SUPREME COURT OF NOVA SCOTIA
Citation: *Caldwell v. JonesCo Contracting Incorporated*, 2025 NSSC 299

Date: 20250915
Docket: Hfx No. 530357
Registry: Halifax

Between:

Andrea Caldwell

Plaintiff/Mover

v.

JonesCo Contracting Incorporated,
a body corporate

Defendant/Respondent

D E C I S I O N

Judge: The Honourable Justice Glen G. McDougall

Heard: July 17, 2025, in Halifax, Nova Scotia

Counsel: John T. Boyle, Cox & Palmer, for the Mover (Plaintiff)
Adam R. Downie, Stewart McKelvey, for the Respondent (Defendant)

By the Court:

INTRODUCTION

[1] The Plaintiff, Andrea Caldwell (the "Plaintiff" or "Ms. Caldwell") seeks an order for partial summary judgment on evidence in respect to claims contained in paragraphs 5 to 12 and 18 to 22 and the related portions of paragraphs 23 and 24 of the Amended Statement of Claim filed along with an Amended Notice of Action on June 25, 2025.

[2] The parties reached an agreement regarding summary judgment in respect to the Plaintiff's claim set out in paragraphs 18 to 22 prior to the hearing of the motion. The cooperation of the parties and their counsel in arriving at a settlement to allow this aspect of the overall claim to succeed is appreciated.

[3] The Court will focus its' attention on the Plaintiff's claim as set out under the heading "Unpermitted and Excessive Excavation Charges" in paragraphs 5 to 12 (inclusive) of the Amended Statement of Claim. The Plaintiff seeks summary judgment to recover additional amounts charged by the Defendant – JonesCo Contracting Incorporated – (the "Defendant" or "JonesCo") for supplying additional aggregate and other infill materials together with work related to the excavation and construction of the foundation of the dwelling JonesCo had contracted to build for her. The amount sought to be recovered (including HST of 15%) totals $82,432.00 which the Plaintiff paid as part of the final invoice submitted by JonesCo on April 18, 2023. The Plaintiff states that she instructed her lawyer to pay the full amount "under protest" in order to get the keys to her new home which, she says, JonesCo would not provide until full payment was received.

[4] In total, Ms. Caldwell paid $838,460.40 to JonesCo which exceeded the fixed-price agreement she initially signed by $190,030.45. As indicated previously, the parties agreed that JonesCo had over-charged the Plaintiff $23,000.00 apparently the result of a simple arithmetical error. What remains in dispute and which forms the basis of this summary judgment motion is the $82,432.00 charged by JonesCo for the additional materials and work related to the excavation and subsequent in-filling required to construct the new home's foundation. A more detailed analysis of the relevant facts relating to this motion with a closer look at the Building Contract, New Home Construction/Schedule "A" (the "Agreement") that the parties entered into prior to commencement of construction will follow.

[5] I will now turn my attention to the rules of procedure and the jurisprudence that has evolved relating to summary judgment on evidence both from our Court as well as the Nova Scotia Court of Appeal.

RULES OF PROCEDURE AND CASE LAW

[6] Summary judgment on evidence is covered by Civil Procedure Rule 13.04. A judge hearing the motion must grant summary judgment if satisfied "there is no genuine issue of material fact, whether on its own or mixed with a question of law… that would require a trial." [CP Rule 13.04(1)(a)]

[7] The rule also gives a judge who hears a motion for summary judgment on evidence the discretion to "determine a question of law, if there is no genuine issue of material fact for trial." [CP Rule 13.04(6)(a)]

[8] Rule 13.04, in its entirety, reads as follows:

> **13.04 Summary judgment on evidence in an action**
>
> (1) A judge who is satisfied on both of the following must grant summary judgment on a claim or a defence in an action:
>
> (a) there is no genuine issue of material fact, whether on its own or mixed with a question of law, for trial of the claim or defence;
>
> (b) the claim or defence does not require determination of a question of law, whether on its own or mixed with a question of fact, or the claim or defence requires determination only of a question of law and the judge exercises the discretion provided in this Rule 13.04 to determine the question.
>
> (2) When the absence of a genuine issue of material fact for trial and the absence of a question of law requiring determination are established, summary judgment must be granted without distinction between a claim and a defence and without further inquiry into chances of success.
>
> (3) The judge may grant judgment, dismiss the proceeding, allow a claim, dismiss a claim, or dismiss a defence.
>
> (4) On a motion for summary judgment on evidence, the pleadings serve only to indicate the issues, and the subjects of a genuine issue of material fact and a question of law depend on the evidence presented.
>
> (5) A party who wishes to contest the motion must provide evidence in favour of the party's claim or defence by affidavit filed by the contesting party, affidavit filed by another party, cross-examination, or other means permitted by a judge.

