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**Court of Appeal for Saskatchewan**
**Docket: CACV4092**

**Citation: *Curry v Athabasca Resources Inc.*, 2024 SKCA 7**
**Date: 2024-01-18**

Between:

**Christopher Curry**

*Appellant*
*(Plaintiff)*

And

**Athabasca Resources Inc., CSIT Consulting Inc., and Ruby Energy Inc.**

*Respondents*
*(Defendants)*

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| Before: | Kalmakoff, McCreary and Drennan JJ.A. |
| Disposition: | Appeal allowed |
| Written reasons by: | The Honourable Mr. Justice Kalmakoff |
| In concurrence: | The Honourable Madam Justice McCreary<br>The Honourable Madam Justice Drennan |
| On appeal from: | 2022 SKKB 221, Saskatoon |
| Appeal heard: | October 30, 2023 |
| Counsel: | Jordan Hardy, K.C. for the Appellant<br>Kelsey O'Brien and Shelby Fitzgerald for the Respondents |

**Kalmakoff J.A.**

## I. INTRODUCTION

[1] Christopher Curry brought an action against Athabasca Resources Inc. [Athabasca], CSIT Consulting Inc. [CSIT] and Ruby Energy Inc. [Ruby] [collectively, the Respondents], seeking damages for breach of contract and unjust enrichment. The Respondents applied for summary judgment, pursuant to what are now *The King's Bench Rules*. A Court of King's Bench judge [Chambers judge] granted that application and dismissed Mr. Curry's claim (*Curry v Athabasca Resources Inc.*, 2022 SKKB 221 [*Decision*]).

[2] Mr. Curry now appeals against the *Decision*. He contends that the Chambers judge erred in concluding that the Respondents had not contracted to pay him a 1% gross overriding royalty [GORR] with respect to oil revenues they collected as a result of the geological consulting work he performed for them. Mr. Curry submits, in the alternative, that if the Chambers judge did not err in his determination of the nature of the contractual terms, then he erred in concluding that the Respondents had not been unjustly enriched.

[3] For the reasons that follow, I would allow the appeal.

## II. BACKGROUND

### A. The parties

[4] Mr. Curry is a professional geologist and the sole proprietor of a geological consulting business. The Respondents were incorporated to pursue investment in natural resources and, relevant to the circumstances of this case, they were involved in acquiring parcels of land and negotiating the leases and permits needed for oil and potash extraction in southern Saskatchewan. Danyuan (Dawn) Zhou is the principal of each of the Respondents.

### B. The initial project

[5] In September of 2005, Ms. Zhou approached Mr. Curry and advised him that she was looking for a geologist she could consult regarding an upcoming land sale. In early November of

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that year, they met, and Ms. Zhou explained that she was considering bidding on mineral interests in two specific areas near the communities of Browning and Stoughton. Ms. Zhou asked Mr. Curry to review the subsurface geology, write a report for her use, and provide a recommendation regarding those two areas [initial project]. Mr. Curry agreed to perform this work, and Ms. Zhou agreed to pay him $60.00 per hour. Mr. Curry provided the requested report and invoiced Ms. Zhou. His report led to the Respondents bidding on, and successfully acquiring, a parcel near Stoughton.

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### C. Mr. Curry's subsequent work for the Respondents

[6] Ms. Zhou was pleased with Mr. Curry's work on the initial project. Following its completion, over the course of several conversations, she canvassed with him whether he would be interested in continuing to work for the Respondents going forward. Ms. Zhou made it clear to Mr. Curry that she wanted him to do all of the geological exploration work for the Respondents, including locating, prospecting, and making recommendations about which properties they should acquire. In response, Mr. Curry told Ms. Zhou that he would be interested in working for the Respondents in this expanded capacity, but that he needed to consider the time commitment required and the appropriate compensation.

[7] Mr. Curry and Ms. Zhou continued to communicate about projects related to the Respondents' business. In December of 2005, Ms. Zhou emailed Mr. Curry to ask for advice on several aspects of the Respondents' operations. When he provided some initial thoughts in response, Ms. Zhou asked him to suggest a compensation package for the expanded role they had been discussing. In an email dated December 16, 2005, Ms. Zhou explained why she wanted to continue to engage Mr. Curry, and requested that he lay out his expectations regarding compensation, saying as follows:

> Though I may be able to learn some of the work, you will be a much more qualified and experienced person to do this job. May you suggest a small monthly fee for you to keep going and add hourly charge for particular work?

