Court of Appeal for Saskatchewan **Citation:** ***Khaira v 102007987 Saskatchewan Ltd.*, 2024 SKCA 78**

Docket: CACV4176

Date: 2024-08-08

Between:

Amritpal Singh Khaira, Ranbir Singh Khaira and M2 Construction and Development Ltd.

Appellants
(Defendants/Plaintiffs by Counterclaim)

And

102007987 Saskatchewan Ltd.

Respondent
(Plaintiff/Defendant by Counterclaim)

And

Newpreet Singh Johal and Anterpreet Singh Johal

Respondents
(Non-parties/Defendants by Counterclaim)

Before:	Schwann, Tholl and McCreary JJ.A.
Disposition:	Fresh evidence application dismissed; Appeal allowed in part
Written reasons by: In concurrence:	The Honourable Madam Justice McCreary The Honourable Madam Justice Schwann The Honourable Mr. Justice Tholl
On appeal from: Appeal heard:	2023 SKKB 49, Regina October 6, 2023
Counsel:	Iqbal Brar, Anthony Tibbs, Jaclyn Watters and Francois Wessels for the Appellants Adam Ailsby for the Respondents

McCreary J.A.

I. INTRODUCTION

[1] The appellants, Amritpal Singh Khaira [A.S.K.], Ranbir Singh Khaira [R.S.K.] and M2 Construction and Development Ltd. [M2 Ltd.; collectively the M2 Parties] appeal from a decision of a judge sitting in Chambers in the Court of King's Bench: *102007987 Saskatchewan Ltd. v Khaira*, 2023 SKKB 49 [*Chambers Decision*].

[2] A.S.K. and R.S.K. are directors and employees of M2 Ltd. They were in a business relationship with the respondents, Newpreet Singh Johal [N.S.J.], Anterpreet Singh Johal [A.S.J.] and 102007987 Saskatchewan Ltd. [SaskCo; collectively the SaskCo Parties]. The relationship soured, and the parties entered into a formal settlement agreement dated September 23, 2019 [Settlement Agreement], in which they purported to untangle their business relationship and resolve the outstanding issues that had arisen between them.

[3] Problems transpired among the parties in the enforcement of the Settlement Agreement, prompting SaskCo to commence an action against the M2 Parties for the outstanding debt owing under the agreement. The M2 Parties defended the claim and filed a counterclaim against the SaskCo Parties, alleging that the SaskCo Parties had repudiated the Settlement Agreement by breaching its confidentiality and non-disparagement provisions. After months of exchanging particulars, the SaskCo Parties applied for summary judgment, seeking a monetary judgment against A.S.K., R.S.K. and M2 Ltd., as well as dismissal of the counterclaim.

[4] The Chambers judge awarded judgment in favour of SaskCo, jointly and severally against all three of the M2 Parties, in the amount of $536,154.86 (subject to a downward adjustment of $24,030), plus solicitor-client costs. The counterclaim was dismissed.

[5] The M2 Parties now appeal the *Chambers Decision*. They argue that the Chambers judge erred, *inter alia*, by holding that the debt owed by M2 Ltd. was also jointly and severally owed by R.S.K. and A.S.K., and by determining that: (1) the case was suitable for summary judgment; (2) no legally enforceable agreement was entered into by the parties in October 2018; and (3) there was no repudiatory breach of the Settlement Agreement.

[6] For the reasons that follow, I would dismiss the appeal, except with respect to the order making R.S.K. and A.S.K. jointly and severally liable for the debt owed by M2 Ltd. to SaskCo. As the SaskCo Parties concede the point, only M2 Ltd. is liable for the debt owing pursuant to the Settlement Agreement.

II. FACTS

[7] The Settlement Agreement required certain payments to be made by and to various parties, most of which were completed. It is uncontroverted that M2 Ltd. made payments to SaskCo totalling $501,293.54.

[8] The last that M2 Ltd. was required to make to SaskCo was $315,000 ($300,000 plus GST of $15,000), plus interest. It was due on October 31, 2019, but notwithstanding that due date, the parties had agreed that interest at the rate of 23% per year would accrue on any outstanding amount commencing April 30, 2019. While this principal amount and its corresponding GST remained outstanding, M2 Ltd. made an interest payment of $21,389.70 to SaskCo, covering the period between April 30, 2019, and August 30, 2019. It is undisputed that no further payments were made after that time.

[9] The SaskCo Parties commenced an action to recover the unpaid debt in July of 2020. In August of 2020, the M2 Parties responded with their defence and brought a counterclaim against the SaskCo Parties in which they alleged that N.S.J. and A.S.J. had breached the confidentiality and non-disparagement provisions of the Settlement Agreement by making statements and disclosures to family members and business associates that were prohibited by the terms of the Settlement Agreement. The M2 Parties contended that they were not required to pay anything to the SaskCo Parties because the SaskCo Parties had breached the confidentiality and non-disparagement provisions to such a degree that the Settlement Agreement was repudiated; in other words, the M2 Parties argued that nothing was owing because there was no agreement in place.

[10] The M2 Parties also took the position that there was an earlier verbal agreement, made on October 27, 2018, that bound the parties from that date, and that the Settlement Agreement of September 2019 was merely a recording of this previously consummated and binding verbal agreement. The M2 Parties alleged, and continue to allege on appeal, that the October 2018 agreement contained the same confidentiality and non-disparagement provisions of the Settlement Agreement, and that those provisions were key to the parties' deal.

