

NOVA SCOTIA COURT OF APPEAL

Citation: *JonesCo Contracting Incorporated v. Caldwell*, 2026 NSCA 53

Date: 20260630

Docket: CA 547923

Registry: Halifax

Between:

JonesCo Contracting Incorporated, a body corporate

Appellant

v.

Andrea Caldwell

Respondent

Judges: Bourgeois, Van den Eynden and Beaton, JJ.A.

Appeal Heard: May 21, 2026, in Halifax, Nova Scotia

Facts: The appellant, a construction company, entered into a contract with the respondent to build a new home on her vacant lot for a fixed price of \$648,429.95. During construction, the final invoice included unexpected charges for excavation and foundation work, raising the total cost to \$838,640.40. The respondent paid under protest and later sued, claiming the contract did not allow for these charges without prior consent (paras [1-3](#), [15-16](#)).

Procedural History: • *Caldwell v. JonesCo Contracting Incorporated*, 2025 NSSC 299: The Supreme Court of Nova Scotia granted partial summary judgment in favor of the respondent, ordering the appellant to pay \$82,432.00 plus interest (paras [4](#), [23](#)).

Parties' Submissions: • Appellant: Argued the contract allowed for additional charges due to unforeseen conditions without prior consent, citing specific contractual provisions that allegedly created a "carve out" for such expenses (paras [33-37](#), [93-100](#)).

• Respondent: Contended the contract required prior notice and consent for additional charges beyond the infill allowance, emphasizing the fixed price nature of the contract and the need for commercial reasonableness (paras [27-32](#), [101-107](#)).

Legal Issues: • Whether the motion judge erred in concluding there was no genuine issue of material fact.

• Whether the contract allowed the appellant to charge for additional foundation and structural work without the respondent's consent.

• Whether the appellant's defence had a real chance of success (paras [41-42](#)).

Disposition: • Leave to appeal granted.

• Appeal dismissed with costs.

Reasons: Per Bourgeois J.A. (Van den Eynden and Beaton JJ.A. concurring):

The judge found no material facts in dispute, as the appellant failed to provide evidence that the respondent was aware of the additional costs or that the contract permitted such charges without consent. The appellant's interpretation of the contract was commercially unreasonable and would render significant portions of the contract meaningless. The contract required the appellant to notify and obtain the respondent's consent for additional charges beyond the infill allowance. The appellant's defence lacked a real chance of success, as the contract did not support its interpretation (paras [47-112](#)).

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 114 paragraphs.

NOVA SCOTIA COURT OF APPEAL

Citation: *JonesCo Contracting Incorporated v. Caldwell*, 2026 NSCA 53

Date: 20260630

Docket: CA 547923

Registry: Halifax

Between:

JonesCo Contracting Incorporated, a body corporate

Appellant

v.

Andrea Caldwell

Respondent

Judges: Bourgeois, Van den Eynden and Beaton, JJ.A.

Appeal Heard: May 21, 2026, in Halifax, Nova Scotia

Held: Leave to appeal granted and appeal dismissed with costs, per reasons for judgment of Bourgeois, J.A.; Van den Eynden and Beaton, JJ.A. concurring

Counsel: Adam R. Downie and Tyler G. White, for the appellant
John T. Boyle, for the respondent

Reasons for judgment:

[1] The appellant, JonesCo Contracting Incorporated, is a builder of new home construction. It entered into a contract with the respondent, Andrea Caldwell, to build a new home on a vacant lot she owned. The total price, subject to adjustments as set out in the contract, was agreed to be \$648,429.95, inclusive of HST.

[2] During the course of the construction, JonesCo issued several invoices which Ms. Caldwell paid. Shortly before the anticipated closing date, the final invoice was issued. It contained work and materials relating to the excavation and placement of the home's foundation which were much higher than Ms. Caldwell anticipated, increasing the total cost of construction to \$838,640.40. In order to gain possession, she reluctantly paid the final invoice and the deal closed.

[3] Ms. Caldwell subsequently commenced an action against JonesCo. She claimed the building contract did not permit JonesCo to charge her for certain items contained in the final invoice relating to the excavation and foundation expenses without obtaining her consent in advance of the work being undertaken.

[4] Ms. Caldwell's motion for partial summary judgment on the evidence¹ was granted by Justice Glen G. McDougall.² The resulting order issued October 7, 2025, directed JonesCo to pay Ms. Caldwell the sum of \$82,432.00 plus pre-judgment interest of \$9,993.47.

[5] JonesCo raises numerous arguments on appeal and asks this Court to set aside the order for partial summary judgment. For the reasons to follow, I would dismiss the appeal and affirm granting partial summary judgment was appropriate on the record before us.

Background

[6] A review of the background relevant to the judge's decision and issues on appeal will put the analysis to follow in context.

[7] In August 2021, Ms. Caldwell reached out to JonesCo inquiring about its willingness to undertake a new home construction on a vacant lot she owned

¹ In her action Ms. Caldwell advanced a number of claims. However, she only sought summary judgment in relation to one, thus the descriptor "partial".

² The judge's written reasons are reported as 2025 NSSC 299.

adjacent to her current residence. Ms. Caldwell was aware JonesCo had previously built several other new homes on her street. This fact was acknowledged by JonesCo.

[8] Ms. Caldwell’s evidence was she had told JonesCo’s principal Mike Jones her budget for the construction was \$650,000 and several changes were made to her initial design plans in consultation with him, in order to keep the project “economically viable”. JonesCo’s evidence on the motion did not dispute these assertions. Indeed, Mr. Jones’ evidence was that a client’s financial resources and budget were also important considerations for JonesCo.

[9] Mr. Jones visited the proposed building site on August 30, 2021. He sent an email to Ms. Caldwell the same day:

...

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.

[Emphasis added]

[10] Six weeks later, the parties entered into a contract – “Building Contract, New Home Construction”. Mr. Jones had prepared the contract but asserted Ms. Caldwell had the opportunity to consult with legal counsel prior to executing it and no revisions were sought. In his discovery evidence, Mr. Jones said he understood the contract to be a fixed price contract. Ms. Caldwell’s evidence echoed this understanding of the nature of the agreement.

[11] With respect to the price, the contract noted:

2. PAYMENT

...