[8] After consulting with colleagues in the industry, Mr. Curry decided to accept the new role that he and Ms. Zhou had been discussing. Following another series of exchanges, Mr. Curry sent an email to Ms. Zhou on January 3, 2006, in which he confirmed that he would be prepared to

work for the Respondents in an expanded capacity, in exchange for increased compensation. In that respect, he proposed that he continue to be paid $60.00 per hour, plus a 1% GORR. He wrote:

> As for future work, I am going to try to keep everyone busy by looking for new drilling plays using 16-20 hours/week. If we could continue the same rate as agreed to ($60.00/hr) plus having a 1.0% production and performance over-ride attached to all production from lands that we successfully acquire and develop, that would be suitable. I also want to keep you involved as much as you have time for because I don't want you to miss out on all the fun and likely some personally lucrative deals.

[9] Ms. Zhou did not directly respond to this email, and, according to the evidence led on the summary judgment application, no further correspondence was exchanged between the two that directly addressed the subject of Mr. Curry's compensation for his new role. However, Ms. Zhou immediately engaged Mr. Curry to perform additional work for the Respondents, which included locating, evaluating, and recommending which parcels should be acquired, preparing reports identifying prospective land, suggesting bid parameters, identifying areas of focus where the Respondents could acquire a strategic land base, and providing advice respecting negotiations with other companies.

[10] An integral aspect of Mr. Curry's ongoing work for the Respondents was the identification and recommendation of various land parcels for acquisition. This eventually led to a successful joint bid by the Respondents, with Medora Resources Inc., on a particular piece of land [North Colgate Land]. Medora's imaging had shown that the North Colgate Land had significant potential for oil production, with a sizable drillable area. Mr. Curry advised Ms. Zhou on the structure of the joint venture with Medora that was eventually executed. Six wells were ultimately drilled on the North Colgate Land, beginning in October of 2006. Those wells began producing oil shortly thereafter and generated significant revenue for the Respondents.

### D. The disagreement about Mr. Curry's compensation

[11] As drilling was set to begin on the North Colgate Land, Mr. Curry contacted Ms. Zhou's associate, Kevan Bender, to provide him with an update on the project, and to advise him that the wells would soon begin producing. Mr. Bender responded by advising Mr. Curry that Ms. Zhou would be prepared to offer him shares in Athabasca and/or Ruby as compensation for his work. Mr. Curry declined this offer, given what he believed to be the agreement regarding the GORR.

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[12] A week later, on October 17 and 18, 2006, Mr. Curry, Ms. Zhou, and Mr. Bender all attended a conference in Regina. There, they had a conversation regarding Mr. Curry's compensation. Ms. Zhou and Mr. Curry provided differing views about the precise contents of that discussion, however they both agreed that Ms. Zhou presented Mr. Curry with a written offer specifying that he would be provided with 100,000 shares in Ruby in exchange for a continued and expanded role in that company, and that he flatly rejected the offer because he took the position that they had previously agreed that he would be compensated in the fashion he had detailed in his January 3, 2006, email (i.e., $60.00 per hour, plus a GORR of 1% in relation to all production from parcels that he had assisted the Respondents in securing and developing).

[13] On October 22, 2006, Ms. Zhou emailed Mr. Curry and, once again, asked him to agree to her offer of the shares in Ruby. Mr. Curry replied on November 7, 2006, and advised her that he would not agree to her proposed amendment of what he believed were the terms of their agreement. He also stated that he would require confirmation of the terms set out in his January 3, 2006, email before doing any further work for the Respondents. Ms. Zhou immediately responded by email, to say that the Respondents would no longer require his services, and to request that he invoice her for the hours he had worked in September and October of 2006. Mr. Curry performed no further work for the Respondents after that.

### E. The claim and the defence

[14] Mr. Curry filed a statement of claim on March 20, 2009. In it, he alleged that the Respondents had breached their contract with him. In that regard, he asserted that the communications he had had with Ms. Zhou between December 16, 2005, and January 3, 2006, had given rise to a new contractual arrangement, which included a term that he be compensated at a rate of $60.00 per hour, plus the 1% GORR, and that the Respondents had failed to pay him in accordance with that agreement. Mr. Curry also pleaded, in the alternative, that the Respondents had been unjustly enriched by his work.