[11] Throughout 2020 and 2021, the parties exchanged various requests for particulars relating to the M2 Parties' allegations that the SaskCo Parties had breached the confidentiality and non-disparagement provisions. Thereafter, in February of 2022, the SaskCo Parties brought an application for summary judgment seeking an order dismissing the counterclaim against the SaskCo Parties, and an order for judgment in SaskCo's favour in the amount of $506,120.55 plus interest, as well as solicitor-client costs.

III. THE *CHAMBERS DECISION*

[12] As noted above, the Chambers judge awarded judgment in favour of SaskCo, jointly and severally, against all three of the M2 Parties, in the amount of $536,154.86 (subject to a downward adjustment of $24,030 to account for a payment that was required to be made on April 30, 2019, but had not, on the evidence, been clearly demonstrated to have been paid), plus solicitor–client costs. The counterclaim was dismissed with costs to the SaskCo Parties.

[13] The Chambers judge identified that there were three key issues to be determined: (1) whether summary judgment was the appropriate procedure for deciding the parties' dispute; (2) whether there was a legally enforceable agreement between the parties prior to the execution of the formal September 2019 Settlement Agreement; and (3) whether there was a repudiatory breach of the Settlement Agreement.

[14] The Chambers judge found that summary judgment was appropriate in the circumstances, based on the law as stated in *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87, and embodied in Rules 7-2 through 7-5 of *The Queen's Bench Rules* (now *The King's Bench Rules*) [*Rules*]. He was satisfied that there was no genuine issue requiring trial, and that it was possible to make a fair and just determination on the merits of the case based on the affidavit evidence alone.

[15] The Chambers judge concluded that there was no binding agreement resulting from the parties' meeting on October 27, 2018. He relied on the Supreme Court of Canada decision of *Ethiopian Orthodox Tewahedo Church of Canada St. Mary Cathedral v Aga*, 2021 SCC 22 at paras 34–38, [2021] 1 SCR 868 [*Aga*], which summarized the critical conditions necessary for finding the formation of a contract: offer, acceptance, consideration and objective intention to create legal relations. He deemed the evidence proffered by the M2 Parties in this regard to be insufficient to meet the objective standard of intention to create legal relations. In addition, he did not accept R.S.K.'s assertion that the detailed record of the alleged October 2018 settlement agreement had been lost and noted that the only evidence concerning the formation of the alleged agreement was the handwritten notes made by R.S.K. on that day, which were sparse, vague, incomplete and could not amount to a binding agreement (see *Chambers Decision* at paras 39-40).

[16] The Chambers judge also found that it was of no consequence that some payments were made by M2 Ltd. to SaskCo before the September 23, 2019, Settlement Agreement was finalized. He reasoned that it made sense for M2 Ltd. to proactively tender some of the payments because no matter what the terms of the Settlement Agreement would eventually become, it was inevitable that money would be flowing from M2 Ltd. to SaskCo at some point and, therefore, any pre-emptive payments made would minimize the interest that would eventually become payable.

[17] Given that negotiations had to take place before the Settlement Agreement could be reduced to writing and executed by the parties, and the fact that the M2 Parties were unable to provide any definitive evidence of an agreement being reached in October of 2018, the Chambers judge determined that no objective, reasonable bystander would have concluded that the parties came to an enforceable covenant in October of 2018. He resolved that what occurred in October of 2018 was essentially an agreement to come to an agreement. No binding deal was in place until the formal Settlement Agreement was executed in September of 2019.

[18] Finally, the Chambers judge determined that the allegations of breach of the confidentiality and non-disparagement clauses, if proven, did not amount to a repudiatory breach of the Settlement Agreement in any event. While the M2 Parties argued that confidentiality and non-disparagement were the "crucial cornerstone aspects" of the Settlement Agreement (*Chambers Decision* at para 49), such that breach of either of them amounted to a voiding of the contract, the Chambers

judge found that the M2 Parties overstated the importance of those provisions in an effort to avoid their obligations to pay. He concluded that the key purpose of the Settlement Agreement was to extricate the business interests of the feuding corporations from one another. In other words, the essence of the agreement was financial. Even if there was a breach of the confidentiality or non-disparagement clauses, any such breach was not repudiatory. However, the Chambers judge ultimately determined that the M2 Parties had failed to establish that the breaches occurred at all and, even if they did occur, they would have occurred before September 23, 2019, i.e., at a time when the parties were not yet bound by the Settlement Agreement. In determining that the allegations were not made out in the affidavit evidence, the Chambers judge also noted that the evidence pertaining to four out of five of the alleged contractual breaches was vague hearsay, which was highly contested and not corroborated, and was therefore unreliable.

[19] Thus, judgment was granted in favour of the SaskCo Parties and the M2 Parties' counterclaim was dismissed.

IV. ISSUES

[20] The M2 Parties raise many grounds of appeal, but the key dispositive issues can be distilled as follows:

(a) Did the Chambers judge err in holding that the debt owed by M2 Ltd. to SaskCo in the amount of $512,124.86 was also jointly and severally owed by R.S.K. and A.S.K?

(b) Did the Chambers judge err in determining that the case was suitable for summary judgment?

(c) Did the Chambers judge err in determining that there was no legally enforceable agreement entered into by the parties in October 2018?

(d) Did the Chambers judge err in determining that there was no repudiatory breach of the Settlement Agreement?

[21] While the *Chambers Decision* and the parties have used the term "fundamental breach" to describe the alleged breach of the Settlement Agreement, I use the term "repudiatory breach" in its place because the term "fundamental breach" relates to a separate doctrine concerning exclusion clauses, which the Supreme Court of Canada "laid to rest" in *Tercon Contractors Ltd. v British Columbia (Transportation and Highways)*, 2010 SCC 4 at para 108, [2010] 1 SCR 69 [*Tercon*].

