SUPREME COURT OF NOVA SCOTIA

Citation: *Alva Construction Limited v. Wilsons Cove Estates Inc.*, 2022 NSSC 279

Date: 20221005
Docket: Hfx No. 498803
Registry: Halifax

Between:

Alva Construction Limited

Plaintiff

v.

Wilsons Cove Estates Inc.

Defendant

D E C I S I O N

Judge:	The Honourable Justice James L. Chipman
Heard:	September 12, 13 and 14, 2022, in Halifax, Nova Scotia
Written Decision:	October 05, 2022
Counsel:	John Kulik, K.C. and Michael Richards, for the Plaintiff James D. MacNeil and Adam McQuarrie (Articled Clerk), for the Defendant

By the Court:

INTRODUCTION

[1] Alva Construction Limited claims that Wilsons Cove Estates Inc. was unjustly enriched in the amount of approximately $112,000.00 through improvements Alva made to Wilson's property, located on Highway No. 7 in the Municipality of the District of St. Mary's, Guysborough County. Wilsons denies that there was an unjust enrichment.

[2] At trial, Alva introduced a joint exhibit book (44 tabbed documents) and called Connor MacDonald (project coordinator) and A.G. MacDonald (president). Wilsons entered the second exhibit and called its principal, Jason Wilson.

[3] I found all of the witnesses to be credible and generally reliable. Indeed, there was no significant discrepancy in the recollections of the three men regarding the events leading up to this lawsuit. In the result, I have in the below section provided the background based on the evidence of the three witnesses, along with the exhibits. Because the MacDonalds are father and son, to avoid confusion and allow for consistency, I have referred to all three witnesses by their first names.

BACKGROUND

[4] On May 6, 2019, the Province of Nova Scotia awarded Alva the tender for the Liscomb River bridge replacement (the "Bridge Project"). Connor was project coordinator for Alva, a position he held soon after graduating with a business degree from Memorial University in 2012. Connor testified that shortly after being the successful bidder on the Bridge Project, he received a call from Jason, the principal of Wilsons.

[5] Jason has a business degree (1998) from St. Francis Xavier University, and further accreditations. He operates various businesses in northern Nova Scotia under the Wilsons Cove Estates Inc. umbrella, including (since 2018) an excavating company. Jason testified that after learning that Alva got the Bridge Project, he passed his name onto an Alva foreman, asking Connor to call him.

[6] Connor and Jason gave consistent evidence concerning their initial phone conversation, which they followed up in email exchanges between May 9 and 16, 2019. It was Jason's idea for Alva to operate a quarry on one of Wilsons' properties

to both supply the gravel/aggregate for the Bridge Project and for Alva to sell gravel/aggregate to Wilsons at a reduced price.

[7] Initially, Jason suggested that Alva develop a quarry using a parcel of property owned by Wilsons in Spanish Ship Bay, Nova Scotia. Due to the blasting needed to develop a quarry, Alva provided Wilsons with consent forms that would have to be signed by all homeowners within 800 meters of the property. Ultimately, one of the nearby owners advised Wilsons that he would not sign the required consent form. As a result, on May 16, 2019, Jason advised Connor in an email that Wilsons owned another property (the "Property"), and recommended this site instead be used to develop a quarry.

[8] There were only three homes within 800 meters of the Property. Two were owned by Jason and his wife, while the third was owned by a neighbour. The Property was closer to the Bridge Project than the Spanish Ship Bay property.

[9] The Property had never previously been operated as a quarry. With Jason's permission, Connor arranged for Alva to take a sample from the Property cliff face. The result confirmed that the Property would be a viable option for providing a gravel source close in proximity to the Bridge Project.

[10] Connor and Jason continued their communications. In addition to having phone calls, meetings and emails, the two exchanged a series of text messages beginning on May 9 and continuing through to August 5, 2019.