[15] In their statement of defence, the Respondents denied that Ms. Zhou had entered a new contractual relationship with Mr. Curry that included the GORR as part of his compensation package. They also denied having breached any contract that may have existed with Mr. Curry and denied that they had been unjustly enriched. The Respondents also pleaded that Mr. Curry's claim

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was statute-barred under *The Limitations Act*, SS 2004, c L-16.1. Alternatively, the Respondents pleaded that no contract had ever existed between them and Mr. Curry, and that he had not proved his damages.

### F. The *Decision*

[16] Eventually, the Respondents applied for summary judgment dismissing Mr. Curry's claim. The matter came before the Chambers judge, who concluded that it was something that could properly be determined under Rule 7-5. In the *Decision,* after identifying the central issue in the case, the Chambers judge stated his conclusion in a point-first fashion, saying:

> [4] For the reasons that follow, I am satisfied that [Mr. Curry's] action must be dismissed. Although I have serious misgivings about the manner in which [Ms. Zhou] conducted herself in 2006, I cannot find that a contract of the kind described by [Mr. Curry] was unequivocally accepted. I am also satisfied that even in the absence of this new contract, the existing contractual relationship between the parties afforded sufficient juristic reason to deny [Mr. Curry's] claim for restitution based on his alternative claim for unjust enrichment.

[17] The Chambers judge noted that, while there were some conflicts and gaps in the evidence about the precise nature of Mr. Curry's relationship with each of the individual Respondents, there was no question about the fact that a business relationship had developed between Mr. Curry and Athabasca and Ruby in 2005. The Chambers judge also found that a contractual agreement had been reached in relation to the initial project, which was as follows: "It is agreed that Ms. Zhou asked [Mr. Curry] to review the subsurface geology for the two areas, provide a write-up for her use and make recommendations. It is further agreed that [Mr. Curry]'s compensation for these services would be at the rate of $60.00 per hour" (*Decision* at para 12).

[18] The Chambers judge next reviewed the progression in the email communications between Ms. Zhou and Mr. Curry. He observed that Ms. Zhou's December 16, 2005, suggestion that Mr. Curry receive a "small monthly fee" in exchange for an expanded role with the Respondents "lacked specifics", and that the description she had provided in her affidavit about her reference to this fee being nothing more than a gesture of good will that was intended to compensate Mr. Curry for time related to his consulting services that would not otherwise be captured in regular invoices was "a retrospective and somewhat scrambling explanation of her intentions at

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that time" (*Decision* at para 19). The Chambers judge concluded that, if that perspective had truly formed part of Ms. Zhou's expectations, Mr. Curry was "obviously unaware of it" (at para 20).

[19] The Chambers judge also noted that, although there was conflicting evidence about the extent to which Mr. Curry had taken on an expanded role with the Respondents after the exchange of the December 16, 2005, and January 3, 2006, emails, there was little dispute about the fact that the nature and complexity of his role with the Respondents had increased after that time.

[20] Next, the Chambers judge reviewed the evidence concerning the termination of Mr. Curry's relationship with the Respondents, and his assertion that the contents of his January 3, 2006, email formed the terms of a new contract between the parties. The Chambers judge began that portion of the *Decision* by saying:

> [34] [Mr. Curry]'s belief that there was an agreement was not based on any express acceptance on the part of Ms. Zhou. There wasn't one. As earlier mentioned, Ms. Zhou did not formally respond to [Mr. Curry]'s January 3 proposal until October 2006. Moreover, the evidence also discloses that [Mr. Curry] did not remind Ms. Zhou about the GORR proposal or question her about a response.
>
> [35] When the proposal resurfaced, it led to the end of the relationship between [Mr. Curry and [the Respondents]]. …

[21] The Chambers judge also reviewed the evidence about the share offer Ms. Zhou had made by way of the October 18, 2006, letter. He observed that "no meaningful negotiations" between the parties had occurred after Ms. Zhou made that offer, and that Mr. Curry had not accepted the offer because he took the view that it amounted to an attempt by Ms. Zhou to amend or back out of the previously existing 1% GORR term of their contract (at para 37).

[22] After reviewing the law that governs summary judgment applications, the Chambers judge stated that he was "more than satisfied that this case includes all the necessary considerations for a determination by summary judgment", because the evidence left him in a position where he could comfortably make the findings of fact necessary to decide whether the Respondents were liable to Mr. Curry on the basis of the causes of action he had asserted (at para 51).