V. STANDARD OF REVIEW

[22] The standard of review relating to appeals from summary judgment decisions was canvassed in *Deren v SaskPower*, 2017 SKCA 104:

> [41] To frame the analysis of this appeal, this Court has the jurisdiction to hear this matter under s. 7(2)(a) of *The Court of Appeal Act, 2000*, SS 2000, c C-42.1, as an appeal from a final decision of the Court of Queen's Bench. In an appeal of this nature, questions of law are assessed on the basis of the standard of correctness: *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235; *H.L. v Canada (Attorney General)*, 2005 SCC 25, [2005] 1 SCR 401. Questions of fact are assessed on the palpable and overriding error standard of review: *Housen v Nikolaisen; Nelson (City) v Mowatt*, 2017 SCC 8, 406 DLR (4th) 1. Absent an extricable question of law, questions of mixed fact and law are also assessed on the palpable and overriding error standard: *Housen v Nikolaisen*; *Hryniak v Mauldin*, 2014 SCC 7, [2014] 1 SCR 87 [*Hryniak*]; *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53, [2014] 2 SCR 633 [*Sattva*]; *Scott v Vanston*, 2016 SKCA 75, [2016] 9 WWR 256. The question of whether there exists a genuine issue for trial in a summary judgment application is one of mixed fact and law, reviewable on appeal on the palpable and overriding error standard: *Hryniak*.

[23] As I will discuss, all the contested issues raised in this appeal are issues of mixed fact and law, and therefore reviewable on the palpable and overriding error standard.

VI. ANALYSIS

A. Attribution of debt jointly and severally to R.S.K. and A.S.K.

[24] The M2 Parties argue that the Chambers judge erred in making R.S.K. and A.S.K. jointly and severally liable to SaskCo for the $512,124.86 debt owed to it by M2 Ltd. The SaskCo Parties concede that this was an error.

[25] The order made after summary judgment that imposed personal liability on R.S.K. and A.S.K. reads as follows (*Chambers Decision*):

> [76] It is hereby ordered that:
>
> 1. 102007987 Saskatchewan Ltd. is awarded judgment, jointly and severally, as against Amritpal Singh Khaira, Ranbir Singh Khaira and M2 Construction and Development Ltd., in the amount of $536,154.86, subject to paragraph 4 below[.]

[26] While R.S.K. and A.S.K. are parties to the Settlement Agreement along with M2 Ltd., clause 2 of the Settlement Agreement, which concerns the corresponding payments, states that "payments to be paid pursuant to this Agreement to SaskCo *by M2* are as follows" (emphasis added). As such, only M2 Ltd. was liable for the debt pursuant to the Settlement Agreement and not R.S.K. and/or A.S.K. in their personal capacities. It was an error for the Chambers judge to rule otherwise.

[27] Through a fresh evidence motion in this Court, the M2 Parties sought to adduce affidavit evidence that the SaskCo Parties had conceded the issue of joint and several liability in oral arguments before the Chambers judge. As I have noted, the SaskCo Parties conceded this point in their factum *prior to* the M2 Parties filing the fresh evidence application in this Court. Accordingly, there was no need for the M2 Parties' fresh evidence application, and it is dismissed with costs for failing to meet the "relevance" criterion set out in *R v Palmer*, [1980] 1 SCR 759.

B. Suitability for summary judgment

[28] The M2 Parties' primary argument is that it was an error for the Chambers judge to decide the case summarily because the M2 Parties were unable to compel key witnesses to provide affidavit evidence that N.S.J. and A.S.J. had divulged confidential information and made disparaging comments in violation of the Settlement Agreement. The M2 Parties contended that, had the matter proceeded to trial, these witnesses could have been subpoenaed to testify.

[29] While the M2 Parties acknowledge their duty to put their "best evidentiary foot forward", they say that the fact that they could not subpoena witnesses in the summary judgment proceeding rendered the procedure unsuitable, thereby raising a genuine issue requiring a trial, because a trial was the only venue in which witnesses could be compelled to give evidence.

[30] I am not persuaded that the Chambers judge erred by determining this matter through a summary procedure. In my view, the Chambers judge was properly focused on the evidence relevant to the matters required to be decided, which did not include the evidence of those witnesses that the M2 Parties contended could only have been given if they had been compelled to testify at trial. Let me explain.

[31] While the Chambers judge declined to consider hearsay affidavit evidence that the M2 Parties tendered to establish breaches of the confidentiality and disparagement clauses (which consisted primarily of an affidavit of R.S.K. in which he said that certain people told him certain things (see *Chambers Decision* at para 56)), the Chambers judge also expressed concern about the reliability of the single allegation of a breach of the Settlement Agreement which was presented in an affidavit sworn by the individual who purported to have direct knowledge (see para 57). Thus, he found the evidence that the M2 Parties had proffered to establish an alleged breach of the Settlement Agreement – including the direct evidence – to be deficient.

[32] In addition, the Chambers judge made two other findings that were fatal to the M2 Parties' position in respect of the litigation as a whole. First, the Chambers judge wrote that "even if [all the alleged breaches] could be construed as cogent and admissible evidence before the Court as proof suggesting that N.S.J. and A.S.J. improperly mentioned aspects of an agreement and made disparaging remarks about any or all of the [M2 Parties], these purported statements are immaterial because of their timing" (*Chambers Decision* at para 58). The Chambers judge found that, even if he accepted the M2 Parties' evidence respecting N.S.J. and A.S.J.'s alleged disclosures and/or disparagements, the alleged conversation occurred *before* September 23, 2019, when the Settlement Agreement was executed.