[11] In mid-May, Connor attended the Property with Jason. Both described the land at that time as "raw", such that if the rock was found to be suitable, the cliff face would have to be blasted. To develop the Property into a quarry, Alva would have to:

(a) clear a portion of the trees from the Property;

(b) construct an access road roughly 300 meters long;

(c) prepare a lay down area; and

(d) perform drilling, blasting and screening work to prepare the quarry face.

[12] On May 21, 2019, Alva obtained a rock sample, and laboratory testing was ultimately carried out by Englobe Corp. on July 19, 2019. The testing confirmed that the rock on the Property was suitable for use as gravel or aggregate.

[13] By text on June 13, 2019, Connor advised that an Alva bulldozer would be dropped off at the Property on that date. The next day, he provided Jason with a letter for him to sign on behalf of Wilsons, giving Alva permission to operate a quarry on the Property. Also on June 14th, Connor texted Jason; "when did you want to set a time aside to discuss exactly what the lease would entail?" Jason responded by suggesting June 25th, following the lobster season. In this regard, Jason was also the holder of a lobster license and was fishing full-time until the season was scheduled to end on June 24th.

[14] On June 14th, Jason also responded to the request to sign the permission letter by asking in an email, "can you please modify this to include start and end dates." Connor responded two days later with this text:

> I can change the duration of our access agreement to "upon the completion of Alva Construction Ltd's contract to replace the liscomb bridge."
>
> But I want your word that you'll negotiate in good faith with us when we are developing the lease
>
> I don't want to do all the work to open it up then get booted out, know what I'm saying?

[15] On June 16th, Connor emailed Jason with the requested change to the permission letter; "changed permission length to last as long as the bridge contract."

[16] On June 27th, Connor texted Jason advising:

> Haven't received the draft lease from my lawyer yet. Once I get it I'll come see you to see what you want changed. Does that work?

They ultimately agree to meet on July 5th. On July 4th, Connor texted Jason, asking (with reference to gravel or aggregate):

> Can you list the products you want crushed and rough quantities so I can have prices ready for you tomorrow

[17] On the morning of July 5, 2019, the two men met at Jason's house. Having regard to all of the evidence, I find that Connor brought a draft license agreement (what Connor termed the "draft lease" in his June 27th text) to the meeting. Whereas he had not yet received the document as of June 27th, I find that he had it in hand by July 5th, and that his possession of the draft license agreement was what precipitated the meeting.

[18] A week after their July 5th meeting, Connor texted Jason proposing that they meet at Alva's office, along with "the guys", which he testified was a reference to his father and Allan MacDonald (Connor's uncle and another Alva principal). They agreed to meet on July 19th, and this text exchange followed:

Connor:	…I'll have the notes we talked about written up on the lease and a price list.
Jason:	Ok. Email me beforehand if you can do I can review please
Connor:	No problem.

[19] On the early evening of July 17th, Connor emailed Jason attaching what he referred to as the "lease with notes and attached price list for material in stockpile." The actual document is an undated "License Agreement", a five-page document which I find was prepared by Alva's legal counsel. There are four notes (typed "commented" boxes) located next to a recital and clauses 4, 16, and 17 on the righthand side margin of the License Agreement. The License Agreement defines "Material" as "rock and aggregate resources" on the Property. Clause 4 reads:

> 4. Alva shall make Material available for purchase by the Owner at Alva's standard prices. Alva shall pay to the Owner or set-off against such purchase price the royalty described in Section 13 hereof. If, on reasonable notice to Alva, the Owner demands more Material than Alva has the capacity to supply, the Owner may enter into the Property and produce Material, provided that such Material may only be used by the Owner and not resold or transferred to any third party.

Next to this clause is this note:

> Commented [A2]: 1.) Wilson's Cove Estates will request a minimum amount of aggregate (20,000 t) to be crushed by Alva Construction Ltd. One time per year at a given date (April 1). Alva will have a deadline to meet the request. No other organization will be given permission to produce aggregate on the property provided Alva meets the request. 2.) There will be no restrictions on the sale of material by either party. 3.) It has been requested that the permit be maintained and in the name of Jason Wilson or his business.