[23] The Chambers judge then instructed himself on the law of contracts, including the need for contracting parties to reach *consensus ad idem* with respect to all essential terms. In that regard, after referring to such authorities as *Mosten Investments LP v The Manufacturers Life Insurance*

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*Company (Manulife Financial)*, 2021 SKCA 36 at para 67, [2021] 9 WWR 1 [*Mosten*], and Gerald H.L. Fridman, *The Law of Contract in Canada*, 6th ed at 15, he said:

> [55] As observed in *Mosten*, the parties to a purported contract must reach *consensus ad idem* about: (1) what has been offered; (2) what has been accepted; and (3) the consideration therefor. Where an offer is tendered with reasonably clear and understandable terms, there can be no contract until the offeree signifies an unequivocal willingness to enter a contract based on the offer's terms. Given the objective test for determining *consensus ad idem*, it necessarily follows that the test whether an offer is accepted turns on how an objective reasonable bystander would view the offeree's actions.
>
> [56] While express acceptance is a clear indication of an offeree's willingness to enter into the proposed contract, other forms of unequivocal conduct will suffice. This can include silence on the part of the party said to have accepted an offer or proposal.

[24] The Chambers judge also reviewed the decision of the Supreme Court of Canada in *Saint John Tug Boat Co. Ltd. v Irving Refining Ltd.*, [1964] SCR 614, and noted what it says about whether a party's silence or acquiescence can amount to acceptance of a contractual offer:

> [60] *Saint John Tug* has been considered in more than 150 published cases. While I have not reviewed all the decisions from those cases, certain of the authorities suggest that objective findings of implied contract terms, based on unequivocal conduct, is more discernible in circumstances where the intention to contract is manifested by reasonably unequivocal evidence that the receipt of contractual consideration is expected. Often, but not exclusively, this intention is manifested by the issuance of invoices for services that go unchallenged, as was the case in *Saint John Tug*. It can also be manifested by a combination of previous payment for issued invoices and communication signifying contractual intention, as was the case in *Yanke Multimodal Services Ltd. v Jastek Master Builder 2004 Inc*., 2014 SKQB 382. Such intention can also be shown in circumstances where a party could not reasonably be expected to act as it did without the kind and amount of consideration it alleges – and the conduct of the other party is not inconsistent with that expectation. I sense this to have been the situation in *O'Neill v Kings County Construction*, 2019 PECA 13.
>
> [61] An objective finding may be somewhat less discernible where there is a pre-existing contractual relationship and one of the parties asserts the existence of a new or amended contract. In the absence of an express agreement by both parties, the party making this assertion bears the burden of showing that the other party's conduct unmistakably signifies acceptance of the new bargain. The burden will not be met if the conduct is consistent with former contractual relationship or with an altogether different arrangement.

[25] Having self-instructed in that fashion, the Chambers judge turned to apply the relevant legal principles to the evidence before him. In that respect, he began by making two significant findings of fact. The first was that Mr. Curry's role with the Respondents in 2006 was "different and larger in scope" than the role he had played in the initial project (at para 65). The second was that Ms. Zhou "knew and recognized" this enlarged role, based on the communications that had

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passed between her and Mr. Curry, and the fact that she had offered him additional compensation in the form of shares in Ruby (at para 66). He then said that the case turned on whether those findings of fact assisted Mr. Curry in proving that "Ms. Zhou's eight-month silence, coupled with his enlarged role with [the Respondents], would lead a reasonable observer to believe that she had unequivocally accepted the terms of his proposal" (at para 67). In other words, the Chambers judge found that the determination of Mr. Curry's claim turned on whether he could prove that a *new* contract had been executed between himself and Ms. Zhou in relation to the work he performed for the Respondents in 2006, on the terms set out in his January 3, 2006, email.

