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**Court of Appeal for Saskatchewan**  
**Docket: CACV4276**

**Citation: *Ace Burger Ltd. v G and I Construction Group Inc.*, 2025 SKCA 82**

**Date: 2025-09-03**

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Between:

**Ace Burger Ltd., 102072408 Saskatchewan Ltd., Cole Dobranski, Bradley Miller  
and Blair Voth Miller**

*Appellants  
(Defendants)*

And

**G and I Construction Group Inc.**

*Respondent  
(Plaintiff)*

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Before: Jackson and McCreary JJ.A. and MacMillan-Brown J. (ad hoc)

Disposition: Appeal dismissed

Written reasons by: The Honourable Justice Meghan R. McCreary  
In concurrence: The Honourable Justice Georgina R. Jackson  
The Honourable Justice Heather MacMillan-Brown (ad hoc)

On appeal from: QBG-SA-00867-2020 (Sask), Saskatoon  
Appeal heard: October 2, 2024

Counsel: Candice Grant for the Appellant  
Marek Coutu for the Respondent

## McCreary J.A.

### I. INTRODUCTION

[1] This appeal considers a contractor’s claim under a cost-plus construction contract where no initial estimate was requested or provided.

[2] Ace Burger Ltd., 102072408 Saskatchewan Ltd. [2408 Sask], Cole Dobranski, Bradley Miller, and Blair Voth Miller [collectively Ace Burger] entered into an oral agreement with the respondent, G and I Construction Group Inc. [G&I] to renovate a premises for use as a restaurant. The renovations were to be conducted on a cost-plus basis, but without estimates, quotations, or a stipulated maximum price.

[3] G&I sought payment at the conclusion of the renovations, but Ace Burger disputed the amount charged. Thereafter, G&I commenced an action for the balance it claimed was outstanding. Through a summary judgment application, a judge of the Court of King’s Bench sitting in Chambers granted judgment in G&I’s favour (*G and I Construction Group Inc. v Ace Burger Ltd*, 2023 SKKB 214) [*Decision*], in the amount of \$67,364.05, plus pre-judgment interest and costs.

[4] Ace Burger now appeals from that judgment, arguing that the Chambers judge erred in several ways, including, by failing to apply the law governing cost-plus contracts correctly.

[5] For the reasons that follow, I would dismiss the appeal. The Chambers judge did not err in any of the ways Ace Burger alleges.

### II. FACTS

[6] Cole Dobranski, Bradley Miller, and Blair Voth Miller own and operate Ace Burger Ltd. and 2408 Sask. They sought to open a restaurant called “Ace Burger” and, in April 2019, acquired Saskatoon premises for that purpose [the Restaurant]. The premises had formerly been used as a restaurant, but further renovations were required.

[7] 2408 Sask hired G&I to renovate the Restaurant, having worked with G&I and one of their principals, Ricky Iula, on two past restaurant renovations. The parties entered into a verbal

agreement that G&I would complete renovations to the Restaurant and would be paid on a cost-plus basis, with a markup of 10%. No estimates or quotations were sought or provided before G&I began the renovations, or during the renovations.

[8] In its factum, Ace Burger describes the renovations as being comprised of “some minor repairs and cosmetic updates”; G&I disagrees with this characterization. Nevertheless, it is common ground that the renovations consisted of the following work:

- (a) demolition and disposal of existing materials and fixtures;
- (b) construction of a patio deck attached to the Restaurant, and provision of all materials pertaining thereto;
- (c) electrical work, including (but not limited to) installation of outlets, light fixtures, and audio equipment;
- (d) plumbing work, including (but not limited to) installation of water service, sinks, bathroom fixtures, and toilets;
- (e) drywall work, including (but not limited to) framing, boarding, taping, patching, and repairs;
- (f) fabrication and installation of cabinets, slat walls, garbage cans, and countertops;
- (g) provision and installation of countertops for serving counters, garbage cans, and tables;
- (h) flooring and subway tile;
- (i) interior trim, including (but not limited to) a metal barn door and hardware, interior doors and handles, and other pine trim and MDF jamb and baseboards;
- (j) painting throughout the Restaurant; and
- (k) provision of tables inside the Restaurant and outside on the patio deck.