[20] There are detailed clauses (11 – 15) with respect to "Price Payments." Next, under "Term and Termination", two of the three clauses are as follows, with these notes:

> 16. The term of this License commences on the Effective Date and runs for a term of ten (10) years. (Commented [A3]: 20 years)

> 17. Alva may terminate the Agreement at any time by giving at least thirty (30) days prior written notice of termination to the Owner. (Commented [A4]: Jason Wilson has requested a termination clause for Wilson Cove Estates.)

[21] The License Agreement stipulates (clause 22) that it is "the entire agreement between the Parties …". The price list (which was attached to the License Agreement emailed to Jason) is a one-page quote on Alva letterhead dated July 12, 2019, and reads:

> To: Wilson Cove Estates

Salesperson	Tenders	Payment Terms	Due Date
Connor MacDonald		30 days	

Qty	Description	Unit Price	Line Total
	The following is a price per tonne for Crushing Aggregates on your property		
Tonne	Type	Price/t	
	1″Clear Stone	$ 8.75	
	Type 1	$ 9.25	
	Type 2	$ 9.00	
	4″-8″Clear Stone	$ 8.75	
Notes:	HST Extra		
	Gravel Crushed in Stockpile		

[22] The meeting took place as scheduled on July 19th in Alva's Antigonish office. Connor and A.G. attended (Allan MacDonald was not present) on behalf of Alva, and Jason for Wilsons. Jason's notes confirm that the three met and discussed what he refers to as the "lease agreement." His notes then read: "Make some adjustments and Jason states hasn't yet reviewed prices and needs to obtain quotes and compare, needs to be mutually beneficial agreement." Connor did not make notes, or, if he did, they were not in evidence. A.G.'s notes state: "…agree to what Jason wanted. He said he agreed and to right [write] it up and he will sign the lease."

[23] Connor testified that A.G. attended "for price negotiations, he does most for Alva." He said that Jason indicated "what he liked and didn't like about the lease, we said we'd make the changes." On cross-examination, he acknowledged that after

July 19th, there were "ongoing discussions regarding what could be in the lease, including the quantity and cost of rock."

[24] A.G. testified that he had not met Jason before the July 19th meeting. He said that he agreed to Jason's changes, which were all contained in the comment boxes. He said that he came up with the prices in the quote. He noted that they reflect drilling, blasting, crushing and screening.

[25] On cross-examination, A.G. agreed that he was not involved in negotiations prior to the July 19th meeting. He left things up to Connor, who updated him. This was Connor's first lease negotiation and A.G. acknowledged that this was "part of a learning process." A.G. acknowledged that a final license agreement was never produced.

[26] A.G. admitted that rock quantities were not included in the Lease Agreement. As for prices, he maintained that the quote prices were agreed upon. He conceded that payment terms were not discussed. As for the purchase of a minimum amount of aggregate, A.G. stated, "I'm not saying he agreed, he did not disagree." A.G. added that when Jason left Alva's office, he asked them to "draw up the agreement and I'll sign." Questioned why the agreement was not prepared, he said, "You'll have to ask Connor."

[27] Jason thought that the July 19th meeting lasted "maybe an hour." He brought a copy of the License Agreement and quote to the meeting. He said that he received the quote sheet for the first time on July 17th. He recalled going through the License Agreement "clause by clause" at the meeting, but could not recall making changes to any of the clauses. Jason said that most of the terms were worked out but, "I needed to check any prices with my current suppliers to see what I should be paying." He said that he needed more clarity regarding "how the payment process would work", adding that this was not discussed and that he did not know why it was not gone over. He said that Alva would get back to him with changes. As to a final version, Jason said, "I'd review with my wife and lawyer". He added that he had not yet retained a lawyer on the matter.