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[26] The Chambers judge concluded that Mr. Curry had failed to prove the establishment of a new contract on those terms for the work he performed in 2006. One of the reasons the Chambers judge gave for reaching this conclusion was that he viewed the pre-existing contractual relationship – i.e., the contract pertaining to the initial project – as being something that was of particular significance, in that it "heightened [Mr. Curry]'s burden, requiring him to prove *consensus ad idem* for a new arrangement that supplanted the earlier one" (*Decision* at para 68). He found that Mr. Curry had not met that burden, giving the following reasons for that conclusion:

> [69] There is little doubt that the parties contemplated an arrangement that would be different from what they had in 2005 and that greater compensation would be due to [Mr. Curry] under such an arrangement. That said, I am not able to say that this contemplation crystallized into a *consensus ad idem*. In this respect, I find [that] Ms. Zhou's eight-month silence is ambiguous at best. The suggestion that Ms. Zhou's silence demonstrated acceptance of [Mr. Curry]'s proposal may be arguable, but it is no more tenable than the suggestion that she simply chose to ignore it in the hope the royalty idea would go away. As such, I am satisfied that application of the objective test would leave the reasonable bystander with considerable doubt – doubt which would resolve the matter in favour of the defendants.
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> [70] In saying this, I accept and understand that [Mr. Curry] honestly believed that his proposal and subsequent efforts, coupled with Ms. Zhou's lengthy silence, formed the basis of a binding agreement that included compensation partly based on a GORR. Respectfully, this belief was ill-founded. As I read [Mr. Curry]'s evidence, including his email message of November 7, 2006, his belief in the existence of such an agreement was informed by advice from geologists with whom he had conferred. It was not based on legal advice or a specific understanding, informed by evidence of industry custom. In this regard, there was no evidence of any such custom.
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> [71] In the end, I am satisfied that there was no agreement of the kind claimed by [Mr. Curry]. It necessarily follows that his action for breach of such a contract cannot succeed.

[27] After he made that finding, the Chambers judge also went on to dismiss Mr. Curry's claim for unjust enrichment. In that regard, after reviewing the principles laid down in *Garland v*

*Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 SCR 629 [*Garland*], and *Atlantic Lottery Corp. v Babstock*, 2020 SCC 19 at para 71, [2020] 2 SCR 420 [*Babstock*], the Chambers judge observed that, even though Mr. Curry had established the first two elements of unjust enrichment (i.e., enrichment of the defendant and corresponding deprivation of the plaintiff), the existence of the previous contractual arrangement between the parties meant that he had not established the third element, namely, the absence of a juristic reason for permitting the defendant to retain the enrichment. On that point, he said:

> [80] In the circumstances of the present case, I am satisfied that [Mr. Curry] has not made out a case for unjust enrichment. In particular, I find that [Mr. Curry]'s claim does not pass the first stage of the applicable analysis. While I accept that [the Respondents] received a benefit from the enlarged scope of the work performed by [Mr. Curry] in 2006, I do not believe it can be said that such a benefit was received in the absence of a juristic reason, namely, a contract. In this respect, it is undeniable that there was a previous contractual arrangement between the parties – one for which the parties were contemplating a change for greater consideration. While that greater consideration was not subsequently agreed upon, I am not persuaded that this should translate into the absence of a contract. As imperfect and imprudent as the contract may have been, it was still sufficient to afford juristic reason for whatever benefit [the Respondents] received from it.

[28] With that, the Chambers judge dismissed Mr. Curry's claim. Given his conclusion on the existence of a juristic reason for the enrichment, the Chambers judge found it unnecessary to consider whether there was a residual reason to deny Mr. Curry's claim under the second stage of the unjust enrichment analysis. And, because he had dismissed both causes of action that Mr. Curry had pleaded, the Chambers judge also found no need to address the Respondents' limitation period defence.

## III. ISSUES

[29] Mr. Curry's appeal raises two questions for determination:

(a) Did the Chambers judge err in concluding that a new contract had not been formed on the terms set out in Mr. Curry's email of January 3, 2006?

(b) If the answer to the first question is "no", did the Chambers judge err in concluding that there was a juristic reason for the Respondents' enrichment?

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## IV. STANDARD OF REVIEW

[30] Where an appeal is taken from a decision granting summary judgment, the applicable standard of review depends on what is in issue. The usual standards specified in *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235 [*Housen*] apply, meaning that questions of law are assessed on a standard of correctness and questions of fact are assessed on a standard of palpable and overriding error. Questions of mixed fact and law are also assessed on a standard of palpable and overriding error, absent an extricable error of law (*Mosten* at paras 31–35; see also *Zoerb v Saskatoon Regional Health Authority*, 2022 SKCA 111 at paras 37–38; *Klaptchuk v Johnson*, 2023 SKCA 25 at para 63; and *Canadian Mortgage Servicing Corporation v Korf*, 2024 SKCA 1 at para 37 [*Korf*]).