[9] The renovations began on May 1, 2019, and were completed on or about June 27, 2019. To complete the renovations, G&I engaged the services of various subcontractors and suppliers – 18 in all – whom G&I paid directly.

[10] Beginning in July of 2019, G&I provided 2408 Sask with several different final invoices for the renovations to the Restaurant. None of these invoices were entirely consistent and Ace Burger raised concerns with all the invoices that G&I issued.

[11] G&I's first invoice to 2408 Sask was for approximately \$154,000.00. Thereafter, G&I sent an additional invoice bringing the total cost of the renovations closer to \$175,000.00. There was some dispute about when G&I sent the invoices, and a further dispute arising from the fact that there were four different versions of the same invoice. Ace Burger requested clarification respecting the invoices it had received and this resulted in G&I providing updated invoices that demonstrated its costs in more detail. When providing additional detail to the invoices, G&I also discovered that it had made some errors – for example, erroneous sales tax calculations—and those errors were corrected through an updated invoice.

[12] Ace Burger made only two payments, totaling \$75,000, taking the position that it would not pay more until G&I had provided more detail respecting its accounts. On October 11, 2019, a fourth and final version of an invoice (Invoice 1835279), in the amount of \$144,961.45, was provided by G&I to 2408 Sask. G&I explained that the total of the new invoice reflected discounts it had negotiated with subcontractors and suppliers (totaling \$8,996.00) and that it had also provided an additional discount of \$19,800.00, for a total reduction in its final account of \$28,796.00. Nonetheless, Ace Burger continued to refuse to make any further payment.

[13] Thereafter, G&I sued Ace Burger for non-payment on the balance it claimed was owing of \$83,113.66, plus pre-judgment interests and costs. This amount reflected G&I's position that the \$19,800 discount reflected on Invoice 1835279 was offered as a gesture of good faith with a view to reaching a settlement, was subject to settlement privilege, and was therefore not applied to G&I's request for relief in its claim. After filing its claim, G&I applied for summary judgment.

### III. THE CHAMBERS DECISION

[14] The Chambers judge granted judgment in G&I's favour, determining that it had proven its account. He began by finding that G&I and 2408 Sask had entered into a verbal contract for G&I to renovate the Restaurant on a cost-plus basis. He concluded that no estimates or quotations had been provided, nor was there a stipulated maximum price. He also found that G&I fully completed the renovations, and that its work was not deficient.

[15] After identifying these key terms of the parties' cost-plus contract, the Chambers judge considered the relevant legal principles governing the interpretation of cost-plus contracts. While noting that disputes in cost-plus construction contracts are fact specific, he accepted (and both parties agreed) that guidance could be drawn from *Infinity Construction v Skyline Executive Acquisitions Inc.*, 2020 ONSC 77 at para 114, 6 CLR (5th) 110 [*Infinity Construction*]. In that case, Healy J. summarized principles to be considered when deciding disputes concerning cost-plus contracts. The Chambers judge reproduced and adopted portions of those principles as follows (*Decision* at paras 61 and 62, emphasis added and citations omitted by Chambers judge):

[114] It is fair to say that the body of case law arising from disputes connected to cost-plus contracts is fact specific. However, I draw the following principles from the authorities to which counsel has directed the court:

- a) even in an open-ended, cost-plus contract, there is still an obligation on the part of the parties to exercise a degree of diligence in carrying out the work so that they do not incur costs significantly higher than the estimate without prior approval;
- b) In open-ended cost-plus contracts, courts will imply terms preventing payment for wasteful or uneconomic use of labour and materials;
- c) Where there is an estimate that provides a guide-post, the final price should fall somewhere near the estimate. The degree of variance between the estimate and the final price is subject to the "bounds of reasonableness", which will be circumstance specific;
- d) Factors that go into assessing the "bounds of reasonableness" will depend on the size of the project, its uniqueness, the number of different cost inputs, and whether each cost input was reasonably ascertainable. There will be a narrower band of reasonable variance where the project comprises numerous input costs where variability in each may offset each other to a degree, and a wider band of reasonable variance the more unique the subject matter of the project;
- e) In assessing the role played by the estimate in the parties' agreement, various criteria should be examined. These include the circumstances in which the estimate was given, whether the owner communicated that price was of overriding importance, the knowledge and expertise of the party providing the estimate, whether it was relied upon by the party requesting it, whether the owner required the contractor to design a project at a specified cost or seek assurances as to what