[33] Second, the Chambers judge reasoned that "[e]ven assuming that there was a breach of the Settlement Agreement as a result of comments made by N.S.J. and A.S.J. that divulged details of its terms and even if N.S.J. and A.S.J. made comments that could be construed to be disparaging in contravention of the spirit of the Settlement Agreement" (*Chambers Decision* at para 63), "the facts fall far short of establishing that such acts would constitute a [repudiatory] breach such that the other provisions of the contract became inoperable" (at para 70).

[34] Thus, for the M2 Parties to demonstrate that the Chambers judge erred in the manner suggested, they must satisfy me that he made a palpable and overriding error in the findings I have just reviewed. I say this because those findings had the effect of disposing of the whole of the M2 Parties' defence and their counterclaim. As I will discuss in the next section of this judgment, I am not persuaded that the M2 Parties have established that the Chambers judge made a palpable and overriding error determining whether a settlement was achieved prior to September 2019 or whether any alleged breaches of it were repudiatory in nature.

[35] Before I turn to that analysis, however, I wish to address the M2 Parties' central argument that, "[i]n circumstances where no legal means exists to subpoena a witness to testify in a summary judgment proceeding, and a litigant has no means to force a witness to swear an affidavit", the litigant cannot adduce material evidence before the court for purposes of opposing summary judgment, thus making it necessary to proceed to trial (or raising a genuine issue for trial). While this may be the M2 Parties' strongest argument in relation to the suitability of summary judgment, I am not persuaded that this ground of appeal has any merit.

[36] As the Chambers judge noted, Rule 7-5(1)(a) of the *Rules* provides that it is appropriate for a court to decide a case using the summary judgment procedure when it is "satisfied that there is no genuine issue requiring a trial". The court is to determine whether a genuine issue for trial arises by considering the evidence. There will be no genuine issue requiring a trial if a fair and just determination can be made on the merits of the affidavit evidence submitted such that:

(a) the judge can make the necessary findings of fact;

(b) the judge can apply the law to the facts; and

(c) summary judgment is a proportionate, more expeditious and less expensive means to achieve a just result, as opposed to a trial.

See *Tchozewski v Lamontagne*, 2014 SKQB 71 at paras 26–30, [2014] 7 WWR 397; *Viczko v Choquette*, 2016 SKCA 52 at paras 28 and 36–42, [2016] 6 WWR 479.

[37] The M2 Parties say that they did all they could to satisfy their obligation to put their "best evidentiary foot forward", but they were unable to do so because they were impeded by the unavailability of a legal mechanism to obtain evidence. In my view, the broader question is whether there really is a *lacuna* in the law which offends the principle that summary judgment must achieve a fair and just adjudication.

[38] The M2 Parties complain that a witness may be subpoenaed in a trial but not in a summary judgment application. However, this state of affairs is offset by other provisions of the *Rules* that provided an avenue for them to secure the evidence that they say bore on the outcome of this case. For example, as the Chambers judge noted, hearsay evidence is more readily allowed in a summary judgment application than in a trial (see *Chambers Decision* at para 52, discussing Rule 7-3(3)). The *Rules* also allow for cross-examination on affidavits and rebuttal affidavits: see Rule 7-3(2). Nevertheless, any hearsay evidence that is tendered must still be shown to be reliable in order to be persuasive and, in this case, the Chambers judge found that the hearsay evidence tendered by the M2 Parties was neither reliable nor persuasive, stating: "[t]he details of the alleged conversation are vague, there is no supporting confirmation (e.g., an unsworn written statement) and the informative details as to why first-hand evidence was not provided are lacking" (at para 55).

[39] It was open to the M2 Parties to attempt to persuade the Chambers judge that material evidence existed that they had been unable to bring forward because of the procedural limitations of a summary judgment application. I also accept that the existence of such evidence could affect the ability of a judge hearing a summary judgment application to be satisfied that they could reach a fair and just determination of the matter. In such a case, the dispute would not be amenable to summary disposition. I would also tend to agree that, in an appropriate case, the *possibility* of such evidence existing could bear on the appropriateness of the matter being decided through the summary judgment process. However, I am satisfied that the Chambers judge was alive to all of this. He demonstrated this when he took note of the existence of the "numerous factual disputes with respect to some aspects of the case". However, he found that "these relate to matters which are of no consequence to the determination of the 'real issues'" (at para 34). This conclusion lays at the heart of his finding that there was no genuine issue for trial. As noted, this determination by

the Chambers judge is one that this Court must respect absent a palpable and overriding error, which the M2 Parties have not demonstrated.

[40] Finally, the M2 Parties have argued that it was an error for the Chambers judge to have held that there was no issue requiring a trial, and then proceed to weigh the evidence. They posit that there would be no need to weigh the evidence if there was no genuine issue requiring a trial. In my view, there is no such defect in the *Chambers Decision*. Rule 7-5(2)(b)(i) expressly provides that the court may weigh the evidence. Further, while the Chambers judge did not clearly delineate his analysis on the suitability of summary judgment into its two stages, a plain reading of the relevant portion of his decision makes it clear how he approached each step. The Chambers judge began by stating: "I conclude that there is no genuine issue requiring a trial". He then said that he expressly found that there were "only two issues of significance" (at para 34). He defined these issues as whether a settlement agreement was entered into in October 2018, and whether there had been a repudiatory contractual breach. He considered these to be the "genuine issue[s]" for trial in the sense associated with the first step in the analysis. Next, he explained how the summary judgment fact-finding powers provided for in the *Rules* would be sufficient to determine those issues on the evidence before him (see paras 34–35). On my reading of the reasons, that leads to the conclusion on the second stage, namely, that the "genuine issue[s]" could be appropriately disposed of by way of summary judgment, instead of through a trial. On this basis, the Chambers judge expressly found that summary judgment could produce "a fair and just determination on the merits" (at para 35). That the *Chambers Decision* is written point-first, with the conclusion on this point preceding its associated analysis, does not reveal a misapplication of the test.