Total Price Including HST Payable to Contractor: (\$648,429.95) with adjustments for allowance items as listed in Schedule “A”

[Emphasis added]

[12] Schedule “A” was entitled “New Home Construction Proposal” and set out the work and services to be provided by JonesCo. It addressed the specifications relating to the scope of “Sitework & Foundation” work as follows:

Sitework & Foundation:

Dig out for Slab on Grade foundation and backfill with onsite materials. Grading to within 4M of foundation. 40’ driveway with class A gravel top, 20’ culvert and concrete headwalls at ditch. ***Additional costs may be incurred if driveway extension is required (approx. \$45/ft) additional structural rock, fill is required to be brought to the site to complete structural infilling or grading around the house. The typical costs for fill materials is \$225 +HST/truckload, structural rock is \$325+HST/truckload (no breaking or blasting of rock included)***

Drilled well package (150’ of drilling & 40’ of casing included) ***Additional costs should the well need to be deeper than 150’ and/or require more than 40’ of casing is \$25.85/ft and \$26.00/ft respectively***

1/2HP well pump and standard pressure tank ***Wells requiring the pump to be placed beyond 200ft deep will require an upgrade to 3/4HP or 1HP***

1000L/day Sloping sand filter septic system or equivalent engineered system ***If septic pump(s) is required due to site grading, additional costs will apply***

Engineered Slab on Grade foundation. ***Additional cost may be incurred for infilling or grading surrounding areas to meet foundation requirements***

Minimum 2” clear stone under the concrete floors

Temporary power to site

[Bolding added]

[13] Schedule “A” also sets out the various allowances included in the contract price:

Allowances:

Flooring allowance \$24,000 (All material and labour for flooring work. Includes any tile work required for tub surrounds, carpet or custom showers, waterproofing, concrete to be covered with approved flooring product)

Cabinet, vanity, Island and counter-top allowance \$26,000 (All material and labour for counter and cabinetry work. Includes any countertop or flatpack vanity assembly or Install from builders selection of suppliers)

Bathroom rough in components, fixtures/faucets allowance \$5,000

Fireplace unit and all propane rough ins \$8,000

Water treatment system \$3,000

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)

Light fixture allowance \$3,000 (Doorbell and range hood to be included in lighting allowance. All pot lights and under cabinet lighting/accents are extra)

*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***

[Bolding added]

[14] I will return to other provisions of the contract in due course.

[15] As the project proceeded, JonesCo invoiced Ms. Caldwell pursuant to the installment schedule set out in the contract. It is the final invoice, issued April 18, 2023, that is at the heart of the dispute. The parties agree it included charges related to the foundation and structural rock work which surpassed the \$5,000 foundation/structural rock infill allowance (“infill allowance”) set out in Schedule A. The invoice itemized these additional charges as follows:

Additional Aggregate required above included amounts	\$47,775
Hauling debris from site	\$1,300
Hardpan materials required	\$17,750
Geotechnical engineering of sub base	\$600
Compaction of materials as per Engineer	\$1,200
Breaking rock per hr	\$3,055

[16] The above work and materials amounted to an additional charge of \$71,680.00 (\$82,432.00 inclusive of HST). JonesCo did not advise Ms. Caldwell of the additional expenses incurred beyond the infill allowance until her receipt of the final invoice.

[17] Ms. Caldwell commenced legal action. In her Amended Statement of Claim, she asserted the above charges had not been rendered in compliance with the contractual terms. She pled:

9. The Plaintiff states that the Defendant breached the Agreement by incurring significant additional costs and then charging said costs to the Plaintiff without any advance warning and without approval from the Plaintiff.
10. Despite being in breach of the Agreement, the Defendant demanded payment for the above noted extras and threatened to not provide the Plaintiff with possession of the Property unless payment was made. This occurred immediately before the intended closing date.
11. The Plaintiff paid the final invoice under protest and duress as a result of the high-handed actions of the Defendant.
12. The Plaintiff further states that the Defendant did not provide the full extent of the alleged additional aggregate to the Property. Rather, she received partial loads and/or the aggregate was used for other purposes. The Plaintiff puts the Defendant to strict proof that the full amount of the charged aggregate was placed at the Property.

[18] And further:

23. During the course of the construction services provided by the Defendant, the Defendant breached the terms of the Agreement and acted negligently. Without limiting the generality of the foregoing, the Plaintiff states that the Defendant's acts of negligence and/or breach of contract include, but are not limited to:
 - (a) The Defendant charging for extras despite **failing to obtain approval** from the Defendant in advance of incurring the expenses.

...

[Emphasis added]

[19] In its Statement of Defence, JonesCo pled:

4. JonesCo pleads and relies upon the terms of the Agreement (as defined in the Statement of Claim).
5. JonesCo denies that it has breached any terms of the Agreement, whether express or implied, and further pleads that at all material times it acted in good faith.
6. Alternatively, JonesCo says that it invoiced the Plaintiff reasonable amounts for services rendered. Accordingly, JonesCo pleads *quantum meruit*.

[20] There are several provisions of the contract relevant to the arguments advanced by the parties. Under the heading “Scope of Work”, clause 1(b)(i) provides:

Notwithstanding the foregoing, the Contractor 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.**³

[Emphasis added]

[21] The “Buyer’s Covenants” appear in clause 4 of the contract. Clause 4(c) is relevant to the present matter:

(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 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.**

[Emphasis added]

[22] Clauses 8 and 9 factor heavily in the contractual interpretations advanced by the parties. They provide:

³ Mr. Jones stated in his affidavit this provision contained a typographical error. It should have referenced Schedule A. This was not challenged by Ms. Caldwell.

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.**

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 related⁴ to Buyer prior to commencement and subsequently billed to the Buyer.**

[Emphasis added]

Proceedings in the Court below

[23] Ms. Caldwell filed an Amended Notice of Motion seeking partial summary judgment on June 25, 2025⁵. The motion was supported by her own affidavit, and two affidavits of counsel John T. Boyle.⁶ In response, JonesCo filed the affidavits of Mike Jones, engineer Richard Henry, and co-counsel Tyler G. White.

⁴ In his discovery evidence, Mr. Jones testified that “related” was intended to be “relayed” – that the buyer would be advised. This was not challenged by Ms. Caldwell.

⁵ The original motion was filed on March 6, 2025 and later amended.

⁶ Mr. Boyle’s affidavits attached excerpts of Mike Jones’ discovery evidence. There was no objection taken by JonesCo to the use of this evidence on the motion.

[24] The motion was heard on July 17, 2025. The only witness at the hearing was Ms. Caldwell, who was cross-examined on her affidavit. The judge reserved his decision after hearing submissions from counsel.

Position of the parties

[25] I will canvass the arguments advanced by the parties on the motion as they closely track those made on appeal.

[26] Both parties relied on this Court's decision in *Shannex Inc. v. Dora Construction Ltd.*, 2016 NSCA 89 as establishing the framework governing the judge's analysis. In *Shannex*, Justice Fichaud set out the now familiar five sequential questions to be asked when summary judgment on evidence is sought pursuant to Civil Procedure Rule 13.04:

1. Does the challenged pleading disclose a genuine issue of material fact, either pure or mixed with a question of law?
2. If the answer to above is No, then: does the challenged pleading require the determination of a question of law, either pure, or mixed with a question of fact?
3. If the answers to the above are No and Yes respectively, does the challenged pleading have a real chance of success? If it does not, summary judgment must issue.
4. If there is a real chance of success, should the judge exercise the discretion to finally determine the issue of law?
5. If the motion for summary judgment is dismissed, should the action be converted to an application, and if not, what directions should govern the conduct of the action?⁷

[27] In her pre-motion written submissions, Ms. Caldwell set out the crux of her position as follows:

11. Ms. Caldwell told JonesCo that she had a budget of \$650,000. They entered into a fixed price agreement for \$648,429.95, which included a \$5,000 allowance for infilling. The agreement stated that JonesCo was not entitled to any additional remuneration unless Ms. Caldwell consented to the additional

⁷ The Supreme Court of Canada applied the *Shannex* framework in *Annapolis Group Inc. v. Halifax Regional Municipality*, 2022 SCC 36 in both the majority (paras. 62 and 63) and minority (paras. 132 and 134) reasons.

work; however, not only did Ms. Caldwell not consent, JonesCo never told her that additional infill was needed or that the \$5,000 allowance would be surpassed. Instead, despite infilling occurring at the beginning of a project, JonesCo waited until immediately prior to closing to drop an additional charge of \$82,432 on Ms. Caldwell.