the project will cost, whether the agreement provided for a percentage of the project cost as a fee to the contractor, whether the contractor made it clear that it was not assuming any of the risk that the estimate might be exceeded, whether the contractor provided the owner with information regarding rates for labour, equipment rental and materials, and whether the owner encouraged the contractor to proceed with the construction despite actual or constructive knowledge that the estimate would be exceeded;

f) The inclusion of a process in the contract for approving extras before they would be constructed implies that there would be a degree of certainty around an estimate;

g) The relative sophistication and knowledge of the parties is important in determining the degree to which the party should be required to adhere to the estimate;

h) A contractor is obliged to promptly notify an owner if there are cost overruns to a budget estimate in a cost-plus contract;

i) Alterations in the work directed while it is in progress by the owner or the owner's agent are to be paid for on the cost-plus basis prevailing for the original contract if no special agreement is entered into for the price of such alterations;

j) Where a contractor is seeking to recover on a cost-plus basis the evidentiary burden of proving these costs is a heavy one;

k) It is not necessary that the accounts be kept in any particular manner or to a high standard, but well enough to show proof of the contractor's charges;

l) Once a contractor proves that he has kept proper accounts and is able to show supporting documentation, the onus shifts to the opposing party to adduce evidence to show that the amounts claimed or the accounts are incorrect or unreliable;

m) Once doubt is cast upon the accounts the onus shifts back to the contractor to satisfy the court that his accounts are accurate and support his claim. If the court is left in doubt, he fails; and

n) As far as materials are concerned, so long as the building is in existence and the system of recording material is capable of providing a substantially accurate result, the court may find that the plaintiff has proved his claim upon evidence somewhat less conclusive. The records of the time of the workmen employed must be strictly proved since it is difficult to verify after the fact.

(Emphasis added)

[62] It is obvious that not all the above principles apply in this case. For that reason, I have emphasized the principles that, either directly or indirectly, afford applicable guidance in the matter before me.

[16] The Chambers judge also relied on *G.T. Parmenter Construction Ltd. v Sanders*, [1947] OWN 539 (Ont H Ct J) [*G.T. Parmenter*] as support for the proposition that a contractor in a cost-plus contract is obliged to keep proper accounts, but is not required to do so in any particular manner. In considering a contractor's obligation with respect to proving its accounts on a cost-plus job, the Chambers judge stated:

[64] As I read the above passage [from *G.T. Parmenter* at para 10], I discern that the described accounting for costs, particularly of time records, pertains principally to the contractor's internal costs, which should be strictly proved – not the internal costs of subcontractors and suppliers. This is not to say that the contractor has no duty to question subcontractor and supplier charges where they appear questionable. Even without the contract stipulating it, a court will imply such a duty. That said, a contractor will meet this duty as long as reasonable diligence is exercised.

[17] Noting the tension between the parties resulting from the confusion created by G&I rendering inconsistent invoices, as well as Ace Burger's "overscrupulous and somewhat pedantic scrutiny of the costs incurred" (*Decision* at para 65), the Chambers judge reasoned as follows:

[68] Having said all this, the evidence persuades me that the plaintiff obviously incurred costs to carry out renovations that met the scope of work expected by the defendant. I am also persuaded that the costs and the fee or markup for the plaintiff's services exceeds the \$75,000 paid by the defendant. As to the precise amount of the costs, the question arises as to which version of Invoice 1835279 is the most accurate, or whether it is necessary for the Court to parse through all the invoices and related evidence to determine a reasonable amount.