[41] For these reasons, it is my view that the M2 Parties have not established an error in the Chambers judge's conclusion that the matter could be fairly and justly determined through summary judgment.

C. The M2 Parties' theory concerning the verbal agreement of October 2018 and its repudiatory breach

[42] I will deal with the remaining grounds of appeal together. The weakness of the M2 Parties' argument associated with these grounds is most clearly seen by considering the two things that must be true in order for the M2 Parties to be successful in this appeal: first, that a settlement agreement was entered into in October 2018; and second, that substantially the whole benefit to the M2 Parties of that agreement was confidentiality and non-disparagement, so as to render any breach of those provisions repudiatory.

[43] As I have said, the M2 Parties have failed to satisfy me that the Chambers judge erred when he concluded that neither of those two things were established.

[44] Turning to the issue of contract formation, the Chambers judge correctly emphasized the component of the test which asks whether the parties intended to create legal relations, citing *Aga* at paras 34–38 (*Chambers Decision* at para 38, citations omitted):

> a) A contract is formed when there is an offer by one party accepted by the other with the intention of creating a legal relationship, and supported by consideration;
>
> b) Where one of the parties alleges that a contract exists, they would have to show the intention to form contractual relations;
>
> c) The test for an intention to create legal relations is objective. Have the parties indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of the contract? The question is not what the parties subjectively had in mind but whether their conduct was such that a reasonable person would conclude that they intended to be bound;
>
> d) In answering the question of objective intent, courts are not limited to the four corners of the purported agreement, but may consider the surrounding circumstances;
>
> e) Under the objective test, the nature of the relationship among the parties and the interests at stake may be relevant to the existence of an intention to create legal relations. For example, courts will often assume that such an intention is absent from an informal agreement among spouses or friends. The question in every case is what intention is objectively manifest in the parties' conduct.

[45] Relating to the allegation of repudiatory breach, the Chambers judge – again, correctly – relied on a leading decision which predates *Tercon*, namely, *Doman Forest Products Ltd. v GMAC Commercial Credit Corp. – Canada*, 2007 BCCA 88 at para 90, 65 BCLR (4th) 1 (*Chambers Decision*):

> [64] The test for a fundamental breach amounting to repudiation of a contract is well-settled. A fundamental breach is a breach "going to the very root of the contract; where one

party fails to perform the very purpose for which the contract is designed so as to deprive the other of the whole or substantially the whole of the benefit which the parties intended should be conferred and obtained". See *Doman Forest Products Ltd. v GMAC Commercial Credit Corp. - Canada*, 2007 BCCA 88 at para 90, 65 BCLR (4th) 1.

[65] According to G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed (Toronto ON: Carswell, 2011) at 576, the question is heavily fact dependent:

> In every instance, it is a question of fact whether the breach complained of by the innocent party amounts to a fundamental breach. That question, in turn, depends upon: the terms of the contract; the intended benefit to the innocent party; the purpose of the contract; the material consequences of the breach; and, perhaps, though this has never been discussed in the cases, the extent to which the loss incurred by the innocent party can be remedied adequately by an award of damages. One point is clear. Whether a breach is fundamental does not appear to depend upon any express terms of the contract. The determination of a fundamental breach is a teleological question not one that involves construction of the contract in the narrow, literal sense. The concept of fundamental breach seems to transcend the normal issues of contractual interpretation. It involves investigation of the underlying nature and purpose of the contract into which the parties have entered, and the respective benefits designed to be obtained or ensured by the agreement.

[46] Respecting contractual formation, the Supreme Court of Canada has said that "the requirements for the formation of [a] contract" constitute an extricable question of law, reviewable for correctness (*Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53 at para 53, [2014] 2 SCR 633, cited in *Neigum v Van Seggelen*, 2022 SKCA 108 at para 46, 474 DLR (4th) 673). That is a legal standard. The application of that legal standard to the facts of the case is also a question of law, reviewed on the correctness standard. However, the underlying findings of fact must be owed deference absent a palpable and overriding error: see *R v Shepherd*, 2009 SCC 35 at para 20, [2009] 2 SCR 527.

[47] Thus, the question of whether there has been a repudiatory breach is generally a question of mixed fact and law, and one that tends to be heavily fact dependent. On appeal, it is reviewed for palpable and overriding error, unless an error of law may be extricated: see *Williams v Ron Will Management & Construction*, 2009 BCCA 543 at para 15, 86 CLR (3d) 50, citing G.L. Fridman, *The Law of Contract in Canada*, 5th ed (Toronto: Carswell, 2006). I note that *Williams* is cited in several reported decisions of the Court of Appeal for British Columbia, most recently *Marcotte v Marcotte*, 2018 BCCA 362 at para 39, 16 RFL (8th) 9. See also *Wotherspoon v Growers International Organic Sales Inc.*, 2014 SKCA 48, where Whitmore J.A., in Chambers,

denied leave to appeal on the basis that the applicant had not extricated a question of law from the lower court judge's holding that there had not been a repudiatory breach of the contract at issue.