12. Ms. Caldwell’s position is that JonesCo is not entitled to any additional remuneration having failed to follow the terms of the agreement.

[28] With respect to the first *Shannex* question, Ms. Caldwell argued there were no material facts in dispute. She asserted the undisputed material facts were:

- The parties entered into a contract to govern their relationship with each other;
- The contract contains terms relied on by the parties;
- JonesCo completed “Infill Extras”⁸ beyond that contained in the \$5,000 allowance;
- Ms. Caldwell had not requested JonesCo to provide the “Infill Extras”;
- JonesCo did not advise Ms. Caldwell about the “Infill Extras” prior to completing the work. JonesCo first told her about the “Infill Extras” when it issued its final invoice shortly before the closing date, and
- JonesCo and Ms. Caldwell had not agreed in advance to incur additional cost for the “Infill Extras”.

[29] Relying on this Court’s decision in *Arguson Projects Inc. v. Gil-Son Construction Limited*, 2023 NSCA 72, Ms. Caldwell cautioned the motion judge not to mischaracterize the parties’ competing contractual interpretations as a genuine issue of material fact. She explained in her written submissions:

59. In this case too, the material facts are not in dispute – an agreement exists and Jonesco charged additional remuneration. The dispute is solely about the legal consequence of those undisputed facts, namely whether Jonesco is entitled to charge beyond the fixed price contract despite failing to follow Article 9 of the Agreement.

⁸ “Infill Extra” is a term used by Ms. Caldwell to describe the additional charges in dispute. Whether the charges constituted an “extra” within the specific meaning of the contract was disputed by the parties

[30] Tracking question 2 of the *Shannex* framework, Ms. Caldwell identified two questions of law that required determination:

60. In relation to the charging for the Infill Extras, there are two legitimate questions of law: (1) Is Jonesco entitled to the Infill Extras pursuant to the Agreement; and (2) is Jonesco entitled to the Infill Extras pursuant to its quantum meruit defence.

[31] With respect to the third *Shannex* question, Ms. Caldwell argued JonesCo's defences did not have a real chance of success, and the judge should grant partial summary judgment as requested.

[32] In response to JonesCo claiming the contract permitted it to charge for the expenses in excess of the \$5,000 infill allowance, Ms. Caldwell relied substantially on clause 9. She submitted a proper interpretation of that provision, in light of the entirety of the contract, demonstrated that to be entitled to payment for the additional costs, JonesCo was obligated to advise her in advance of the expenditure and obtain her consent. In her brief to the judge Ms. Caldwell maintained to do otherwise would be commercially absurd:

76. It is commercially absurd for a builder to incur any amount of expense without any notice to or authorization from the homeowner. In this case, Jonesco charged 1,400% over the allowance, a major financial impact to Ms. Caldwell.
77. Jonesco's interpretation would effectively render the Article 9 ineffective. It creates an exclusion that is not set out in the Agreement. If Jonesco wanted to exclude the Infill Extras from this provision, creating the possibility of significant additional charges without any forewarning (such as in this case), there should have been very clear language to that effect, and it should have been specifically drawn to the attention of Ms. Caldwell. Conversely, Ms. Caldwell's interpretation does not render any provision ineffective. Rather, it creates harmony between the provisions, specifically Articles 8 and 9 and Schedule A.

[33] JonesCo's response to the motion was also structured around the *Shannex* framework. With respect to whether there was a genuine issue of material fact, JonesCo submitted the nature of the dispute – competing contractual interpretations – necessarily answered the question in the affirmative and the motion should be dismissed on that basis. In its written submissions it explained:

59. Ms. Caldwell challenges JonesCo's ability to charge certain amounts pursuant to the Agreement. This issue which is squarely in issue in this matter is the proper interpretation of the Agreement.

...

61. Issues of contractual interpretation are issues of mixed fact and law. As outlined by the Supreme Court of Canada in *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53, contractual interpretation is a question of mixed fact and law:

[50] *With respect for the contrary view, I am of the opinion that the historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.*

62. As contractual interpretation involves issues of mixed fact and law, and the proper interpretation of the Agreement is the issue to be decided in evaluating the merits in this case, there is necessarily material facts in issue.

[34] JonesCo highlighted a number of other material facts in dispute, including the characterization of the expenses incurred beyond the \$5,000 infill allowance under the contract. Ms. Caldwell's interpretation relied on the additional charges being considered as "extras" within the meaning of the contract, however, JonesCo disputed this characterization. JonesCo further identified the following as giving rise to other material facts in dispute:

- Whether the aggregate billed to Ms. Caldwell had been delivered to her property;
- Whether the full amount of the aggregate billed to Ms. Caldwell had been used at her property;
- Whether the work underpinning the aggregate charges was necessary to construct the home as contemplated under the contract;
- What the parties' contractual intentions were and whether those intentions aligned with the terms of the contract, and
- The contractual meaning and force of the contract in all of the circumstances.

[35] With respect to the second *Shannex* question, JonesCo identified the question of law as follows:

100. JonesCo submits that this case requires determination of the question of whether JonesCo was able to properly charge Ms. Caldwell the Aggregate Charges. Determination of this question necessarily requires consideration of what the proper interpretation of the Agreement is. Namely, whether the Aggregate Charges amount to extras on the basis of contractual interpretation, whether Ms. Caldwell was entitled to be notified by way of change order⁹, and whether the interpretation of the Agreement allows for changes for the subject work.

[36] Moving to the third *Shannex* consideration, JonesCo submitted its defence had a real chance of success and as a result, the motion for summary judgment must be dismissed. It canvassed various aspects of the contract which supported its view that there was a “carve out” which contemplated JonesCo being paid for whatever excavation and foundational groundwork was necessary beyond the \$5,000 infill allowance, without any obligation to advise Ms. Caldwell or obtain her consent. Mr. Jones’ evidence was that so long as the work and materials were necessary, JonesCo was entitled to present an invoice at closing regardless of amount – even if that was an additional charge of \$1 million dollars. JonesCo’s counsel did not resile from that position on appeal.

[37] JonesCo’s proposed interpretative interplay between clauses 8 and 9 was described as follows:

114. Section 8 and 9, as highlighted throughout this brief, make clear that a change order was not required in this instance and that any and all unforeseen conditions related to underground materials and structural components are subject to removal and repair as needed. These provisions indicate an as need basis for this work, opposed to one which required Ms. Caldwell’s agreement.
115. These provisions consistently carve out unique exceptions to other terms of the Agreement as it relates to use of fill and aggregate at the Property compared to other costs contemplated. This suggests this work was contemplated to be treated differently from other work under the Agreement as the work is necessarily distinguished throughout these provisions.

[38] JonesCo argued the contractual interpretation advanced by Ms. Caldwell would serve to render various clauses ineffective whereas its approach made sense when considering the contract as a whole and the surrounding circumstances.

⁹ As will be discussed later, Ms. Caldwell never suggested a change order was required in order for JonesCo to be permitted to charge her for additional costs beyond the \$5,000 infill allowance, only that she be notified and consent to them.