[18] The Chambers judge held that G&I had proven its claim, despite the multiple invoices it had issued. He attributed the number of confusing invoices to the casual nature of the arrangement between the parties, but he also noted that Mr. Iula had not been transparent in his efforts to support his claims for the costs incurred prior to the start of litigation. Despite these shortcomings, the Chambers judge was persuaded that G&I incurred costs to conduct the renovations which exceeded the \$75,000.00 paid by Ace Burger, and that the said renovations met the expectations of Ace Burger. Regarding the exact amount that remained owing, the Chambers judge saw his task as determining whether any of the different versions of the final invoices were accurate, or whether G&I must prove its costs through other means. He found that the fourth version of the invoice (Invoice 1835279) was the most reliable, although he made slight modifications to the amount owing, which I discuss below.

[19] In making this determination, the Chambers judge concluded that Mr. Miller's and Mr. Dobranski's views of the reasonableness of G&I's charges should be given little weight, as should the estimates that Ace Burger tendered from other contractors, because this was opinion evidence given by non-experts.

[20] While noting that Ace Burger was dissatisfied with the sufficiency of the discount shown on the fourth version of Invoice 1835279, the Chambers judge was not persuaded that the costs

reflected in that invoice were incorrect or unreliable, or that G&I did not do everything it could to negotiate economical terms with subcontractors and suppliers, particularly given the discount it offered. As such, the Chambers judge determined that the fourth version of Invoice 183759, totalling approximately \$116,000.00 (after the application of the \$19,800 discount offered by G&I, and prior to adding G&I's markup and applicable taxes) represented the most accurate view of the costs incurred for the completion of the renovations. In particular, the Chambers judge stated as follows:

[74] I appreciate that the defendant remains unhappy with the amount charged in the fourth version of Invoice 1835279. That said, I am not persuaded that their criticism of the amount charged, without further and better evidence, is sufficient to meet the burden of showing that the costs reflected in that version were incorrect or unreliable. Moreover, the evidence does satisfy me that, as imperfectly as the plaintiff conducted itself in this transaction, it did what it could to negotiate reasonable terms with its subcontractors and suppliers.

[21] Accordingly, the Chambers judge held that G&I had proven its account for the renovations, in the total amount of \$142,364.05 (adding \$11,660 on account of the agreed-upon 10% markup, and \$14,108.15 for applicable taxes). I note that the Chambers judge's calculation respecting the quantum owed differed slightly from the total claimed in the fourth version of Invoice 1835279. The Chambers judge calculated the total amount owing as follows (*Decision* at para 75):

Itemized costs (including a \$19,800 discount):	\$116,595.90
Markup	\$11,660.00
Total before taxes	\$128,255.90
GST	\$6,412.80
PST	\$7,695.35
Total	\$142,364.05

[22] The difference between G&I's calculation in the fourth version of Invoice 1835279 and the Chambers judge's conclusion respecting the final amount owing is that the Chambers judge applied the 10% to the total amount *after* the discount was accounted for, resulting in the mark up totalling \$11,660, not the approximately \$14,000 claimed by G&I.

[23] The Chambers judge ordered judgment for \$67,364.05, as against 2408 Sask only, together with costs and pre-judgment interest.

#### IV. ISSUES AND STANDARD OF REVIEW

[24] The issues arising in this appeal are as follows:

- (a) Did the Chambers judge err by failing to correctly apply the governing law respecting cost-plus contracts to G&I's claim?
- (b) Did the Chambers judge err by failing to consider, or by misapprehending, relevant evidence respecting the amounts charged by the supplier, Artista Interiors Boutique Ltd. [Artista], for materials provided for the renovations?
- (c) Did the Chambers judge err in his characterization and treatment of the evidence of Mr. Miller and Mr. Dobranski regarding the reasonableness of G&I's costs?
- (d) Did the Chambers judge err by concluding, in the absence of expert evidence, that G&I had proven its claim?