[28] On cross-examination, Jason confirmed that he did not write Alva after the meeting with any changes to the License Agreement or prices. He added that Alva's price list was not discussed at the meeting. Subsequent to the meeting, he thought that he provided A.G. with his prices over the phone.

[29] There was no further communication between the parties until a week after the meeting, when this text exchange took place on July 26th:

Connor:	What's going on
	Are we able to add a clause to the lease that you can't price material to our competitors provided we re bidding the job?
Jason:	No
	I'm having trouble obtaining quotes from blasting companies and crushing companies because they are all under the impression that this is Alvas pit and need to stay out of there. I am not pleased.
Connor:	What have I done to make anyone think that? That has nothing to do with me.

[30] There are further texts between the two men in late July and early August. On July 30th, Connor prompted Jason and he responded by texting that he was waiting to hear back from an Alva competitor regarding crushing and blasting prices.

[31] On all of the evidence, I find that on July 17th, Alva provided Wilsons for the first time with what the Lease Agreement refers to as "Alva's standard prices" (clause 4). This was in the form of the one-page quote on Alva Letterhead dated July 12th (reproduced herein at para. 21). Undoubtedly the quote was prepared with A.G.'s input, as he was largely responsible for determining Alva's aggregate prices. Additionally, it is my determination that prior to July 19th, A.G. had very little input in the negotiations (i.e., periodically he and Connor discussed their status). There is no question that A.G. and Jason met for the first time on July 19th.

[32] With respect to the Property, Connor acknowledged, and I find, that Alva arranged for blasting to take place on July 9 and July 31, 2019.

[33] On August 5th, there were separate telephone conversations between Connor and Jason, as well as A.G. and Jason. During the call between Jason and Connor, Jason informed him that he would not be signing the License Agreement. At the same time, he confirmed that Alva could use (for the purpose of obtaining aggregate) the Property for the duration of the Bridge Project.

[34] Connor advised his father that Jason said he was not going to sign the lease agreement, and this precipitated A.G. calling Jason. A.G. testified that he wanted to "find out why he changed his mind; we invested a lot of time and money and my understanding was that he was going to proceed with the long term lease." Jason responded by stating that "it was not in his best interests to sign." When A.G. asked

why, he replied that "he didn't like the aggregate prices." There may have been a second call between A.G. and Jason on August 5th; in any event, both testified that Jason agreed to consider things further.

[35] A.G. and Jason had a subsequent phone conversation on August 15th. According to A.G., Jason repeated that "he didn't like my prices in the lease." Jason proposed reduced prices and A.G. responded by meeting his price on two grades of gravel, and coming closer on the two other grades. Jason rejected the offer and his notes made in proximity to the call read:

> Jason calls to inform AG that he will not be signing a long term lease agreement but if he wants to crush materials for him, he would like it done at certain prices …provides AG with prices. AG gets very angry and says he would never do it at those prices, is going to sue Jason into the ground …doesn't care if he has to spend a fortune to do it.

[36] During his testimony, Jason confirmed the call took place and, although uncertain of the exact date, he gave *viva voce* evidence in line with his notes. He described the proposed licence agreement as "dead in the water at that point." On August 19th at 8:52 p.m., Jason emailed A.G. "a quick note to reaffirm that there will be no lease agreement…"

POSITIONS OF THE PARTIES

Alva

[37] In their Statement of Claim Alva's claim is expressed as follows at para 6:

> 6. Alva agreed to develop the Property as a source of aggregate for the Liscomb Bridge Project but only on the express condition that Alva would have continuing long-term access to the Property to operate a quarry thereon for other purposes, and that Wilsons would negotiate in good faith with Alva for a long-term licence agreement for this purpose. In particular, Alva specifically advised Wilsons that it would not be economical for Alva to incur the expenses of opening up a quarry on the Property if Alva was only going to be able to use the quarry for the Liscomb Bridge Project only.

[38] They go on to allege that they made "significant improvements" to the Property at a cost of approximately $112,000.00, including building the 300-meter access road and quarry face and laydown area where there was a previously wooded area.