The motion judge's decision

[39] The judge's reasons will be discussed later when addressing the issues raised on appeal. For now, I note he set out the factual background based on the evidence, reviewed contractual provisions and cited a number of legal authorities.

[40] Following the *Shannex* framework, he concluded:

- There were no material facts in issue on the motion;
- There were two questions of law to be determined:
 - (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?" and
 - (ii) "Is JonesCo entitled to payment of the extra charges based on its *quantum meruit* defence?"¹⁰
- Neither of the defences advanced by the appellant had a real chance of success.¹¹

Issues

[41] JonesCo's Notice of Appeal and factum set out the following issues:

1. Did the Motion Judge err by engaging in an impermissible weighing of evidence, drawing of inferences, and an assessment of credibility?
2. Did the Motion Judge err by disregarding or failing to properly consider relevant and material evidence?
3. Did the Motion Judge err by failing to apply the governing principles of contractual interpretation?
4. Did the Motion Judge err by concluding that there were no genuine issues of material fact requiring a trial?
5. Did the Motion Judge err by concluding that the Appellant had no real chance of success on the issues pleaded and the evidence tendered?

¹⁰ The judge's identification of the questions of law has not been challenged on appeal.

¹¹ JonesCo has not challenged the judge's determination regarding its defence based on *quantum meruit*.

[42] Having considered the submissions of the parties, and in particular JonesCo's numerous allegations of error, the issues raised can be consolidated as follows:

1. Should leave to appeal be granted?
2. Did the judge err in concluding there was no genuine issue of material fact?
3. Did the judge err in concluding JonesCo's defence – the contract allowed it to be paid for foundation and structural rock work undertaken beyond the infill allowance without Ms. Caldwell's knowledge and consent – had no real chance of success?

Standard of Review

[43] There is no standard of review in relation to the question of leave. This Court assesses it as a matter of first instance.

[44] The standard of review relating to motions for summary judgment is not controversial. In *Burton Canada Company v. Coady*, 2013 NSCA 95, Justice Saunders wrote:

[19] The standard of review applicable to summary judgment motions in Nova Scotia is settled law. The once favoured threshold inquiry as to whether the impugned order under appeal did or did not have a terminating affect, is now extinct. There is only one standard of review. We will not intervene unless wrong principles of law were applied or, insofar as the judge was exercising a discretion, a patent injustice would result. (citations omitted)

Analysis

Issue 1 - Should leave to appeal be granted?

[45] In *Shannex*, Justice Fichaud addressed the issue of leave as follows:

[27] This is an appeal from an interlocutory motion, for which leave is required. In *Burton Canada Company v. Coady*, 2013 NSCA 95, Justice Saunders, for the majority, set out the test for leave to appeal:

18. ...The question of whether leave to appeal ought to be granted is one of first instance. The well-known test on a leave application is whether the appellant has raised an arguable issue, that is, an issue that could result in the appeal being allowed. [citations omitted]

[46] JonesCo has raised arguable issues. I would grant leave to appeal.

Issue 2 - Did the judge err in concluding there was no genuine issue of material fact?

[47] JonesCo submits there are material facts in issue between the parties. It says the judge's flawed consideration of the evidence led him to improperly conclude otherwise. It argues there were several obvious material facts in issue which the judge failed to recognize, and highlights the same alleged factual disputes as it did in the court below (as set out earlier at para. 34).

[48] With respect, there are two erroneous premises entrenched in JonesCo's submissions as to the material facts in issue and the evidence relevant to identifying them:

- Relying on *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, it says contractual interpretation is an issue of mixed fact and law. As there is a dispute as to how the contract is to be interpreted, that inherently gives rise to there also being a material fact in issue, and
- By looking at other aspects of Ms. Caldwell's pleadings, it was apparent there were material facts in issue.

Relevance of Sattva

[49] JonesCo's reliance on *Sattva* is misplaced. In that decision, the Supreme Court of Canada was resolving a historical debate as to whether contractual interpretation was a question of law or a question of mixed fact and law for the purpose of identifying the applicable appellate standard of review. In other words, it was clarifying what lens a reviewing court should apply when assessing if an initial decision-maker erred in its interpretation of a contract.

[50] However, the standard of review to be applied on appeal is entirely different from the process a first instance judge should employ when assessing a motion for summary judgment. JonesCo's attempt to inject the appellate standard of review into the *Shannex* framework is misguided and contrary to the approach repeatedly stressed by this Court.

[51] The first *Shannex* question requires the facts to be separated from any question of law and considered on their own. In *Shannex*, Justice Fichaud noted

the first question remained consistent with the earlier test established in *Burton* under the former version of Rule 13.04(1). In *Burton*, Justice Saunders explained:

[42] . . . In the first stage the judge’s focus is concerned only with the important factual matters that anchor the cause of action or defence. At this stage the relative merits of either party’s position are irrelevant. It is only if the judge is satisfied that the moving party has met its evidentiary burden of showing there are no material factual matters in dispute that the judge will then enter into the second stage of the inquiry. The focus of that stage is not – as the judge put it here – to see if the “undisputed facts ... give rise to a genuine issue for trial”. . .

[52] In describing the focus of the first question, Justice Fichaud described “[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.”¹²

[53] In *Arguson*, the Court applied the *Shannex* framework in the context of a contractual dispute and said this regarding the first task on a motion for summary judgment:

[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.**

[Emphasis added]

[54] Applying the above principles to the present instance, the existence of differing contractual interpretations advanced by the parties does not give rise to a material fact in issue. Nor do questions about how the contractual terms should be applied to the undisputed facts. Those questions are to be considered later. For example, whether the additional charges should be characterized as an “extra” pursuant to the contract, is not a material fact in dispute. Similarly, JonesCo’s allegation the possible interpretations of the email it sent to Ms. Caldwell prior to

¹² *Shannex*, at para. 34.

entering the contract and their significance, if any, to the contractual provisions, do not give rise to a dispute of material fact.

Use of the pleadings

[55] The second premise underpinning JonesCo's identification of material facts in issue is based on its view of the use of the pleadings. It relies on *Arguson* as support for the role of the pleadings in establishing what material facts are in issue:

[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.

[56] JonesCo argues paragraph 12 of Ms. Caldwell's claim gives rise to a dispute of material facts. For ease of reference, I set it out again:

12. The Plaintiff further states that the Defendant did not provide the full extent of the alleged additional aggregate to the Property. Rather, she received partial loads and/or the aggregate was used for other purposes. The Plaintiff puts the Defendant to strict proof that the full amount of the charged aggregate was placed at the Property.

[57] Based on the above claim, JonesCo argues the judge should have found material facts in dispute regarding whether the aggregate billed in the final invoice had been delivered to and used at the Caldwell property. It criticizes the judge for ignoring the evidence of Mr. Jones and engineer Mr. Henry which demonstrated that, contrary to Ms. Caldwell's pleadings, the materials were not only used at the property but were also necessary¹³ for the construction of the foundation.

[58] If the case had proceeded to trial, Ms. Caldwell's claim she was charged for aggregate she did not receive may have become an issue in dispute. However, as is often the case, context matters. It is clear from the record Ms. Caldwell was only seeking summary judgment on the question of whether the contract permitted JonesCo to charge her at all for anything beyond the infill allowance without her knowledge and consent. If the answer was "no" then it is irrelevant whether the final invoice contained charges for aggregate she did not receive or were not necessary for the completion of the foundation.