[48] It follows that in order to succeed in this appeal, the M2 Parties must establish, at minimum, a palpable and overriding error in the Chambers judge's findings that there was no settlement agreement prior to September of 2019, and that the alleged breach of its terms was not repudiatory. In my view, they have not done so.

[49] The Chambers judge found that the "only rational conclusion that can be drawn [from the evidentiary record] is that there was no binding agreement that resulted from the October 27, 2018 meeting" (*Chambers Decision* at para 38). He gave two reasons for this finding: (1) there had been no document signed by the parties on October 27, 2018 (see para 39); and (2) "lengthy and protracted discussions and negotiations respecting the ultimate agreement", which worked out "[s]ignificant details" of the same, occurred after the October 27, 2018, meeting. The Chambers judge concluded: "It was not until September 23, 2019 that all details were finally resolved and the parties put pen to paper" (at para 41). The M2 Parties have not identified any error in these determinations which otherwise rationally support the Chambers judge's finding.

[50] Further, the Chambers judge reasoned that even if a settlement agreement was entered into in October of 2018, it was overtaken by the Settlement Agreement executed on September 23, 2019, based on the "entire agreement" clauses of the Settlement Agreement (see *Chambers Decision* at para 47). The M2 Parties do not take issue with the nature and purposes of these clauses.

[51] In addition, it is essential to the M2 Parties' position on appeal that not only was the purported settlement agreement of October 2018 effective from that date, but that it also included terms relating to confidentiality and disparagement. As the Chambers judge noted, the evidence to establish this was, at best, sparse. The Chambers judge did not accept R.S.K.'s affidavit evidence that any document containing such terms was signed by the parties at that time, as mentioned above. Moreover, as the Chambers judge found, R.S.K.'s personal notes from the October 27, 2018, meeting were "silent respecting confidentiality and disparagement" (*Chambers Decision* at para 40). In my view, the M2 Parties have not demonstrated any error in the Chambers judge's finding in this regard.

[52] Even if a settlement agreement was entered into in October of 2018 which included confidentiality and disparagement clauses, the Chambers judge found that the evidence adduced by the M2 Parties did not establish that there was a breach of these provisions. As I have noted, the Chambers judge did not accept the hearsay evidence tendered to establish four of the alleged breaches and doubted the reliability of the affidavit evidence concerning the fifth and final alleged breach (see *Chambers Decision* at paras 56–57). I see no error here.

[53] Finally, even accepting the M2 Parties' argument that there was an October 2018 agreement with confidentiality and disparagement clauses in the form that was ultimately memorialized in the September 2019 Settlement Agreement, the Chambers judge found that a breach of those clauses would not constitute a repudiatory breach (see *Chambers Decision* at paras 69–70).

[54] The confidentiality and disparagement clauses in the Settlement Agreement read as follows:

> **Mutual Confidentiality**
>
> 24. This Agreement may not be disclosed to any person or entity except the Parties may disclose this Agreement to their legal counsel for enforcement or the dollar amount of this Agreement: (1) To their respective lawyers, to their respective tax advisors, to agents of governmental taxing authorities acting in their official capacities, to agents of governmental agencies acting in their official capacities, or pursuant to lawful subpoena, as may otherwise be required by law; (b) To defend the lawyers for any party against claims for professional negligence or misconduct; (c) With express, written permission of the other Parties; (d) On a "need to know" basis, to its board members, officers, agents and employees. It shall not be a breach of this paragraph or of this Agreement for either party to state that "issues between the parties were resolved by way of this Agreement to the parties' mutual satisfaction" (or substantially similar comment) or to disclose or refer to anything that is public record.
>
> …
>
> **Mutual Non-Disparagement**
>
> 37. The Parties agree that none will engage in any conduct or communications designed or which might be reasonably expected to disparage or otherwise cause damage or inconvenience to the others.

[55] The Chambers judge considered the wording contained in those clauses to be standard form commonly found in settlement agreements (see para 67), and not clauses that "go to the very root of the contract" as required by the legal test (at para 69). He made these findings specifically in relation to the Settlement Agreement, but the only reasonable inference that can be drawn is that he would have found the same in relation to the purported October 2018 agreement with terms as

alleged by the M2 Parties. In any event, the M2 Parties have not demonstrated how any error arises from these findings.

[56] I therefore see no merit in the M2 Parties' argument that the Chambers judge erred by finding that there was no binding verbal agreement between the parties as of October of 2018 (or thereafter) and, alternatively, by determining that if such an agreement existed, no repudiatory breach had occurred.

D. The M2 Parties' other arguments

[57] The M2 Parties also make a series of other arguments in support of their appeal, none of which I find persuasive.

[58] First, the M2 Parties place great emphasis on the cultural context within which the purported October 2018 agreement was entered into. They argue that because of the way the parties' cultural norms value collectivism, social cohesion and interdependence, both the SaskCo Parties and the M2 Parties would have considered confidentiality and disparagement clauses to have significant importance. The SaskCo Parties argue that adding "various irrelevant cultural factors into the mix to further attempt to inflate the importance of these peripheral components" in what was "a largely financial contract" is "neither appropriate nor convincing". The SaskCo Parties also argue that, in any event, the *Chambers Decision* did consider the family relationships between the parties, when the Chambers judge wrote:

> [38] …
>
> > (e) Under the objective test, the nature of the relationship among the parties and the interests at stake may be relevant to the existence of an intention to create legal relations. For example, courts will often assume that such an intention is absent from an informal agreement among spouses or friends. The question in every case is what intention is objectively manifest in the parties' conduct ….