[31] The interpretation of contracts generally gives rise to questions of mixed fact and law, as it is an exercise that involves applying principles of law to the words of the contract, considered in the relevant factual matrix. Accordingly, appellate review of decisions concerning the interpretation of contracts is generally conducted on the palpable and overriding error standard, absent an extricable question of law (*Sattva Capital Corp. v Creston Moly Corp*., 2014 SCC 53 at paras 46–50, [2014] 2 SCR 633 [*Sattva*]; *Teal Cedar Products Ltd. v British Columbia*, 2017 SCC 32 at para 47, [2017] 1 SCR 688; *Uniprix Inc. v Gestion Gosselin et Bérubé Inc.*, 2017 SCC 43 at para 41, [2017] 2 SCR 59; *Korf* at paras 39–40). A determination concerning whether the elements necessary for the formation of a contract have been established involves a question of law and is thus reviewable for correctness (*Sattva* at para 53).

[32] With respect to the determination about whether a party was unjustly enriched, if the question is whether the judge applied the proper legal test, that is a question of law, reviewable for correctness. However, if the question concerns the application of the appropriate legal standard to a set of facts, it is a question of mixed fact and law, reviewable for palpable and overriding error (*Housen* at paras 26–36; *Ambrozic v Burcevski*, 2008 ABCA 194 at para 17).

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## V. ANALYSIS

### A. Did the Chambers judge err in concluding that a new contract had not been formed on the terms set out in Mr. Curry's email of January 3, 2006?

[33] Mr. Curry's first line of argument is that the Chambers judge's conclusion that the parties had not entered a new contract, on the terms proposed in his January 3, 2006, email, was the product of a legal error. As I understand this aspect of his submission, Mr. Curry agrees that the Chambers judge correctly identified the legal principles that govern the determination of whether a contract has been formed, namely whether the parties have reached *consensus ad idem* with respect to all essential terms. He also concedes that the Chambers judge properly recognized that one party may be found to have accepted the contractual terms proposed by the other based on conduct that includes silence and acquiescence. However, says Mr. Curry, because the parties had a previous contractual relationship pertaining to the initial project, the Chambers judge erroneously determined that he was required to meet a "higher burden", i.e., one more onerous than a balance of probabilities, to establish that the Respondents' conduct following his January 3, 2006, email formed the necessary *consensus ad idem* for a new contractual arrangement. Mr. Curry contends that, had the Chambers judge correctly applied the objective test, rather than proceeding from the footing that the previous business relationship between the parties required him to meet a higher burden of proof, he would have understood that *consensus ad idem* had been reached.

[34] I cannot accept this argument, in large measure because I do not read the *Decision* in the way that Mr. Curry urges. When the *Decision* is read as a whole, it is apparent, in my respectful view, that the Chambers judge did not misunderstand or misapply the standard of proof. Rather, the Chambers judge's use of the words "heightened the plaintiff's burden", in paragraph 68 of the *Decision*, was a reference to the history of business relations between the parties, and the relevance it would have in the determination of what a reasonable observer would conclude about whether they intended to make any substantial changes to the contractual arrangement that had governed the initial project, or to simply continue with it. As I see it, the Chambers judge's reference to a "heightened" burden in that regard was nothing more than an acknowledgment that, where parties have an existing contractual relationship, it may be more difficult for the party who seeks to

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establish that silence on the part of the other is sufficient to signify the acceptance of terms that amount to a *new* contract, to prove their case.

[35] I am also unable to accept Mr. Curry's submission that the *only* conclusion a reasonable person could have reached, based on the evidence before the Chambers judge, was that the Respondents had agreed to the GORR term proposed in his January 3, 2006, email.