(6) A judge who hears a motion for summary judgment on evidence has discretion to do either of the following:

(a) determine a question of law, if there is no genuine issue of material fact for trial;

(b) adjourn the hearing of the motion for any just purpose including to permit necessary disclosure, production, discovery, presentation of expert evidence, or collection of other evidence.

[9] The Nova Scotia Court of Appeal, in the case of *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89, ("*Shannex*"), laid out an analytical framework for summary judgment motions on evidence. At para. 34, the Honourable Justice Joel Fichaud, interpreted "…the amended Rule 13.04 to pose five sequential questions:

> [34] …
>
> **First Question: Does the challenged pleading disclose a "genuine issue of material fact", either pure or mixed with a question of law?**
>
> …
>
> **Second Question:** If the answer to #1 is No, then: **Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?**
>
> …
>
> **Third Question:** If the answers to #1 and #2 are No and Yes respectively, leaving only an issue of law, then the judge "may" grant or deny summary judgment: Rule 13.04(3). Governing that discretion is the principle in *Burton*'s second test: **"Does the challenged pleading have a real chance of success?"**
>
> …
>
> **Fourth Question:** If the answer to #3 is Yes, leaving only an issue of law with a real chance of success, then, under Rule 13.04(6)(a): **Should the judge exercise the "discretion" to finally determine the issue of law?**
>
> …
>
> **Fifth Question**: If the motion under Rule 13.04 is dismissed, **should the action be converted to an application** and, if not, what directions should govern the conduct of the action?
>
> [emphasis Fichaud, J.A.]

[10] In a subsequent case from the Nova Scotia Court of Appeal, cited as *Arguson Projects Inc. v. Gil-Son Construction Limited*, 2023 NSCA 72, ("*Arguson*"), the Honourable Justice Cindy A. Bourgeois provided a consolidation of the principles governing motions for summary judgment on evidence beginning first with the five sequential questions set out by Justice Fichaud in *Shannex* [*Arguson*, at para. 33]. She then went on to state the following, at paras. 35 to 42:

> [35] **The first question's focus is solely whether there is a dispute of material fact. A material fact can be one that stands on its own** (i.e., whether an email was sent and received) or it can be mixed with a question of law (i.e., an email was sent, but does it constitute a "decision" pursuant to the notice provisions of the contract?). At the first stage, a motion judge looks only at whether the material fact - was an email sent and received - is in dispute. It is irrelevant at this stage whether there is a question of law mixed with the material fact (i.e., the application of the contractual provisions in determining the legal significance of the email) - that consideration belongs in the second step.
>
> [36] In *Shannex*, Justice Fichaud noted "a 'material fact' is one that would affect the result. A dispute about an incidental fact - i.e., one that would not affect the outcome - will not derail a summary judgment motion" (para. [34]). And further:
>
> > The moving party has the onus to show by evidence there is no genuine issue of material fact. But the judge's assessment is based on all the evidence from any source. If the pleadings dispute the material facts, and the evidence on the motion fails to negate the existence of a genuine issue of material fact, then the onus bites and the judge answers the first question Yes.
>
> [37] Identifying a material fact is anchored in what has been alleged in the pleadings. To identify a material fact, it is helpful to ask what needs to be proven to answer the allegations pled by a party. If a fact is necessary to prove the allegation, then it is material.
>
> [38] To determine whether there is a dispute of material fact, Rule 13.04(4) makes clear that it is the evidence presented on the motion that must be considered. As noted recently by Justice Farrar in *Risley*, bald assertions in a responding affidavit, without more in terms of an evidentiary foundation, will not give rise to a dispute of material fact. It is critical to emphasize that a dispute of material fact cannot arise from the submissions of counsel, or a judge's speculation about legal issues not raised by the pleadings or what evidence could possibly be called at the time of trial.
>
> [39] The second question requires a court to determine whether a question of law arises from the pleadings. If there is no dispute of material fact and no question of law, either pure or mixed with fact, then summary judgment must follow. For the purposes of this appeal, the interpretation of a contract is a question of law. As referenced above, the application of contractual provisions to the factual context, is a question of law mixed with fact.