[39] Alva asserts that it undertook the improvements "on the clear understanding with Wilsons that Alva would be able to recoup its costs through the formal execution of a long-term agreement permitting Alva to operate a quarry on the Property for an extended period of time." Alva alleges that Wilsons deprived them of the benefit of the improvements by excluding Alva from the long-term use of the Property.

Wilsons

[40] Wilsons argues that because Alva was in a rush to gain access to the Property, they agreed to provide the permission letter enabling Alva to access the Property. Wilsons argues in their Defence at para. 10:

> …they were prepared to consider extending the Plaintiff's use of the quarry on the Property past the completion of the bridge project if the parties could agree on specific terms. Wilsons states that it made it clear to the Plaintiff that it would only extend the Plaintiff's access to the quarry if the parties could agree on preferred pricing for Wilsons with respect to the rock coming out of the quarry. Wilsons had suggested specific rates which it knew were slightly below market (on a per tonne) price, but they were not unreasonable. Further, Wilsons was prepared to commit to purchasing an approximately 25,000 tonnes of various types of rock. Wilsons states that the Plaintiff would not agree to Wilsons prices and quantity and rather demanded prices that were actually above market rate, and also demanded payment towards the Plaintiff's development of the quarry. Wilsons states that there was never any agreement reached between the parties with respect to Wilsons purchasing rock from the quarry, nor was there ever any agreement that the Plaintiff's operation of the quarry would continue once the bridge project was complete.

GOVERNING LAW

[41] As Alva points out, their claim is solely for unjust enrichment and not breach of contract. In *Organigram Holdings Inc. v. Downton*, 2020 NSCA 38, Justice Bryson refers to the three-part test for unjust enrichment at para. 39:

> 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.

[42] In *Garland v. Consumers' Gas Co.*, 2004 SCC 25, the Supreme Court of Canada provided guidance with respect to the juristic reason part of the test for unjust enrichment. Justice Iacobucci states as follows at paras. 44 – 46:

> 44 The parties and commentators have pointed out that there is no specific authority that settles this question. But recalling that this is an equitable remedy that will necessarily involve discretion and questions of fairness, I believe that some redefinition and reformulation is required. Consequently, 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. By closing the list of categories that the plaintiff must canvass in order to show an absence of juristic reason, Smith's objection to the Canadian formulation of the test that it required proof of a negative is answered. 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.
>
> 45 The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a *de facto* burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.
>
> 46 As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. It may be that when these factors are considered, the court will find that a new category of juristic reason is established. In other cases, a consideration of these factors will suggest that there was a juristic reason in the particular circumstances of a case which does not give rise to a new category of juristic reason that should be applied in other factual circumstances. In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment. In the latter cases, recovery should be allowed. The point here is that this area is an evolving one and that further cases will add additional refinements and developments.

ANALYSIS AND DISPOSITION

[43] Having regard to all of the evidence, I find that in this case there has been an enrichment of Wilsons (an entity which operates, among other things, an excavating

company). In this regard, the Property was transformed from raw land to a developed quarry with a 300-meter access road. There has been a corresponding deprivation to Alva because they spent in, the words of A.G., "considerable time and money" for the Property, which they only had the use of for the duration of the Bridge Project. As to the third and final part of the test, "an absence of a juristic reason for the enrichment", this is the battleground of the matter.

[44] The established categories that can constitute juristic reasons include what Justice Iacobucci set forth in the last part of para. 44 of *Garland*, quoted at my para. 42 above. In this case, I find that there is no juristic reason from an established category. In the result, Alva has made out a *prima facie* case under the juristic reason component of the analysis. Accordingly, my analysis must proceed to the second stage, where Wilsons has the burden to rebut the *prima facie* case by showing that there is some residual reason to deny recovery and that the enrichment should be retained. I must examine all of the circumstances of the transaction between the parties in order to determine whether Alva has shown that there is another reason to deny recovery.