¹³ Both in the court below and on appeal, Ms. Caldwell acknowledged that for the purpose of the motion, the materials were necessary for the construction.

[59] Although the identification of a material fact is grounded in the pleadings, the relevant ones are those engaged in the motion for summary judgment. Summary judgment cannot be thwarted by a responding party finding factual disputes in aspects of the pleadings which are not relevant to the live issue being addressed on the motion (See *Peill v. Soil and Sea Co-op Limited*, 2025 NSCA 11 at para. 30).

[60] The majority of JonesCo's complaints are neutralized by these principles and require no further discussion.

[61] I will address two additional criticisms advanced by JonesCo on appeal: that the judge erred in his findings of the parties' respective knowledge the infill allowance had been exceeded, and further erred by failing to recognize the evidentiary record before him was incomplete.

[62] JonesCo challenges the judge's findings relating to each parties' respective knowledge the \$5,000 infill allowance had been surpassed. It highlights the following passage from the judge's reasons:

[37] . . .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 . . . 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.

[Emphasis added]

[63] JonesCo submits the judge erred in concluding Mr. Jones was aware of the additional costs in advance of the final invoice being issued, as well as finding Ms. Caldwell was not aware of these expenses until shortly before the closing date. It says the judge failed to properly engage with the evidence and if he had done so, he would have concluded the respective knowledge of the parties were material facts in issue.

Mr. Jones' knowledge the infill allowance had been exceeded

[64] With respect to Mr. Jones' knowledge, JonesCo asserts the judge erred in several respects:

- Firstly, on a motion for summary judgment, a judge should not engage in making findings of fact, weighing of evidence or assessing credibility. JonesCo says the judge clearly did so;
- Secondly, the judge compounded that error by failing to recognize JonesCo did not know the full cost of the foundation and infill work because it had not received an invoice from one of its sub-contractors until shortly before the closing date, and
- Relatedly, JonesCo argues the judge ignored the fact it was impossible for it to be aware of the extent of the foundation and structural infill work required, and therefore it was impossible for it to advise Ms. Caldwell in advance.

[65] As I will explain, none of these complaints serve to impugn the judge’s conclusion there were no material facts in issue. Before addressing JonesCo’s complaints, I will set out the relevant legal principles.

[66] A motion judge’s ability to engage with the evidentiary record was explained in *Wright v. Ratcliffe*, 2024 NSCA 77 where Justice Gogan noted:

[51] The principles restricting the assessment of evidence on summary judgment are not contested. It is an error to weigh evidence, assess credibility, or resolve factual disputes. These tasks belong to a trial judge. That said, a motion judge has tools to assist in assessing the evidence. Several of those are important here.

[52] First, **a judge hearing a summary judgment motion is permitted to draw inferences from undisputed facts as long as the inferences are strongly supported...**

[53] Second, a motion judge is required to determine whether the evidence raises a “genuine” dispute of fact. This point was addressed in *Risley* where the respondent’s evidence on the motion was inconsistent with statements made in a previous email conversation. Relying on *Guarantee*, and *Smith v. Nova Scotia (Attorney General)*, the motion judge in *Risley* determined the inconsistent evidence did not disclose a genuine issue:

[47] Said differently, the court is not deciding between the evidence of one witness over another. It is deciding whether to accept the statements made by a party prior to litigation over his evidence given in an affidavit on a summary judgment motion.

[54] This Court agreed with the motion judge. Justice Farrar concluded:

[69] The appellants’ position is that it is only necessary for them to file an affidavit where they simply deny what the motions judge found to be clear

and unequivocal evidence, without any other corroborating evidence, and that will be enough to raise a genuine issue of material fact for trial.

[70] A review of the record makes it clear that Mr. Risley’s change in position was solely for the purpose of trying to avoid summary judgment. His position is contrary not only to the evidence of Ms. MacDonald, but by his own words as evidenced by all of the email communications. A self-serving affidavit is not sufficient in and of itself to create a triable issue, in the absence of any supporting evidence (*Guarantee*, para. 31).

[Emphasis added; Footnotes omitted]

[67] It is also useful to highlight the obligation of the parties to put their “best foot forward” in terms of the evidence presented on the motion. In *Shannex*, Justice Fichaud wrote:

[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.

[68] Bald assertions without supporting evidence fall short of a responding party’s obligation to present evidence in fending off a motion for summary judgment.¹⁴

[69] JonesCo’s first two complaints can be dealt with together. The judge, in concluding Mr. Jones was aware of the additional costs “well in advance” of rendering the final invoice, did not engage in impermissible fact-finding, nor did he ignore evidence.

[70] Mike Jones’ affidavit had attached numerous invoices from sub-contractors which contained the expenses forming the basis of the additional charges in dispute. Those invoices demonstrate that between March 3 and June 13, 2022, JonesCo had received invoices for aggregate totalling \$19,655.00. This was over the \$5,000 infill allowance and well in advance of the final invoice issued on April 26, 2023, which passed those costs (and others) along to Ms. Caldwell. In his affidavit, Mr. Jones testified he was “actively involved in the day-to-day business of JonesCo.”

¹⁴ See *Arguson*, at para. 38.

[71] Based on the above evidence, it was entirely reasonable for the judge to infer Mr. Jones knew in advance of rendering the final invoice the infill allowance had been exceeded. Although another subcontractor had not sent JonesCo its invoice relating to the foundation work until shortly before closing, JonesCo already knew, early in the construction process, the infill allowance had been surpassed and had not advised Ms. Caldwell of that fact. From reviewing the arguments made before him, that was clearly the point the judge was making.

[72] I turn now to JonesCo's final complaint relating to the judge's conclusion it knew the infill allowance had been surpassed. In its factum it explains:

75. . . . [T]he Motion Judge found against JonesCo in part on the implicit basis that it should have communicated anticipated costs and sought prior approval before proceeding with the work. This finding assumes that the conditions giving rise to the charges were foreseeable and that a meaningful opportunity for advance approval existed.
76. Mr. Henry's affidavit evidence directly addressed and rebutted this assumption. He attested that the Property was low lying and underlain with rootmat and organic soil over bedrock, that these conditions necessitated removal of unsuitable soils, and that the engineered filling program was initiated during initial site preparation and mass excavation. The failure to consider this evidence meant the Motion Judge assessed JonesCo's conduct against a standard of advance notice that the evidence before him, had he considered it, may well have shown was practically unattainable in the circumstances.

[73] I have carefully reviewed the record. At no time in the court below did JonesCo argue it was unable to provide Ms. Caldwell with advance notice of what was required to complete the foundation and structural work. Nor did it plead this as a defence.

[74] Although Mr. Jones' pre-contractual email said it was impossible to know "what is underground until we pick a spot and dig", his affidavit never asserted that it would be "unattainable" for JonesCo to know what was required after the digging had occurred. Mr. Jones' affidavit never asserted there was any impediment to providing that information to Ms. Caldwell. In fact, Mr. Jones' affidavit suggested otherwise:

77. The additional costs above the allowance for infill contemplated in Schedule A were required to complete the construction project at the Property. The additional costs were incurred by adhering to engineering requirements and

the requirements necessary for the house to be built as located by Ms. Caldwell.