[40] If there are no disputed material facts, but there is a question of law, the motion judge must proceed to the third question - does the challenged pleading have a "real chance of success"? In *Shannex*, Justice Fichaud wrote:

> Nothing in the amended Rule 13.04 changes *Burton*'s test. It is difficult to envisage any other principled standard for a summary judgment. To dismiss summarily, without a full merits analysis, a claim or defence that has a real chance of success at a later trial or application hearing, would be a patently unjust exercise of discretion.
>
> It is for the responding party to show a real chance of success. If the answer is No, then summary judgment issues to dismiss the ill-fated pleading.

[41] In *Burton*, Justice Saunders explained how to ascertain if there is a "real chance of success":

> [42] . . .Instead, the judge's task is to decide whether the responding party has demonstrated on the evidence (from whatever source) whether its claim (or defence) has a real chance of success. This assessment, in the second stage, will necessarily involve a consideration of the relative merits of both parties' positions. For how else can the prospects for success of the respondent's position be gauged other than by examining it along with the strengths of the opposite party's position? It cannot be conducted as if it were some kind of pristine, sterile evaluation in an artificial lab with one side's merits isolated from the others. Rather, the judge is required to take a careful look at the whole of the evidence and answer the question: **has the responding party shown, on the undisputed facts, that its claim or defence has a real chance of success?**
>
> [43] In the context of summary judgment motions the words "real chance" do not mean proof to a civil standard. That is the burden to be met when the case is ultimately tried on its merits. If that were to be the approach on a summary judgment motion, one would never need a trial.
>
> [44] The phrase "real chance" should be given its ordinary meaning - that is, a chance, a possibility that is reasonable in the sense that it is an arguable and realistic position that finds support in the record. **In other words, it is a prospect that is rooted in the evidence, and not based on hunch, hope or speculation.** A claim or a defence with a "real chance of success" is the kind of prospect that if the judge were to ask himself/herself the question:
>
> *Is there a reasonable prospect for success on the undisputed facts*?
>
> the answer would be yes.
>
> (Emphasis added)

[42] From the above, it is clear that the second and third questions are anchored in the evidence presented on the motion. As reiterated in *Shannex*, it is expected that each party "put its best foot forward":

> [36] "**Best foot forward**": Under the amended Rule, as with the former Rule, the judge's assessment of issues of fact or mixed fact and law depends on evidence, not just pleaded allegations or speculation from the counsel table. Each party is expected to "put his best foot forward" with evidence and legal submissions on all these questions, including the "genuine issue of material fact", issue of law, and "real chance of success": Rules 13.04(4) and (5); *Burton*, para. 87.
>
> (Emphasis in original)

[11] The phrase "put its best foot forward" was explained further by the Nova Scotia Court of Appeal in *Nova Scotia Association of Health Organizations Long Term Disability Plan Trust Fund v. Amirault*, 2017 NSCA 50. The Honourable Justice Peter M.S. Bryson, writing for the unanimous panel (that also included Fichaud and Farrar, JJ.A.), stated the following, at para. 15:

> [15] Putting one's best foot forward is an important obligation of parties to a summary judgment motion. A respondent to a summary judgment motion "must lead trump or risk losing" (*Goudie v. Ottawa (City)*, 2003 SCC 14 at para. 32). Assuming there has been adequate time for disclosure, an absence of evidence cannot be overcome by arguing that something might turn up in the future. The Supreme Court emphasized the obligation of the parties in *Canada (Attorney General) v. Lameman*, 2008 SCC 14:
>
> > [19] We add this. In the Court of Appeal and here, the case for the plaintiffs was put forward, not only on the basis of evidence actually adduced on the summary judgment motion, but on suggestions of evidence that might be adduced, or amendments that might be made, if the matter were to go to trial. ***A summary judgment motion cannot be defeated by vague references to what may be adduced in the future***, if the matter is allowed to proceed. To accept that proposition would be to undermine the rationale of the rule. A motion for summary judgment must be judged on the basis of the pleadings and materials actually before the judge, not on suppositions about what might be pleaded or proved in the future. This applies to Aboriginal claims as much as to any others.
> >
> > [Emphasis added]

[12] This, then, sets out the legal framework that applies to motions for summary judgment on evidence. The burden is on the moving party to show, by evidence, that there are no genuine issues of material fact in dispute. If there are genuine issues of material fact (either pure or mixed with a question of law) in dispute, a motion for summary judgment will be dismissed.