[45] In keeping with the Supreme Court of Canada's guidance, I have borne in mind two factors in this analysis: the reasonable expectation of the parties and public policy considerations.

[46] The transaction between the parties began in mid-May and concluded three months later in mid-August. In examining all of the circumstances, I note that as Connor acknowledged on cross-examination, Alva decided to proceed with developing the quarry on the Property even though there was not a lease agreement in place. In this regard, the evidence confirms and I find as fact, that Alva:

- obtained rock samples from the Property by late May;
- placed their equipment on the Property and began work there during mid-June;
- continued to work on the quarry before presenting the License Agreement to Wilsons on July 5th;
- agreed to change the permission letter to access the Property from no duration to Wilsons' stipulated duration of the Bridge Project (with the understanding that Wilsons would negotiate in good faith when developing the lease) by mid-July;

- continued to work on the quarry – including the first blasting of the Property to begin creating the quarry face and lay down area before sending the License Agreement (with comments noted) and price quotation to Wilsons on July 17th and meeting on July 19th;

- following the July 19th meeting (which concluded without a signed lease agreement), continued to work at the Property, including conducting a second blasting;

- sent the rock samples for testing and received and paid for results by late July; and,

- continued to work at the Property (including stock piling aggregate) in the absence of an industrial permit.

[47] Based on my review of all of the evidence, I conclude that Alva wanted access to the quarry on the Property for a lengthy period of time. Given the commented box beside clause 16 of the Lease Agreement, optimally Alva wanted to secure a term of 20 years. Notwithstanding this, when Wilsons asked Alva to modify the time to limit access to the duration of the Bridge Contract, Alva obliged, albeit Connor wanted Jason's "…word that you'll negotiate in good faith with us when we're developing the lease. I don't want to do all the work to open it up and then get booted out [of the Property], …" Jason's text reply was for Connor to give him a call. From Jason's notes it can be observed that the two spoke on the phone on July 16th (the date of the texts) and I accept that Jason communicated to Connor what he recorded: "…any agreement has to provide cheap gravel and be a mutually beneficial agreement."

[48] I have previously set forth the details of the parties' further dealings in what ultimately led to their disagreement and inability to come to terms on a final lease agreement. Returning to the legal analysis, I must have regard to the reasonable expectation of the parties and public policy considerations. Based on all of the evidence, I find that Alva reasonably expected that the lease would be long term and Wilsons must have known this to be so. At the same time, I find that the evidence overwhelmingly demonstrates that all along, Wilsons wanted to have a supply of four grades of aggregate at preferred (reduced) prices and Alva must have understood this to be the case. There is no evidence that either party turned their mind to what would occur if no long term lease was executed.

[49] Unfortunately for Alva, they did not pause the process to attempt to come to terms on a lease agreement – inclusive of the critical issues of aggregate supply and pricing – before moving forward with developing the Property. Nor did they attempt to reach an agreement to share the cost of any improvements made by Alva to the Property if no lease agreement was ever formalized. To my mind, in the circumstances, they forged ahead at their peril.

[50] Alva comes before this Court seeking an equitable remedy; as the Supreme Court of Canada explains, this kind of a remedy involves discretion and questions of fairness. I am of the view that to exercise my discretion to make an award of unjust enrichment in the circumstances of this case would be profoundly unfair. After all, the parties are (and were at the material time) sophisticated commercial enterprises engaged in the construction business in northern Nova Scotia. They became involved in an ongoing negotiation that ultimately broke down after a three-month period. Alva dropped their requirement of accessing the Property indefinitely, and agreed to Wilsons' term of the duration of the Bridge Project. After making this concession, Alva asked for negotiations to continue in good faith and Wilsons responded that any agreement would have to be mutually beneficial. On all of the evidence, I cannot find that either party exercised bad faith. As for a mutually beneficial agreement, there obviously was no agreement.