78. These costs relate to the structural integrity of the home. At the time the engineer evaluates what structural materials are required, excavation has already occurred including the removal of unsuitable environmental materials. The infilling and structural rocks then applied to the Property were pursuant to structural requirements for the Home as supported by the Henry Report.

[75] From the above, JonesCo, after excavating the lot, followed the engineering requirements provided by Mr. Henry to apply infilling and structural rocks. Mr. Henry's evidence established he was on site March 7, 2022 to assess what was required. Mr. Jones' evidence is that JonesCo received Mr. Henry's instructions about what was required to complete the foundation and structural infill. It presented no evidence it was precluded from ascertaining the cost of following those instructions or passing that information along to Ms. Caldwell prior to commencing the work as instructed by Mr. Henry.

[76] Further, contrary to JonesCo's assertion, Mr. Henry's affidavit and exhibited report did not provide evidence supporting its claim it was unable to provide notice of the work required to prepare the site and provide foundational and structural information to Ms. Caldwell. JonesCo's bald assertion it could not ascertain what was required in order to convey that information to Ms. Caldwell is inconsistent with the evidentiary record on the motion.

Ms. Caldwell's knowledge the infill allowance had been exceeded

[77] I turn now to the judge's impugned finding Ms. Caldwell had no advance knowledge of the additional costs in excess of the infill allowance. JonesCo argues this conclusion was in error given "Ms. Caldwell was involved in creating the plans for the Home, she lived next to the Property throughout the construction, and had knowledge of the work being done". It says the judge should have recognized that whether Ms. Caldwell knew the infill allowance had been exceeded, was a material fact in issue.

[78] Again, JonesCo advanced no evidence on the motion relating to whether Ms. Caldwell knew, or ought to have known, the infill allowance had been exceeded. The undisputed facts do not lay an evidentiary foundation for such an inference to have been drawn. JonesCo argues that because Ms. Caldwell lived next door to the construction site, she was able to independently ascertain the foundational and

structural work being done had exceeded the \$5,000 infill allowance. JonesCo does not explain how Ms. Caldwell would obtain that knowledge, notably in light of the restriction on her ability to visit the site contained in clause 4(d) of the contract:

(d) *Site visits and inspections*

The Owner agrees to visit the site only with an authorized representative of the Contractor at 3 intervals such that they do not impeded progress of work by the Contractor or subject the Owner or Contractor to safety violations or work stoppage. Typical site visit intervals are at Mechanical rough in, finish trim install, substantial completion. All site visits are to be scheduled with the Contractor in writing and when a representative of the Contractor is available to accompany the Owner at all times while on site. A maximum of 3 site visits are included. Additional, unauthorized or unannounced site visits by the Owner are prohibited and are in violation of this agreement and subject to \$175 fee per instance. Only those inspections provided by the Contractor of municipal and engineering officials are permitted. No agent of the Owner or third party inspections by others are permitted.

[Emphasis added]

[79] The undisputed evidence before the judge was Ms. Caldwell did not know the infill allowance had been exceeded until she received JonesCo's final invoice. Her unrefuted evidence as to her knowledge was contained in her affidavit:

16. I never requested any additional infill. No one at Jonesco ever told me that costs related to infill had exceeded the allowance of \$5,000. I was unaware that Jonesco had exceeded the allowance. I never agreed to an extra cost related to additional infill.

17. I only learned of the additional charges related to infill a few days before the closing date. Attached hereto . . . is a copy of the final invoice.

[80] JonesCo's bald assertion otherwise does not establish the judge erred.

Motion determined on "an incomplete evidentiary record"

[81] JonesCo asserts the judge's decision was made on the basis of an incomplete evidentiary record and the appeal could be allowed on this basis alone.

[82] It is essential on a motion for summary judgment on evidence that the parties provide the judge with an adequate evidentiary record to assess the merits of their positions. Rule 13.04(6)(b) gives a judge discretion to adjourn the hearing of a

motion, including for the purpose of the parties providing further disclosure, undertaking discovery or the collection of other evidence. If additional evidence may inform the existence of material facts in issue, define the legal questions or demonstrate the challenged pleading has a real chance of success, a responding party may be well-advised to request the judge exercise this discretion.

[83] The record here demonstrates neither party expressed any concern to the judge about the adequacy of the evidentiary record. In particular, JonesCo never suggested it required an opportunity to enhance the evidentiary record in order to properly respond to the motion.

[84] JonesCo's complaint regarding the adequacy of the evidentiary record cannot be laid at the feet of the judge, nor give rise to a reason for this Court to intervene.

[85] In summary, JonesCo has not demonstrated the judge's determination there were no material facts in issue was in error.

Issue 3 - Did the judge err in concluding JonesCo's defence – the contract allowed it to be paid for the foundation and structural rock work undertaken beyond the infill allowance without Ms. Caldwell's knowledge and consent – had no real chance of success?

[86] JonesCo raises numerous complaints regarding the judge's reasons and says they demonstrate he misapplied the principles of contractual interpretation. I agree with JonesCo it is difficult to ascertain how the judge decided its defence did not have a real chance of success. Both parties advanced competing contractual interpretations, yet the entirety of the judge's analysis on the issue was contained in a single paragraph:

[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.

[87] It was incumbent on the judge to undertake a meaningful analysis which addressed the arguments before him. He did not. In these circumstances, it is appropriate for this Court to undertake its own analysis. As will be seen, I reach

the same conclusion as did the judge. I will set out the legal principles that inform the analysis to follow.

Legal Principles - “Real chance of success”

[88] Where there are no material facts in issue and there is a question of law to be determined, the third *Shannex* question asks whether the challenged pleading (JonesCo’s defence the contract allowed it to be paid for additional costs incurred beyond the infill allowance without Ms. Caldwell’s knowledge and consent) has a real chance of success.

[89] In *Burton*, Justice Saunders explained how to ascertain if a pleading has a real chance of success, including the following principles¹⁵:

- The exercise necessarily involves a consideration of the relative merits of both parties’ positions;
- 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?
- 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.

Legal Principles - Contractual Interpretation

[90] Both parties cite *Sattva* as setting out the principles relating to the modern approach to contractual interpretation. These were recently summarized and re-affirmed in *Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc.*, 2024 SCC 20¹⁶:

- The overriding concern of the modern approach to contractual interpretation is to determine the parties’ intention and the scope of their understanding;

¹⁵ *Burton*, at paras. 42 to 44.

¹⁶ See paras. 62 to 65. See also *Port Hawkesbury Paper LP v. Nova Scotia (Energy Board)*, 2026 NSCA 29, at paras. 62 to 66.

- The actual words of the contract are central to the analysis because this is how the parties chose to capture and convey their contractual objectives;
- When seeking the meaning of a document, the focus of the court is properly on what the parties objectively intended and what they reasonably understood their words to mean. The meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean; and
- Courts are to interpret contractual terms in light of the contract as a whole and with reference to objective evidence that illustrates what was within the parties' knowledge at or before the time of the contract's formation. Ultimately, ascertaining the objective intent of the parties involves not only a consideration of the actual words used in a contract but also a consideration of the factual matrix surrounding it.