[13] At para. 34 of *Shannex*, Fichaud, J.A., stated that "[A] material fact" is one that would affect the result. A dispute about an incidental fact – i.e. one that would not affect the outcome – will not derail a summary judgment motion: *2420188 Nova Scotia Ltd. v. Hiltz*, 2011 NSCA 74, para. 27, adopted by *Burton*, para. 41, and see also para. 87 (#8)."

[14] Also at para. 34 of *Shannex*, Fichaud, J.A., stated that "…the judge's assessment is based on all the evidence from any source. "And, as Farrar, J.A., put it in *Risley v. MacDonald*, 2022 NSCA 76, ("*Risley*") at para. 56:

> [56] …, determining whether a genuine issue of material fact exists is based on both the pleadings **and the evidence**, not simply "an issue tied to the pleadings."
>
> (Emphasis in the original decision)

[15] On summary judgment motions under Rule 13.04, it is not open to the judge to (i) make findings of fact; (ii) draw inferences; (iii) assess credibility; or (iv) weigh evidence. [See *Risley*, at para. 68 and *Hatch Ltd. v. Atlantic Sub-Sea Construction and Consulting Inc.*, 2017 NSCA 61, at para. 26].

FACTUAL BACKGROUND AND COMMENTARY

[16] Ms. Caldwell first contacted a representative of JonesCo sometime in August, 2021 to discuss the possibility of having the company construct a house for her on a lot she had previously purchased at 250 Owl Drive, Musquodoboit Harbour, Nova Scotia. The person she dealt with at JonesCo was its President and Owner, Mike Jones. She told him that she had a budget of $650,000.00 to cover the costs of construction.

[17] Following discussions that took place over the course of several weeks, Ms. Caldwell was presented with an agreement entitled "Building Contract, New Home Construction" to which was attached a Schedule "A" containing specifications for the construction of her new home (together, the "Agreement").

[18] The Agreement called for a total price (including HST) of $648,429.95 with adjustments for allowance items as listed in Schedule "A". Payment of the contract price required a deposit of $40,000.00 followed by a series of four draws as follows:

First Draw:

20% of the Contract Price - $122,770,43 plus HST of $16,915.56 for a total payment of $129,685.99 (Note: This was later determined to be in error. The payment of $129,685.99 was correct but it should have been calculated on $112,770.43 plus HST of $16,15.56).

Second Draw:

30% of the Contract Price - $169,155.64 plus HST of $25,373.35 for a total payment of $194,528.93.

Third Draw:

30% of the Contract Price - $169,155.64 plus HST of $25,373.35 for a total payment of $194,528.98.

Fourth Draw:

20% of the Contract Price - $122,740.43 plus HST of $16,155.64 for a total payment of $129,685.99 minus the $40,000.00 deposit leaving $89,685.99. (Note: The same error in using $122,740.43 instead of $112,740.43 was made. The final payment of $89,685.99 was, however, calculated correctly).

[19] The deposit together with the four instalment payments added up to the total price of $648,429.95 in accordance with the Agreement that the parties signed on October 19, 2021.

[20] As previously mentioned, the Agreement included Schedule "A" which set out the building specifications for the new home. Certain allowances were stipulated for various aspects of the project including one for "Foundation / structural rock infill allowance $5,000 (includes all infill materials, trucking, rolling or tamping, engineering, and any removal of unsuitable materials from lot requested".

[21] This allowance was set by JonesCo without input from Ms. Caldwell. Immediately below the list of allowances was the following provision:

> All allowances are inclusive of material, labour and taxes. If an allowance amount is not used by the client, the additional amount will be credited back at closing. All allowance items must be submitted within 45 days of agreement. If the final amount exceeds the allocated amount, the client must pay the extra at closing. All applicable HST rebates ascribed to JonesCo.