[25] Ace Burger contends that all the issues it raises are questions of mixed fact and law, reviewable on a standard of palpable and overriding error: *Housen v Nikolaisen*, 2002 SCC 33 at para 37, [2002] 2 SCR 235. However, allegations that a judge has failed to apply the law, or that they have misapplied a legal principle, raise questions of law: *Sattva Capital Corp v Creston Moly Corp.*, 2014 SCC 53 at para 53, [2014] 2 SCR 633. As such, Ace Burger's first ground of appeal – whether the Chambers judge failed to apply the correct law or “proper legal test” – is reviewable on a correctness standard. This is a correct statement of the law.

#### V. ANALYSIS

[26] The first issue raised by Ace Burger requires some explanation of the law touching on cost-plus contracts. I turn to that issue first.

##### A. No error applying the law of cost-plus contracts

[27] Ace Burger argues that the Chambers judge failed to “properly apply” the law applicable to cost-plus contracts. It submits that he failed to consider whether G&I met the “threshold issue of demonstrating that the amounts it sought to recover were within the ‘bounds of reasonableness’

as set out in *Infinity Construction*". Additionally, Ace Burger contends that the Chambers judge was required to, but did not, consider and determine whether any of G&I's invoices constituted a wasteful or uneconomical use of labour and materials when he considered whether G&I had demonstrated that it had kept proper accounts.

[28] As the following reasons indicate, I am not persuaded that the Chambers judge erred in his consideration or application of the law of cost-plus contracts or in his conclusion that G&I had proven its costs were accurate and economical.

### 1. Cost-plus contracts

[29] The Chambers judge adopted the 14 principles set out in *Infinity Construction* as governing cost-plus agreements. As these reasons demonstrate, many of those principles do not apply to the circumstances of this case.

[30] *Infinity Construction* is largely distinguishable. This is because no estimate was provided for the work to be performed by G&I to renovate the Restaurant. Given this crucial fact, there is no estimate of total cost – in other words, no *benchmark* – to use as a comparator. The principles enunciated in *Infinity Construction* are, for the most part, related to the task of comparing a quotation or estimate for the work to be performed to the final invoice rendered for the work. Such principles are therefore of limited use here.

[31] Further, *Infinity Construction* may also no longer be the law on one significant point. *Infinity Construction* states that the contractor's evidentiary burden in the first stage of proving its claim is "heavy", and in the third stage, when the onus shifts back to the contractor, the court may find that "the plaintiff has proved his claim upon evidence somewhat less conclusive" (*Infinity Construction* at para 114(j) and (n), emphasis added, relying on *G.T. Parmenter* at para 10 and *Smith v Rzasa*, 2003 CanLII 11743 (Ont Sup Ct) at para 18). I do not accept this characterization of the contractor's burden of proof. In the years since *Infinity Construction* and *G.T. Parmenter* were decided, the Supreme Court of Canada has determined that there is only one civil standard of proof – proof on a balance of probabilities: *F.H. v McDougall*, 2008 SCC 53 at para 53, [2008] 3 SCR 41; see also, *Cosgrove v Saskatchewan Government Insurance*, 2025 SKCA 56 at para 61. Thus, the burden of proof that rests with a plaintiff contractor is always proof on a balance of

probabilities. If a contractor cannot prove that its accounts are accurate on that standard, then its claim must fail.

[32] Nevertheless, I do accept that, as set out in *Infinity Construction*, proving a claim under a cost-plus contract is a three-part process under which, first, a contractor is required to prove that the charges it claims were for the purpose of completing the work contracted for, and that those charges were accurate. If this is demonstrated, then the onus shifts to the opposing party to adduce evidence to suggest that the amounts the contractor claims are incorrect or unreliable. If the opposing party raises evidence that casts doubt upon the contractor's accounts, then the onus shifts back to the contractor to satisfy the court that its accounts are accurate and reliable.

## 2. The law was applied correctly

[33] Returning to the specific errors alleged by Ace Burger, it argues that the Chambers judge failed to correctly apply the law to determine:

- (a) Whether the invoices put forward by G&I constituted wasteful or uneconomical use of labour and materials;
- (b) Whether G&I's overall account fell within the bounds of reasonableness; and
- (c) Whether G&I demonstrated that it had kept proper accounts.

[34] Respectfully, I do not agree that the Chambers judge erred in any of the ways Ace Burger alleges.