[59] I do not agree that the above-noted passage of the *Chambers Decision* responds to the M2 Parties' arguments about the significance of family relationships. That passage is limited to the objective test found in *Aga* for whether parties intend to create legal relations. However, the Chambers judge did consider R.S.K.'s affidavit (see *Chambers Decision* at para 39). That affidavit included evidence concerning the significance of family relationships and reputation.

Nevertheless, it is my view that, ultimately, the Chambers judge decided against the M2 Parties on the basis of the totality of the evidence before him. He did not err by doing so because the evidence of cultural context should not overwhelm the other evidence, including the Settlement Agreement as it reads as a whole.

[60] Second, the M2 Parties contend there would have been no consideration flowing to them in the October 2018 agreement without the inclusion of the confidentiality and disparagement clauses. They cite *Downey v Ecore International Inc.*, 2012 ONCA 480 at paras 56–59, 294 OAC 200, where it was found that an agreement to maintain confidentiality can amount to good and valid consideration. That proposition is necessary to the M2 Parties' argument, but it is not sufficient to establish a palpable and overriding error in the Chambers judge's determinations. The M2 Parties fail to address the Chambers judge's finding that the Settlement Agreement includes "[f]ull *mutual* release conditions and an indemnification clause" (*Chambers Decision* at para 66, emphasis added). In other words, even if there was an agreement in October 2018, the M2 Parties have not refuted that the parties could have settled on its terms, with valid mutual consideration, and without any of those terms relating to confidentiality or disparagement.

[61] Third, the M2 Parties state that "it is not unusual in law for parties to conclude an agreement with an undertaking to later execute a formal note to memorialize their original agreement", citing several examples in reported decisions to illustrate the point. The M2 Parties argue that the Chambers judge erred by finding that the negotiations in October of 2018 amounted to nothing more than an agreement to agree. They contend that the "entire agreement" clause of the Settlement Agreement signed in September of 2019 does not detract from the agreement entered into in October of 2018, but rather "encapsulates everything that had been agreed to by the parties since October 27, 2018". They make this argument by venturing into the parol evidence rule, on the basis that the entire agreement clause merely codifies that rule. The M2 Parties contend that they should have been allowed to adduce their evidence about the October 2018 agreement, notwithstanding the entire agreement clause, because their evidence would not have contradicted the terms of the September 2019 Settlement Agreement.

[62] In my view, this argument misconstrues the text of the "entire agreement" clause, which states: "[t]his Agreement will not be binding on any party until signed by all Parties" (clause 43 of the parties' Settlement Agreement, quoted in the *Chambers Decision* at para 47). The M2 Parties cannot logically say that their parol evidence does not contradict that clause because the Settlement Agreement was executed on September 23, 2019, and expressly says that its terms are binding as of that date. It is therefore inconsistent to assert that those terms bind the parties as of an earlier date.

[63] Fourth, the M2 Parties say that "[c]onfidentiality and mutual non-disparagement can be reasonably and objectively inferred from the circumstances in which the 2018 Agreement was concluded". In support, the M2 Parties cite two decisions. First is *Eaton Fund Distributors Ltd. v Poulin* (1973), 12 CPR (2d) 35 (WL) (Ont H Ct J), where Henry J. granted the plaintiff a continuation of an interim injunction against the defendants pending disposition of the action. This injunction was to prohibit, among other things, "[d]isclosing or using confidential information with respect to the names and nature of clients of the Plaintiff acquired by the Defendants while associates with the Plaintiff" (at para 2(d); see also paras 4 and 37). Second is *Kuruyo Trading Ltd. v Acme Garment Co. (1975) Ltd.*, [1988] 3 WWR 644 (Man QB), in which a successful plaintiff in an action for collection of unpaid debt sought to collect monies held in court pursuant to a garnishing order which had been made in the action. The defendant's bank had obtained standing as an intervenor and laid claim to those monies on the basis of security agreements it had entered into with the defendant. The passage from *Kuruyo* cited by the M2 Parties relates to the plaintiff's argument that the bank had created a fiduciary relationship with the plaintiff, which the bank breached by advising the plaintiff about the defendant's ability to pay without disclosing the bank's own security agreements with the defendant. The M2 Parties note that although they had relied on these decisions before the Chambers judge, neither decision was referred to in the *Chambers Decision*. Notably, *Kuruyo* was reversed on appeal: [1988] 5 WWR 286 (Man CA).

[64] I am not persuaded by the M2 Parties' argument on this point as they have attempted to analogize the purported contract in the instant case to issues in other reported decisions in a manner that does not articulate any error in the Chambers judge's findings or conclusions based on the evidence before him. Absent an identifiable and reviewable error, this Court cannot intervene.

[65] Fifth, the M2 Parties say that the "wrong" at issue is not whether "the recipients of the impugned information still recall exact details of what had been said". They argue that any acts of disclosure and/or disparagement, in and of themselves, are wrongful. I confess that I am unclear about what point the M2 Parties are making here. The idea may be that the Chambers judge was improperly focused on the precision with which the contractual breaches could be recalled in affidavit evidence. If that is so, the argument does not reveal an error in the Chambers judge's treatment of that affidavit evidence. Perhaps the M2 Parties' point is to emphasize the gravity of the alleged contractual breach because they also argue that a range of remedies are available to an innocent party in a case involving the other party's breach of a confidentiality provision. Here, again, the M2 Parties' argument is not persuasive as it does not address the Chambers judge's application of the legal test associated with the sole remedy sought by the M2 Parties: repudiation.