[22] JonesCo invoiced Ms. Caldwell an additional amount of $71,680.00 plus HST of $10,752.00 (a total of $82,432.00) for infill extras in its fourth and final draw. This, despite clause 9 of the Building Contract, New Home Construction which reads:

> 9 **EXTRAS**
>
> The contractor shall only receive additional remuneration for and only be bound to provide extra services and materials when both parties have agreed to the cost and the date of completion and the amendment has been confirmed by a change order. The Buyer is to pay the Contractor for the extras promptly upon their completion. Any and all unforeseen conditions due to buried underground materials or existing underground structural conditions are subject to removal and repair as needed. Any engineering, breaking or blasting of rock, underpinning or repair of existing foundations or structural components will be deemed an "Extra" and costs will be related to Buyer prior to commencement and subsequently billed to the Buyer.

[23] JonesCo did not alert Ms. Caldwell that any extra infill services or materials were required nor did the company obtain her consent or seek an amendment to the Agreement and have it confirmed by a change order prior to submitting the invoice for the final draw. There were additional errors in the calculation of the final draw which were part of this summary judgment but, as indicated earlier, they were resolved by agreement and thus are no longer of concern as it relates to this motion.

[24] It is interesting to note that the Agreement appears to have considered lot conditions under the heading Buyer's Covenants. Under clause 4(c), the contract provided the following:

> (c) **Lot Conditions**
>
> The Buyer saves liable the Contractor from all existing lot conditions, seen and unseen during the course of excavation for construction, foundation installation, septic systems, connections to municipal services, and well installations that may require blasting, chipping of rock, soft bottom or buried materials be remediated. All environmental costs for the site contamination found to be the responsibility of the Buyer. Any power poles or service poles required to service dwelling to be at the expense of the Buyer. Should the lot require fill materials to correct grades for the dwelling, stumps or materials exported from the site or structural rock be imported, all costs associated will be the responsibility of the buyer.

[25] Under the sub-heading "Scope of Work", the contract provided the following at clause 1(b)(i):

(b) Notwithstanding the foregoing, the Contract shall **not** be responsible for the following:

(i) obtaining any well, or Geotechnical engineering, water tests of samples related to the water supply on the Lot. The Buyer shall, at its own expense, take water samples for testing from the water supply to the Lot and satisfy itself that the water meets the recommended health standards of the Government of Nova Scotia for bacteria, minerals and chemicals. In the event that the water tests do not meet the recommended standards of the Government of Nova Scotia, the cost of rectification including the cost of any water filtration system that may be required to meet the recommended standards shall be the sole responsibility of the Buyer. Any and all infilling amounts required additional to allowance amounts listed in Schedule.

[26] In the affidavit of Mike Jones, JonesCo's Owner and President, filed on July 9, 2025, he addressed this aspect of the Agreement in this way, at paras. 39 and 40:

39. There is a drafting error contained in the aforementioned provision (1.(b)). The final sentence in the provision is incomplete and it should be contained within a separate subheading. There is only one Schedule to the Agreement (Schedule A) and it fails to reference it.

40. Had the drafting been done properly, there would be another subheading labeled (1.(b)(ii)) and it would read: "[**a**]ny and all infilling amounts required additional to allowance amounts listed in Schedule **A**."

[27] In the lead-up to signing the Agreement, JonesCo's President sent an email to Ms. Caldwell in which he brought up the possibility of incurring extra costs "in case we need structural rock." This email was sent on August 30, 2021. The entire message is set out below:

Subject: Re: Mark up

That is looking pretty close, yes.

I was down to your lot today to take a look…….seems like you have a third pet perhaps?? See attached.

The lot looks good. Most of them in Owl dr are the same. Mix of bedrock and organic. Aerial views show some high ground towards the front, but I also looked for any moving water along the road and in the lot and found none.

It has been my experience that most lots on Owl dr require minimal breaking but at least some infilling for slab on grade. While it is impossible to know what is

> underground until we pick a spot and dig, my best guess would be that you have $10k-$15k aside just in case we need structural rock. If we don't need it, great.
>
> I spoke with Troy Re: drafting and so he is just waiting to hear back. Should we get this going?