[51] Public policy considerations dictate that I must deny recovery. Once again, sophisticated parties entered into a negotiation in what was a transparent process. Talks ultimately broke down in mid-August 2019. On my reading of the evidence, this was squarely because A.G. and Jason could not come to terms on aggregate prices. No expert evidence was proffered on the going rates for aggregate in northern Nova Scotia for the spring and summer of 2019; however, the oral and documentary evidence provides me with enough to conclude that Wilsons expected reduced prices for the simple reason that they owned the Property. From the evidence of A.G. (he ultimately offered Wilsons lower than Alva's standard aggregate prices) alone, I find that Wilsons' expectation was reasonable; the question remains as to what would have been a fair price for the two grades of aggregate that the parties could not agree upon.

[52] Rather than attempting to answer this question, I will simply observe that I do not envision the role of the Court as somehow entering the fray in an attempt to sort out this issue. This is particularly so when the evidence shows that the parties came close to agreeing on per tonne aggregate prices. Ultimately, however, they moved

apart on two of the four grades of aggregate, such that they could not come to terms. That is why their agreement became, as Jason said, "dead in the water."

[53] Given all of the evidence and law, I have determined that public policy considerations militate against allowing the claim. In the circumstances, Wilsons' retention of the enrichment is not unjust. There is no evidence of any wrong doing by Wilsons that it is profiting from. The Property was enriched because Alva decided to proceed without a long term lease in place, on the assumption that such an agreement would be forthcoming. Through the fault of neither party, that assumption turned out to be incorrect. It is not the role of unjust enrichment to act as insurance against hasty or unfortunate business decisions made by sophisticated parties (see, for example, *Weisberg v. Dixon*, 2020 ONSC 2536, aff'd 2021 ONCA 491). In all of the circumstances, Wilsons has met its burden in demonstrating that Alva should not be awarded special damages for unjust enrichment.

[54] By way of conclusion, I will briefly provisionally address the damages claimed by reproducing Alva's claim summary (as amended during the trial):

ALVA CONSTRUCTION LIMITED v. WILSONS COVE ESTATES INC. CLAIM SUMMARY		
NO.	ITEM	$ AMOUNT
1.	**Labour**	6,257
	Timecards and pay sheets at exhibit 1, tabs 39 and 40	
2.	**Overhead on Labour**	750.84
	12% Of labour costs	
3.	**Subcontractors**	60,252.64
	Archibald Drilling and Blasting invoice at exhibit 1, tab 41	
4.	**Fuel**	10,055.4
	MacGillivray Fuels invoice at exhibit 1, tab 41	
5.	**Equipment Rental Costs**	797.20
	Bio-liquid Waste Disposal Inc. invoice at exhibit 1, tab 36	
6.	**Own Equipment**	15,860.60
	Summary of Alva's equipment used to perform the improvements at exhibit 1, tab 43	
7.	**Additional Work**	18,892.00
	Summary of additional work at exhibit 1, tab 42	
8.	**Sample Testing Costs**	
	Invoices from Englobe Corp. and Stantec Consulting Ltd. at exhibit 1, tabs 35, 37 and 38	
	SUBTOTAL	114,803.49
	Credit for unprocessed rock removed	1,986.85
	TOTAL	112,816.64

[55] In accepting the above referenced documents, I am mindful of Connor's *viva voce* evidence addressing each aspect of the claim. While I consider the referenced documents to be business records, I am mindful of s. 23(4) of the *Evidence Act*, 1989 R.S., c. 154 (as amended) and attach less weight to the records which are not Alva's. I also attach less weight to the Alva records where Connor admitted a lack of knowledge about how the figures were compiled. In the result (and bearing in mind Alva's counsel's concession on one of the MacGillivray Fuels invoices), I hereby reduce the overall claim by ten percent such that the provisional award is $101,534.98, plus prejudgement interest.

[56] Once again, the entirety of the unjust enrichment claim is dismissed. If the parties cannot agree on costs, I would ask that written submissions be provided within 30 days of this decision.

Chipman, J.