[36] A valid contract is only formed when three criteria are met from the perspective of an objective bystander: (i) the parties intended to contract; (ii) the parties reached an agreement on all essential terms; and (iii) the essential terms are sufficiently certain (*Jans Estate v Jans*, 2020 SKCA 61 at para 34 [*Jans*]; citing *Matic v Waldner*, 2016 MBCA 60 at para 57, [2017] 1 WWR 504 (leave to appeal to SCC refused, 2017 CanLII 1341)). Determining whether a contract has been formed and, if it has, on what terms, calls for the application of an objective test. In the absence of a written agreement, or some other clear and unequivocal communication respecting contractual terms, a court must determine whether a reasonable person in the position of one party would consider that the other party's conduct constituted an offer and, conversely, whether a reasonable person in the position of the latter would consider the former's conduct to have constituted an acceptance (*Owners, Strata Plan LMS 3905 v Crystal Square Parking Corp*., 2020 SCC 29 at para 33, [2020] 3 SCR 247). Where it is alleged that a party has agreed to a proposed contractual term through conduct – including through silence or acquiescence – rather than through express acceptance, such conduct must be sufficiently clear, unambiguous, or absolute to objectively demonstrate an intention to create binding legal relations on those terms (*AlumaSafway Inc. v The International Association of Heat & Frost Insulators and Asbestos Workers Local 119*, 2022 SKCA 99 at para 49, [2023] 6 WWR 74).

[37] In this case, the Chambers judge found that the parties had clearly contemplated a different arrangement in 2006 than had been the case with respect to the initial project, both in terms of the services Mr. Curry would provide, and with respect to his compensation. However, he also found that Ms. Zhou's agreement to Mr. Curry's proposed terms regarding compensation could not be inferred from her silence or her conduct, because those things were "ambiguous at best" (at para 69). This is a finding of fact, with which an appellate court may only interfere if it is the product of palpable and overriding error. I see no error of that sort here. The evidentiary record in this case

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included the email exchange in which Mr. Curry proposed the GORR term, which was imprecise in nature. There was also no evidence that Ms. Zhou ever expressly agreed to such a term. Moreover, her conduct in October of 2006, which included offering to compensate Mr. Curry with shares in Ruby and declining to further engage his services when he insisted on the GORR, was pointedly inconsistent with such an agreement on her part. All of this was capable of supporting the conclusion the Chambers judge reached on this point, namely that the parties had not attained *consensus ad idem* with respect to the GORR term proposed by Mr. Curry.

[38] Accordingly, this ground of appeal cannot succeed.

### B. Did the Chambers judge err in concluding that there was a juristic reason for the Respondents' enrichment?

[39] I reach a different conclusion, however, with respect to the second branch of Mr. Curry's argument. As I will discuss, I am of the view that the Chambers judge erred in concluding that the contract pertaining to the initial project constituted a juristic reason for the Respondents' enrichment and, thus, erred by dismissing Mr. Curry's claim for unjust enrichment.

[40] There are three requirements that a plaintiff must establish to prove a claim in unjust enrichment: (i) an enrichment; (ii) a corresponding deprivation; and (iii) the absence of a juristic reason for the enrichment (*Pettkus v Becker*, [1980] 2 SCR 834 at 848; *Garland* at para 30). The "juristic reason" element of the unjust enrichment analysis proceeds in two stages. At the first stage, the plaintiff must demonstrate that the defendant's enrichment cannot be justified by any of the established categories of juristic reason. If the plaintiff succeeds in doing so, they will have established a *prima facie* case for unjust enrichment. At the second stage of the analysis, the defendant may rebut the *prima facie* case by showing that there is a residual reason to deny recovery (*Garland* at para 70; *Moore v Sweet*, 2018 SCC 52 at paras 57–58, [2018] 3 SCR 303 [*Moore*]).

[41] The existence of a valid contract is recognized as a juristic reason that will prevent a claim of unjust enrichment from succeeding (*Garland* at para 44). This is because "such a contract reflects the intentions and expectations of the parties and demonstrates that [they] have come to an

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agreement on how risk will be allocated and how benefits will be received; therefore, it would be unwarranted to allow a claim in unjust enrichment where a contract exists" (*Jans* at para 93).

[42] However, a claim in unjust enrichment will not be precluded just because the parties have had an arrangement that was contractual in nature at some point in their history. Where a contract did not exist at the relevant time, it does not bear on the claim (*Palkowski v Ivancic*, 2016 ONCA 762 at para 8). Further, a contract that is illegal, unenforceable, or otherwise invalid will not amount to a juristic reason for enrichment (*Babstock* at para 71; *Golden Oaks Enterprises Inc. v Scott*, 2022 ONCA 509 at para 83). Nor will a contract whose validity is unclear because the requisite elements are not present (*Sirius Concrete Inc. (Re)*, 2022 ONCA 524 at para 18), or a contract that is unenforceable because its essential terms cannot be determined with a reasonable degree of certainty (see: *Ren v Jin*, 2016 ABCA 80). In short, in order to form a juristic reason for enrichment, a contract must be valid, enforceable, and in existence at the time the benefit was conferred upon the defendant or when the deprivation reason was suffered by the plaintiff.