[28] During argument, JonesCo's counsel raised this to suggest that Ms. Caldwell was alerted to the possibility that there could be extra costs for infilling and related services. While this is a plausible argument, it could also be said that given Mr. Jones' personal experience with soil and ground conditions in the area where Ms. Caldwell intended to have her new home built, perhaps he should have also been more alert to this possibility and taken immediate steps to discuss the anticipated extra costs and sought her consent before going ahead with the work. According to clause 9 of the Building Contract / New Home Construction not only should he have taken this step, it should have also been "confirmed by a change order."

[29] Regardless of the contents of the email, the Agreement was intended to "constitute the entire contract as between the parties and that all amendments to this Agreement must be incorporated herewith in order to be binding upon the parties hereto." [See clause 17(h) of the Building Contract / New Home Construction]

[30] The discussions that took place prior to the signing of the Agreement would only be relevant should there be any ambiguities in its interpretation. And, it should be kept in mind that the Agreement was prepared by JonesCo and presented to Ms. Caldwell for her signature. If there are any ambiguities in its interpretation, it would have to be interpreted in a manner favouring the buyer – Ms. Caldwell – based on *contra proferentem*.

[31] The only other clause in the Building Contract / New Home Construction that has any particular relevance to the motion is clause 8. Under the sub-heading "Changes", it provides the following:

> 8. **CHANGES**
>
> At any time during the progress of the work upon giving reasonable notice to the Contractor, the Buyer may in writing request changes to the work described in this Agreement. If the changes are capable of being made the Contractor will confirm to the Buyer in writing the additional cost of the changes which are to be paid for by the Buyer. An appropriate amendment shall be attached to this Agreement as a "Change order". Upon implementation of the change order by the Contractor, the Buyer shall consent to a minimum 3 day extension, or an amount of time that is mutually agreed upon, to the date of completion per instance. Change orders exceeding 6 during the course of the build are subject to a $175+HST fee. **Change**

> **orders are not required by the Contractor for excavation, infill materials, or geotechnical items required due to lot conditions or placement of the home on the Lot**.
>
> (Emphasis added)

[32] The last full sentence of this clause suggests that Change Orders "are not required by the Contractor for excavation, infill materials, or geotechnical items required due to lot conditions or placement of the home on the lot." As with any written agreement, the proper interpretation requires a contextual approach based on a consideration of the entirety of its contents.

[33] In a case decided by the Nova Scotia Court of Appeal in *Nova Scotia Public Service Long Term Disability Plan Trust Fund v. Boxendale*, 2022 NSCA 6, Bryson, J.A., (for the panel that also included Beveridge and Hamilton, JJ.A.) at para. 23 citing the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, offered the following quote:

> [23] …
>
> > [47] [...] the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, per LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, per Cromwell J.). **To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.** Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
> >
> > > No contracts are made in a vacuum: there is always a setting in which they have to be placed. In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
> > >
> > > (Reardon Smith Line, at p. 574, per Lord Wilberforce)
> >
> > (Emphasis added, Bryson, J.A.)

ISSUE

[34] The issue for this Court is whether Ms. Caldwell's motion for summary judgment on evidence should be granted?

DISCUSSION / ANALYSIS

[35] To answer this question the Court must re-visit the five sequential questions laid out in Fichaud, J.A.'s decision in *Shannex*.

Question # 1: Does the challenged pleading disclose a "genuine issue of material fact, either pure or mixed with a question of law?

[36] There is really no dispute about the material facts pertaining to this situation. What it boils down to is whether JonesCo is entitled to the extra amount charged for the cost of infill and related services over and above the $5,000.00 allocated in the Agreement.

[37] The Agreement is clear that any additional charges above and beyond what the parties agreed to in the fixed price contract would have to be agreed to and made the subject of a change order. Despite the fact that JonesCo's Owner and President was aware of the additional costs associated with the excavation and in-filling of the lot well in advance of tendering the final invoice, he did not share this knowledge (other than a vague suggestion in an email he sent to Ms. Caldwell prior to the Agreement being signed that there was a possibility of extra costs "in case we need structural work") with Ms. Caldwell nor did he obtain her consent to pay the additional cost before proceeding with the work. It was not until the eve of closing when the final invoice was presented that Ms. Caldwell first became aware that the fixed-price contract she had signed was going to cost her considerably more than what she had budgeted for. In order to get the keys to her new home, she had little choice but to pay the additional amount "under protest" as she said she instructed her property lawyer to pass along to JonesCo's lawyer. Whether the lawyer did or did not do as she said she instructed him to do is immaterial for purposes of this motion. It is not a material fact that could affect the outcome.