[91] Both parties also rely on this Court's decision in *Jorna & Craig Inc. v. Chiasson*, 2020 NSCA 42 for the proposition that a contract is to be construed as a whole, in a manner that gives meaning to all of its terms, and avoids an interpretation that would render one or more of its terms ineffective.¹⁷ They acknowledge that as a commercial contract, their agreement must be interpreted in accordance with commercial reasonableness, sound commercial principles, and good business sense and in a manner that avoids commercial absurdity.¹⁸

[92] I will apply the above principles in assessing whether JonesCo's defence has a real chance of success. Before doing so, I will set out each parties' respective interpretations.

JonesCo's contractual interpretation

[93] JonesCo argues the contractual terms and surrounding factual matrix demonstrate the \$5,000 infill allowance was never intended to be a cap, but only an estimate of the possible cost of the foundation and structural infill work. It says the pre-contractual email from Mr. Jones to Ms. Caldwell shows it was a "best

¹⁷ *Jorna*, at para. 35.

¹⁸ See also *Salah v. Timothy's Coffees of the World Inc.*, 2010 ONCA 673 at para. 16 and *Pinnacle International (One Yonge) Ltd. v. TorStar Corporation*, 2024 ONCA 755 at para. 60.

guess” and the actual expense could be greater. JonesCo asserts, contrary to Mr. Jones’ testimony, it was not intended to be a fixed price contract.

[94] It points to a number of provisions in the contract that specifically state it is the buyer who is responsible for the costs associated with the lot condition and required structural rock. In particular, JonesCo says there are six provisions which together create a “carve out” for foundation and structural infill expenses to be treated differently from other costs of construction.

[95] JonesCo acknowledges changes to the work described in the contract or extras require the parties to consent in advance to the work being done. However, the effect of the “carve out” serves to exempt foundation and structural infill expenses from the advanced notice/consent requirement. JonesCo argues the unique treatment for this category of expense is created by Schedule A “Allowances”, and clauses 1(b)(i), 2, 4(c), 8 and 9.

[96] Clauses 8 and 9 are particularly significant to JonesCo’s interpretation. With respect to clause 8, JonesCo says the last sentence – *“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”* – signals these expenses are to be treated differently than others, and this provision removes the requirement for a buyer to be advised or consulted in relation to them.

[97] JonesCo makes several arguments regarding the intent of clause 9. It says the “carve out” in relation to foundation and structural infill is seen in – *“Any and all unforeseen conditions due to buried underground materials or existing underground structural conditions are subject to removal and repair as needed”*. JonesCo submits the intention of this provision is to distinguish this specific type of expense from the others contemplated in the first sentence – *“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”*. As it did in the court below, JonesCo argues the “carve out” means that provided the work required due to unforeseen conditions is necessary, it can surpass the infill allowance and do whatever is required, regardless of cost without the need to consult with or obtain the agreement of the buyer.

[98] JonesCo also says the final sentence of clause 9 – *“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 rela[y]ed to*

Buyer prior to commencement and subsequently billed to the Buyer” – does not apply in the present case for two reasons.

[99] Firstly, it argues that provision would only apply where there are existing foundations and structures on the lot, not in the case of a new build on a vacant lot as here. Secondly, it says the additional infill expenses incurred should not be considered to be an “Extra”. In advancing this argument, JonesCo relies on the underlined portion of the following passage from *Heintzman, West and Goldsmith on Canadian Building Contracts*:

The general principle relating to extras can, accordingly, be stated as follows. If, on the proper construction of the contract documents, the item of work is one which is properly included within the existing contract, it is not an extra. If, on the other hand, the work is not specifically called for by the contract when properly interpreted, but is nevertheless properly within the general scope of the work as contemplated, it is an “extra”.

While the general principle can be stated, the distinction between extra work and work falling within the original building contract work will in each case depend entirely on the wording of the contract and the facts.¹⁹

[100] JonesCo says its interpretation is in line with sound commercial principles and good business sense. In particular, it would be unreasonable in a commercial context to expect a builder to bear the financial consequences of providing adequate excavation and infill to make a foundation structurally sound in the face of unexpected ground conditions. Those expenses justifiably belong with the land owner, and the contract recognizes the risk allocation chosen by these parties.

Ms. Caldwell’s contractual interpretation

[101] In response to JonesCo’s arguments, Ms. Caldwell began her submissions to this Court by stating:

- She was not arguing the \$5,000 infill allowance was a cap that could never be exceeded;
- She was not arguing the contract required JonesCo to pay for expenses beyond the infill allowance in all circumstances; and

¹⁹ Thomas G. Heintzman, Bryan G. West & Immanuel Goldsmith, *Heintzman, West and Goldsmith on Canadian Building Contracts*, 5th ed (Toronto: Thomson Reuters, 2023)

- She was not arguing a change order was required in order for JonesCo to bill for the additional expenses.

[102] Rather, based upon her proposed contractual interpretation, Ms. Caldwell said JonesCo was required to advise her if any of the specified allowances were going to be exceeded, and if so, to obtain her consent to proceed. The infill allowance was not excluded from this contractual obligation and ought to be treated the same as all other extra expenses. If JonesCo had brought the additional infill expenses to her attention and she had consented to the work being done, Ms. Caldwell acknowledges she would have been responsible for these costs. However, JonesCo's failure to obtain her consent precluded it from seeking payment for these unexpected and unbudgeted expenses.

[103] Ms. Caldwell's interpretation places reliance on the "Allowances" provision in Schedule A, in particular – *If the final amount exceeds the allocated amount, the client must pay the extra at closing*. She makes the observation that all of the various allowances are treated the same in this provision, with no indication the infill allowance was to be treated differently than the others.

[104] She argues clause 9 – "EXTRAS" – is particularly significant. She says this clause has to be read in its entirety and not in the parsed fashion advocated by JonesCo. When read properly, it is clear the objective intention was for JonesCo to only be entitled to additional payment for extra services and materials beyond the allowances where both parties had agreed to the cost. Why else would there be allowances in the agreement, and why else would the parties have had pre-contractual discussions about the extent of her budget?

[105] Further, Ms. Caldwell says the final sentence of clause 9 should not be disregarded as suggested by JonesCo. She asserts it was purposely included in the contract which was a "Building Contract – New Home Construction", and must have had an intended meaning in that context. Both parties knew they were creating a contract in relation to a vacant lot which did not have an existing foundation or other structures – they would not have chosen to place an irrelevant term in their agreement. She says its meaning could only be that the parties intended for the additional costs associated with the infilling to be an "Extra" subject to the notification and consent requirements. In support of this, Ms. Caldwell notes the "Allowances" provision specifically refers to costs beyond the itemized allowances as being "extras".

[106] Ms. Caldwell does acknowledge there is one place in the contract where infill expenses are specifically carved out and treated differently from other expenses. She notes, as did JonesCo, the final sentence in clause 8 - “*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*”. Ms. Caldwell says this provision only serves to alleviate the need for the parties to prepare a change order; it does not dispel the requirement for advance notice and consent. If that was the intention, the provision would have said so.