[43] In my respectful view, the Chambers judge's conclusion that the *previous* contractual arrangement between the parties constituted a juristic reason for the Respondents' enrichment cannot be sustained, because it is the product of a legal error. Let me explain.

[44] The Chambers judge made clear findings that the agreement with respect to the initial project was that Mr. Curry was to review the subsurface geology for two specific areas, provide a report for Ms. Zhou to use, and make recommendations regarding the acquisition of those parcels, and that he would be paid $60.00 per hour for this work. He also found that Mr. Curry had completed this work and submitted his invoices for it in late 2005 (*Decision* at paras 12–13).

[45] The Chambers judge found that the work Mr. Curry performed for the Respondents in 2006 was "different and larger in scope" than that which he had performed in relation to the initial project (*Decision* at para 65), and that Ms. Zhou "knew and recognized" his enlarged role. He also found that, before Mr. Curry took on further work for the Respondents in 2006, the "parties contemplated an arrangement that would be different from what they had in 2005 and that greater compensation would be due to [Mr. Curry] under such an arrangement" (at para 69).

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[46] In short, the Chambers judge found that, after the initial project had been completed, the parties, through their communications and conduct, had demonstrated an *intention* to form a new contractual arrangement. In that regard, he determined that they had reached a new agreement about one of the contract's essential terms (the services Mr. Curry was to provide) but not the other (compensation). In other words, he must be taken as finding that the parties had *not* entered into an agreement governing the work that Mr. Curry provided to the Respondents in 2006.

[47] In these circumstances, while the Chambers judge was correct to find that the lack of agreement on that essential term meant that a new contract had not been formed in relation to the work Mr. Curry performed in 2006, I see no basis in law for his conclusion that this did not "translate into the absence of a contract", and that the "previous contractual arrangement between the parties" was "still sufficient to afford juristic reason for whatever benefit [the Respondents] received from it" (*Decision* at para 80). No authority was cited by the Chambers judge for this proposition, and, in my respectful view, the facts as he found them *did* translate into the absence of a contract at the relevant time, which negated the existence of a juristic reason for the benefit bestowed on the Respondents by Mr. Curry's work.

[48] The fact that the parties had not reached a *new* contractual agreement did not mean the old contract was revived, or that it continued to be in force. This was not a situation where, as the Respondents suggest, the contract for initial project could be properly viewed as a contract of employment for an indefinite term. Based on the facts found by the Chambers judge, the contractual arrangement that the parties had with respect to the initial project had come to an end. Not only had all of its terms been fulfilled (i.e., Mr. Curry had completed all the work that it called for on his part, and the Respondents had paid him what he was owed), there was also no agreement between the parties that either of its two essential terms, namely the services Mr. Curry was to provide and his compensation, would continue unaltered going forward. On the contrary, the parties had agreed that Mr. Curry would provide significantly expanded services in exchange for increased compensation in 2006, but no agreement was reached about the new terms of his compensation. Thus, the Chambers judge determined that, at the time the relevant enrichment occurred – namely, 2006 – the parties did *not* have an agreement on the essential terms of a contract for the services Mr. Curry provided for the Respondents. In other words, based on the facts the Chambers judge found, there could not have been a valid and enforceable contract in existence at

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the relevant time that formed a juristic reason for the enrichment. It follows that the *Decision* cannot be sustained.

## VI. CONCLUSION

[49] For the foregoing reasons, I would allow the appeal and set aside the *Decision*.

[50] My conclusion respecting the absence of a juristic reason means that Mr. Curry has established a *prima facie* claim for unjust enrichment. In the circumstances, it is appropriate to remit the matter to the Court of King's Bench so that the "second stage" of the unjust enrichment analysis recognized in *Garland* and *Moore* may be conducted, and, if necessary, the Respondents' limitation period defence may be addressed.

[51] Mr. Curry is entitled to the costs of the appeal, calculated in the usual way.

"Kalmakoff J.A."

Kalmakoff J.A.

I concur. "McCreary J.A."

McCreary J.A.

I concur. "Drennan J.A."

Drennan J.A.

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