[38] The answer to question # 1 is therefore "No". Turning then to question # 2.

Question # 2: If the answer to # 1 is No, then: Does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?

[39] There are two legitimate questions of law that must be addressed:

(i) Under the Agreement, is JonesCo entitled to the payment of the extra amount charged for additional infill and services related to excavation and structural work pertaining to the foundation?

(ii) Is JonesCo entitled to payment of the extra charges based on its *quantum meruit* defence?

[40] Since the answer to question # 2 is "Yes", this leads to the third *Shannex* question.

Question # 3: If the answers to # 1 and # 2 are No and Yes respectively, leaving only an issue of law, then the judge "may" grant or deny summary judgment: Rule 13.04(3). Governing that discretion is the principle in *Burton*'s second test: Does the challenged pleading have a real chance of success?

[41] It is appropriate in the circumstances of this case to exercise the discretion to determine the two issues of law set out above.

[42] In regard to JonesCo's right, under the Agreement, to charge an extra amount for infill and related services the clear answer is "No". JonesCo's failure to notify and seek Ms. Caldwell's approval for the additional work prior to completing the work, waiting instead until just before the closing, to lay this on her, is a breach of the Agreement. She should not be responsible for these extra charges.

[43] As for the defence of *quantum meruit*, this too must fail. Ift has no real chance of success. In *High Performance Energy Systems Inc. v. Halifax (Regional Municipality)*, 2023 NSCA 15, the Honourable Justice David P.S. Farrar, wrote this at paras. 41 – 45 of the decision:

> [41] After addressing the contractual claim, the motion judge turned his attention to High Performance's claim for unjust enrichment. He struck that claim not because it was statute-barred but rather because it was unsustainable due to the existence of the Contract:
>
> > [69] As for HPES's claims based on unjust enrichment and *quantum meruit*, they cannot be used as a means of circumventing a statutory limitation period. [See *Caglar v. Moore*, 2005 CanLII 39871 (On Sc), at paras. 34 and 35.] The equitable relief sought is inextricably linked to the alleged breach of contract.

[70] I rely on the case of *Rillford Investments Ltd. V. Gravure International Captial [sic] Corp*. [1997] 7 W.W.R. 534, where, at para. 29, it is written:

> 29 As to unjust enrichment, I have serious reservations about the direct linkage suggested by plaintiff's counsel between the principles of *quantum meruit* and the newer concept of unjust enrichment. It is difficult to see how the remedy of unjust enrichment could be implied when the plaintiff's claim in *quantum meruit* is met head-on by the existence of an express contract. See *Peter Kiewit Sons' Company of Canada Ltd. et al. v. Eakins Construction Ltd.*, 1960 CanLII 37 (SCC), [1960] S.C.R. 361. But even if the principles of unjust enrichment are applicable, the law is clear as noted in *Rathwell v. Rathwell*, 1978 CanLII 3 (SCC), [1978] 2 S.C.R. 436, that "a contract" can constitute a juristic reason for the enrichment (at p. 455). As a recent example of this, see the decision of this Court in *Hill Estate v. Chevron Standard Ltd. et al*. (1992), 1992 CanLII 4025 (MB CA), 83 Man.R. (2d) 58 (at p. 70):
>
> > Decided cases are of little assistance in determining what is meant by "juristic reason." It simply comes down to this: if there is an explanation based upon law for the enrichment of one at the detriment of another, then the enrichment will not be considered unjust and no remedy, whether by constructive trust or otherwise, will be available. ***For example, there might be a contract between the parties under the terms of which an enrichment by one at the expense of the other is contemplated or justified.*** [emphasis added]

[71] The equitable doctrine of unjust enrichment applies where there is no juristic reason for a party to benefit at the expense of another. ***As indicated in Rillford, supra, "the plaintiff's claim in quantum meruit is met head-on by the existence of an express contract." The same applies to HPES's claim based on unjust enrichment. Any damages that HPES might have sought are derived directly from the Contract.*** HPES breached its contract with HRM when it ceased work on the Project in February of 2009. HPES was not prevented from carrying out its obligations under the Contract because of any actions taken by HRM. HPES must bear the responsibility for its failure to honour its contractual obligations to the Municipality.