[107] Ms. Caldwell says her interpretation does not require any part of the contract to be excluded – all provisions work together. For the reasons she set out in the motion to the judge, Ms. Caldwell submits the interpretation advanced by JonesCo is not commercially reasonable. Her interpretation however, would allow JonesCo to be paid for extra services and materials beyond the infill allowance where it has informed the buyer of the added expense and obtained their consent to proceed. She argues such a requirement is not onerous for JonesCo. It avoids a situation where on the eve of closing, a buyer cannot pay for the unexpected and unbudgeted expenses, and the anticipated sale is aborted. Ms. Caldwell underscores that having a new home sale fall through at the last minute, after months of construction, would not be commercially attractive for either party.

Is there a real chance of success?

[108] The extent of clause 9’s applicability is central to the respective interpretations advanced by the parties. JonesCo says it has limited application. Ms. Caldwell says the entirety of the clause must be part of the interpretative exercise.

[109] I do not accept JonesCo’s assertion the final sentence - “*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 rela[y]ed to Buyer prior to commencement and subsequently billed to the Buyer*” - should be excluded from the interpretation exercise because it was intended to only apply if there was an existing building or structure on the lot. I say that because:

- Removing that provision would be contrary to the modern approach to contractual interpretation. A contract is to be construed in a manner that gives effect to all of its terms; and

- The factual matrix demonstrates the parties entered into an agreement for the construction of a new home on a vacant lot. In light of this, I cannot conclude the parties intended to include a provision which had no application to their contractual relationship. Rather, the parties' intention was to include that provision because it was applicable to the agreement they intended to govern them.

[110] I further do not accept JonesCo's more global submission that the majority of clause 9 does not apply because the expenses beyond the infill allowance are not "Extras" within the meaning of the contract. In reaching this conclusion I note:

- In Schedule "A", the parties have chosen to refer to expenses incurred beyond the infill allowance as an "extra". Similar words used in different places in a contract should be given the same meaning, unless the contract serves to distinguish them. In this case, the contract does not distinguish between the meaning of expenses beyond the infill allowance as being "extra" and the use of the same word in clause 9. This supports expenses beyond the infill allowance are "extras" and the parties intended them to be governed by clause 9 – "EXTRAS";
- Clause 9 makes specific reference to "engineering" and "breaking of rock". The additional expenses in dispute includes charges for breaking rock and engineering services. It is difficult to see how these charges should not be considered to be governed by clause 9, when they are specifically identified as examples of "extras";
- Clause 9 identifies "structural components" as a type of "extra". I have already dismissed JonesCo's argument this term refers to a man-made construct. The word "structural" appears numerous times in the contract including "existing underground structural conditions", "structural infilling", and "structural rock". Mr. Jones also uses the term "structural rock" in his pre-contractual email. "Structural" in these contexts were used to describe the pre-existing natural underground conditions of the lot or the rock required to account for these conditions to properly underpin the foundation. When the parties identified "structural components" as an "extra" they intended an equivalent meaning – structural rock which surpassed what was contemplated in the infill allowance. This

includes the charge for aggregate contained in JonesCo's final invoice; and

- JonesCo's use of the *Heintzman* passage is not helpful to its argument. Here, the contract did not call for the additional aggregate and other expenses incurred. In my view, the expenses here more appropriately fall in the second example provided in *Heintzman*:

If, on the other hand, the work is not specifically called for by the contract when properly interpreted, but is nevertheless properly within the general scope of the work as contemplated, it is an "extra".

[111] Having determined the scope of clause 9's role in the interpretative process, I turn now to whether JonesCo's defence has a real chance of success. In other words, is it arguable and realistic the contract permitted JonesCo to be paid for expenses incurred beyond the infill allowance when it did not advise Ms. Caldwell in advance or obtain her consent to proceed? I conclude JonesCo has not met its burden, in light of the following:

- JonesCo's interpretation creates a commercial absurdity given the factual matrix contained in the record. Here, the parties entered into the contract on the basis Ms. Caldwell had a budget of \$650,000 and she worked with Mr. Jones on design changes to respect her financial constraints. JonesCo's evidence was a client's financial resources was also an important consideration from its perspective. In this context, it would be absurd to conclude the parties intended for JonesCo to be permitted to exceed the infill allowance by whatever amount it deemed necessary and to present the unexpected and unbudgeted costs for payment at closing. Just as the parties had worked together to make design changes to respect the budget, potential extra expenses arising from the structural conditions of the lot would engage the same budgetary concerns. It makes no commercial sense these costs would be treated any differently;
- Ms. Caldwell's interpretation results in an arrangement which makes commercial sense for both parties. It allows JonesCo to be paid for additional expenses beyond the infill allowance if these are agreed to in advance. If Ms. Caldwell was advised of the potential cost, and did not agree, JonesCo would not proceed and not incur the expense – no harm, no foul;

- As previously discussed, JonesCo's interpretation rests on the majority of clause 9 having no application. Such a result is contrary to the principles of modern contractual interpretation. Similarly, if JonesCo could charge anything it deemed necessary beyond the infill allowance as it argues, there was no point in including it as an allowance in the contract. Its inclusion would be rendered meaningless. It must have been added for a reason and the value assigned to it must have had contractual significance;
- With respect to clause 8, JonesCo's interpretation focuses on the last sentence – *"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"*. I do not accept this provision demonstrates JonesCo did not need to advise Ms. Caldwell of the additional expenses and seek her permission to proceed. This sentence cannot be interpreted in isolation. Rather, it appears in the context of the entire clause, the focus of which was setting out what a buyer must do in order to obligate JonesCo to undertake work constituting a change to the contract. Given that excavation, infill materials and geotechnical items are things JonesCo carries out at the direction of an engineer and are within its knowledge as opposed to the buyer's, it makes sense it would not need a change order. This is entirely different from other changes sought by a buyer, such as design changes or requested upgrades,
- JonesCo's agreement not to require a change order for excavation and infill material in clause 8 is not inconsistent with clause 9. The two must be read in a way that both in their entirety are applicable. When the first sentence of clause 9 says - *"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 need for a change order has been alleviated by clause 8, but the requirement for the agreement of both parties remains. This interpretation is supported by the final sentence of clause 9 - *"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 rela[y]ed to Buyer prior to commencement and subsequently billed to the Buyer"*.

If, as JonesCo alleges, the provision removing the requirement for a change order also removed the obligation to advise and obtain the consent of the buyer, then the subsequent obligation to relay the costs to the buyer prior to commencement would make no sense.

[112] In summary, the interpretation advanced by JonesCo would render significant portions of the contract irrelevant. Further, given the factual matrix, its assertion the contract permitted it to undertake whatever excavation and infilling was necessary regardless of cost without advising or seeking Ms. Caldwell's consent, is not commercially reasonable. JonesCo has not demonstrated its defence has a reasonable chance of success.

Disposition

[113] As explained earlier, the judge was correct in concluding there were no material facts in issue. None of JonesCo's numerous arguments serve to displace that finding. Despite the judge's reasons being lacking, his conclusion JonesCo's defence had no real chance of success aligns with my analysis.

[114] For the reasons above, I would grant leave, but dismiss the appeal. Based on the quantum suggested by the parties, I would order costs of \$3,500.00 inclusive of disbursements payable by JonesCo to Ms. Caldwell.

Bourgeois, J.A

Concurred in:

Van den Eynden, J.A.

Beaton, J.A.