiator and did not speak with Mr. Harvey on this subject.

[97] Seven months later on November 6, 2019 the landlord activated the boiler and water flowed out of the uncapped pipes that had previously been connected to the radiator, causing water to flow out and down into the basement, flooding the basement. This caused damage to the landlord and TRN. On November 6, 2019 Mr. Moosa sent an email to TRN describing the flood and blaming BBD, alleging that he told BBD in April, 2019 not to remove the radiator. Eventually, 264 charged TRN $5,479.35 for the cost of cleaning up and rectifying the damage caused by the flood. TRN paid this amount on June 5, 2020 and now seeks to recover it from BBD.

[98] I accept the BBD version of these events. As stated earlier, I found that Mr. Moosa was not at all credible. He did not disclose relevant documents until I ordered him to do so at the trial. Even then, he admitted having additional documents and the cut pipes in his possession, and not disclosing them. I draw an adverse inference against the defendants, namely that this undisclosed material would have detracted from the defendants' case. Furthermore, I simply do not believe that BBD would have blatantly cut the radiator pipes and removed the radiator without clearance from the landlord. I find that the landlord cut the pipes leading to the radiator, not BBD.

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[99] The question then is whether Mr. Wargalla's decision not to cap the pipes made BBD liable for the water damage to any degree. There is no doubt that the standard of workmanship contained in the Contract, implicitly if not explicitly, required that BBD not cause such a flood. It is also clear that the onus rests on the defendants to prove that BBD caused or contributed to the flood, as the defendants assert this claim. Significantly, the defendants did not call an expert to give an opinion as to whether Mr. Wargalla's decision not to cap the pipes was within the standard of workmanship specified by the Contract and the standard of care generally.

[100] Nevertheless, Mr. Perry conceded in closing argument that Mr. Wargalla should have capped the pipes and argued instead that the defendants failed to prove the causal link between the TRN payment to the landlord on June 5, 2020 and the flood. The cheque stub for the payment has handwriting linking the payment to the flood. But the stub itself refers only to an email dated June 5, 2020, an email the defendants never produced. There is, therefore, merit to Mr. Perry's point.

[101] In the circumstances, I find that BBD must bear some responsibility for this damage. Mr. Wargalla' decision not to cap the pipes, in my view, given Mr. Perry's concession, should have resulted in BBD sharing liability with the landlord equally. But I reduce BBD's by half again due to the causation issue. I therefore find that BBD should contribute $1,300 to this repair cost.

[102] As BBD made clear in its answers to undertakings, BBD's only claim against the landlord was for the damages BBD must pay to TRN for the flood damage. I find that the above noted $1,300 is entirely the responsibility of BBD and its subcontractors, and not the landlord. There is no other BBD claim against 264.

VI CONCLUSION

[103] For these reasons, I make the following orders:

- the BBD lien is discharged and the BBD action is dismissed;
- concerning the defendants' counterclaim, BBD must pay TRN damages as follows: $182,825.55 (overpayment) + $1,300 (flood damage) = $184,125.55;
- prejudgment and post-judgment interest and costs are to be determined after receiving closing submissions on these issues (see below); and
- the remainder of the TRN counterclaim is dismissed.

[104] Concerning costs, as directed, counsel filed costs outlines for the costs of this action and reference. The BBD costs outline shows $54,996.20 in partial indemnity costs and $72,382.34 in substantial indemnity costs. The defendants' costs outline shows $$75,690.14 in partial indemnity costs, $106,135.85 in substantial indemnity costs and $116,284.42 in actual costs.

[105] I encourage the parties to settle the issues of costs and interest. If they cannot agree, written submissions on costs and interest must be served, filed and uploaded in accordance with the following schedule:

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- the defendants must serve, file and upload written submissions on costs and interest of no more than four (4) pages on or before August 30, 2024;
- BBD must on or before September 11, 2024 serve, file and upload responding written submissions on costs and interest of no more than four (4) pages; and
- the defendants must serve, file and upload reply written submissions on costs and interest of no more than one (1) page on or before September 16, 2024.

Released: August 20, 2024

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ASSOCIATE JUSTICE C. WIEBE

2024 ONSC 4633 (CanLII)

CITATION: BLDNG BLX Developments Inc. v. The Roasted Nut Inc., 2024 ONSC4633
COURT FILE NO.: CV-20-633938

2024 ONSC 4633 (CanLII)

ONTARIO
SUPERIOR COURT OF JUSTICE
In the matter of the *Construction Act, R.S.O. 1990, c. C.30*

B E T W E E N:

BLDNG BLX Developments Inc.
.

Plaintiff

- and -

The Roasted Nut Inc. and 2641582 Ontario Inc.

Defendants

REASONS FOR JUDGMENT

Associate Justice C. Wiebe

Released: August 20, 2024