[Emphasis added.]

[42] The motion judge's decision to disallow the claim of unjust enrichment is consistent with this Court's recent decision in *Organigram Holdings Inc. v. Downton*, 2020 NSCA 38, where Bryson J.A. found that a claim for unjust enrichment ought to be struck where a contract is present:

[39] Organigram makes a strong argument that this is an untenable cause of action. They cite authority that unjust enrichment is unsustainable when a contract is present. Organigram begins its attack on the judge's ruling with a quotation from *Garland v. Consumers' Gas Co*., 2004 SCC 25 which sets out the well-known tri-part test for unjust enrichment:

> 1. An enrichment of the defendant;
>
> 2. A corresponding deprivation of the plaintiff; and
>
> 3. An absence of juristic reason for the enrichment.

[40] Focusing on the third criterion, Organigram relies upon these comments in *Garland*:

> [44] ... in my view, the proper approach to the juristic reason analysis is in two parts. First, the plaintiff must show that no juristic reason from an established category exists to deny recovery. ... ***The established categories that can constitute juristic reasons include a contract*** (*Pettkus, supra*), a disposition of law (*Pettkus, supra*), a donative intent (*Peter, supra*), and other valid common law, equitable or statutory obligations (*Peter, supra*). If there is no juristic reason from an established category, then the plaintiff has made out a *prima facie* case under the juristic reason component of the analysis.
>
> [Emphasis added]

[41] Organigram criticizes the judge for failing to refer to binding and persuasive authority supporting its submission that a contract precludes a successful plea of unjust enrichment citing *Garland, supra; Evanoff Enterprises Ltd. v. Pioneer Hi-Bred Ltd*., 2009 ABQB 223 at para63; *Boulanger v. Johnson & Johnson Corp.,* [2002] O.J. No. 1075, aff'd 174 OAC 44; *Williams v. Canon Canada Inc.,* 2011 ONSC 6571 at para232, aff'd 2012 ONSC 3692.

[...]

> [49] Here Ms. Downton has pleaded facts material to a breach of contract. Those facts cannot simultaneously sustain an unjust enrichment claim. Where Ms. Downton explicitly refers to unjust enrichment, she fails to plead facts material to that claim.

[43] The facts pleaded by High Performance in its crossclaim all relate to the existence of the Contract between HRM and High Performance. The crossclaim in its very first paragraph provides the following:

> 1. his crossclaim arises from the termination of a multi-million dollar contract as between HRM and HPES.

[44] It then goes on to detail the terms of the contract concluding as follows:

> 53. HPES states that HRM's termination, whether with or without cause, is unconscionable, without reasonable compensation, unless a claim for unjust enrichment/*quantum meruit* is appropriate in this case.
>
> [45] As outlined in its pleading, High Performance's claim for unjust enrichment is inextricably linked to the Contract. It cannot circumvent the express terms of the Contract in an effort to seek compensation it would not be entitled to under the Contract itself.

[44] JonesCo's claim, based on *quantum meruit*, like High Performance's claim against the Halifax Regional Municipality, "is inextricably linked to the Contract." And, using Justice Farrar's words: "It cannot circumvent the express terms of the Contract in an effort to seek compensation it would not be entitled to under the Contract itself."

CONCLUSION

[45] The Plaintiff's motion for partial summary judgment is granted. JonesCo is required to reimburse her for the extra amount she was charged totalling $82,432.00 along with pre-judgment interest and the costs of this motion.

[46] I will leave it to counsel to try to reach an agreement on costs and pre-judgment interest. If not successful, I will accept their written submissions within 30 (calendar) days of the date of release of this decision.

[47] As for the other claims advanced against JonesCo by Ms. Caldwell, which are not the subject of this summary judgment motion, they remain to be litigated in due course.

Glen G. McDougall, J.