[66] Sixth, the M2 Parties argue that it is an error to consider the confidentiality and non-disparagement clauses to have become effective no earlier than September 23, 2019, because by that date, those terms had been rendered useless by the SaskCo Parties' undisclosed conduct. This argument raises an issue of misrepresentation. Relatedly, the M2 Parties argue that the SaskCo Parties must be liable for "breach of the implicit duty of good faith in negotiations", such that they are liable for damages "in an amount that has not yet been quantified before this Court". In my view, none of this supports the proposition that the purported agreement was formed in October 2018, nor does it support the remedy of repudiation, which is what the M2 Parties sought before the Chambers judge.

[67] Seventh, the M2 Parties argue that a repudiatory breach occurred because the SaskCo Parties showed "their intention to no longer to [*sic*] be bound by the agreement", which they say is apparent based on the circumstances surrounding the formation of the purported October 2018 agreement and that confidentiality and disparagement terms were "main and fundamental obligations". This argument is read in its best light when considered together with the M2 Parties' contention that the Chambers judge erred in fact by concluding that the confidentiality and disparagement terms of the Settlement Agreement are only peripheral to its main terms.

[68] There are several fatal problems with this argument, including that the M2 Parties allege a breach of only one of the three distinct confidentiality clauses (being the "Mutual Confidentiality" clause, not the "Confidential Information" clause which targets customer, business and accounting information), and that the SaskCo Parties did refute the theory concerning the October 2018 agreement, based on the totality of the evidence and, in particular, the text of the Settlement Agreement. The crucial problem, however, is that the M2 Parties have failed to establish the importance of the confidentiality and disparagement clauses relative to the clauses which the Chambers judge found to be central to the Settlement Agreement, in particular those contemplating the payment of significant funds and those setting out mutual releases (see *Chambers Decision* at para 66). Thus, the M2 Parties have failed to establish a reviewable error on this basis.

[69] Eighth, the M2 Parties argue that an agreement must have been entered into before September 2019, since M2 Ltd. made payments associated with the Settlement Agreement prior to that date. In my view, the M2 Parties have not demonstrated that the Chambers judge's reasoning on this point is untenable and/or contrary to the evidence. The Chambers judge considered the possibility that a party may, out of financial prudence, make an early payment based on the expectation that the terms of that agreement will be such that interest on the payment begins accruing before the agreement is entered into (see *Chambers Decision* at para 45). Indeed, the Settlement Agreement was executed on September 23, 2019, and it stipulated that interest would begin accruing on April 30, 2019 (clause 2(b)). This is only one month later than the date contemplated in a draft of the agreement which was circulated by counsel for the M2 Parties on January 31, 2019. Thus, I am again not persuaded that the M2 Parties have established a reviewable error on this ground.

[70] Ninth, the M2 Parties argue that the Chambers judge made a series of errors of fact. One concerns whether the M2 Parties had asserted in their statement of defence that the 2019 Settlement Agreement had been breached, as opposed to the purported October 2018 verbal agreement. This argument relates to comments in the *Chambers Decision* suggesting that the M2 Parties had changed their argument partway through the proceedings, and questioning what their motivation for doing so might have been (see, e.g., *Chambers Decision* at para 37). The M2 Parties take the position that the Chambers judge erred in concluding that they had "pivot[ed] their position" (at para 37). In my view, this aspect of the appeal may be simply disposed of because, even if this was

a palpable error(s), it is not overriding; it did not relate to a finding of fact to which the Chambers judge applied any legal standard now at issue. Neither the test for contract formation nor the test for repudiatory breach is informed by whether a party has changed its position in the course of litigation.

[71] Another alleged error of fact relates to the Chambers judge's statement that four men met on October 27, 2018, ignoring the presence of a fifth individual, Kanwaljit Singh Khaira, a cousin of N.S.J. and A.S.J. This may well have been an oversight by the Chambers judge, but I do not see how it is overriding. If anything, the presence of an additional witness to the October 2018 meeting casts even more doubt on the M2 Parties' assertion that a written agreement was executed at that time but has since gone missing.

[72] Still another error of fact alleged by the M2 Parties relates to the Chambers judge's finding of reliability associated with the affidavit of Gurpreet Singh Bhatia, on the basis she swore that she was told that 23 drafts of the settlement agreement had been circulated by October 2018. The M2 Parties defend that statement of the affidavit, suggesting it could "have multiple meanings" and does not contradict other evidence. With respect, in my view, the M2 Parties misunderstand the Chambers judge's reasoning on this point when he wrote, "it is clear that in October of 2018, 23 draft versions of the agreement had not been created", since the first discussion relating to that agreement also took place in October of 2018 (*Chambers Decision* at para 57).

[73] In conclusion, for the reasons set out above, none of the M2 Parties' arguments establish that the Chambers judge made a palpable and overriding error in his findings of fact nor in his application of the law to the facts.

VII. CONCLUSION

[74] In the result, I would dismiss the appeal, except to find that it was an error for R.S.K. and A.S.K. to be made jointly and severally liable for the debt owed by M2 Ltd. to SaskCo (as conceded by the SaskCo Parties). Only M2 Ltd. is liable for that debt and the interest thereon.

[75] Given the overall success of the SaskCo Parties, they are entitled to the costs of this appeal as well as the costs of the fresh evidence application payable from M2 Ltd., calculated in the usual manner. There shall be no costs payable to or from R.S.K. or A.S.K. for the appeal or the fresh evidence application. There shall be no costs for the application for a stay of execution that was determined by Tholl J.A. on April 26, 2023.

"McCreary J.A."

McCreary J.A.

I concur. "Schwann J.A."

Schwann J.A.

I concur. "Tholl J.A."

Tholl J.A.