[35] First, the Chambers judge *did* acknowledge that the open-ended nature of the cost-plus contract required him to imply terms in the parties' agreement that prevented payment for wasteful or uneconomical use of labour and materials. He emphasized this principle by underlining it, along with other tenets he considered relevant, in the portion of *Infinity Construction* that he reproduced in his reasons (*Decision* at para 62). Thereafter, it is evident from his reasons that he determined the costs incurred by the plaintiff were neither wasteful nor uneconomical because he determined that the evidence did not establish that the costs claimed were "incorrect or unreliable" (*Decision* at para 74). This conclusion was based on his findings that:

- (a) the expenses fell within the scope of the work accepted (*Decision* at para 68);

- (b) G&I did its best to negotiate reasonable terms with its subcontractors and suppliers (*Decision* at para 74);
- (c) there was no admissible evidence to challenge the reasonableness of the costs claimed (*Decision* at para 70); and,
- (d) the principals of Ace Burger had conceded that they did not have concerns about the quality of the work performed (*Decision* at para 28).

[36] Second, I do not agree with Ace Burger’s assertion that the Chambers judge was required to consider whether the costs claimed by G&I were “reasonable”. As I have previously discussed, because no initial estimate was obtained for the work that was to be carried out by G&I, it was not possible to identify any “degree of variance between the estimate and the final price” (*Infinity Construction* at para 114(c)). The reasonableness of the degree of variance between an estimate and the final price is the type of “reasonableness” analysis that is contemplated by *Infinity Construction*, where the court expressly stated that such an analysis applies when an estimate has been given (see para 114(c)). It follows that the “bounds of reasonableness” do not apply to the analysis of G&I’s account. I note that most if not all the decisions relied on by Ace Burger involved scenarios in which the claimant provided an initial estimate before starting the work. Those cases are, therefore, distinguishable. Given that no estimate was provided, G&I was not under a burden to prove the *reasonableness* of the amounts it charged; it was only required to show that its costs were accurate.

[37] Thus, as the Chambers judge correctly identified, the focus at the first stage was to validate G&I’s accounts. The Chambers judge found that G&I proved that its accounts were accurate and reliable. He did not err in so concluding.

[38] Finally, Ace Burger contends that the Chambers judge erred by failing to consider whether G&I had demonstrated that it kept proper accounts. The Chambers judge did not make that error either. On the contrary, he scrutinized the summary invoices rendered by G&I at length in his reasons. He concluded that the fourth version of Invoice 1835279, which included the discounts secured by G&I, accurately demonstrated the charges incurred (*Decision* at paras 73–74). As the Chambers judge stated (relying on *G.T. Parmenter* at para 10), G&I was required to exercise

reasonable diligence by questioning subcontractors and supplier charges when they appeared questionable. By doing this, it ensured that charges from subcontractors and suppliers were not wasteful. However, beyond that, all that G&I was required to prove was its internal costs. G&I did not have to prove the costs of the subcontractors beyond providing invoices to demonstrate that it had exercised reasonable diligence in its retainer of the subcontractors.

[39] In summary on this issue, the Chambers judge did not err in his consideration or application of the legal principles that applied to the cost-plus contract between Ace Burger and G&I. It follows that this ground of appeal must fail.

### **B. No error in treatment of Artista invoices**

[40] Artista supplied materials to G&I in its work to complete the renovations and charged G&I for same. G&I passed these charges on to 2408 Sask. Ace Burger contends that the Chambers judge erred by not expressly vetting the Artista invoices because it was common ground that Artista was a related party to G&I. Ace Burger says that the Chambers judge's failure to expressly comment on the Artista invoices constitutes a misapprehension of the evidence, or a failure to consider relevant evidence, which it classifies as an error of mixed fact and law. It argues that had the Chambers judge expressly scrutinized the Artista invoices, this evidence would have served to cast doubt on the reliability, accuracy, and/or economical nature of G&I's accounts at stage two of the inquiry.

[41] Respectfully, the Chambers judge did not err by not expressly touching on the Artista invoices in his reasons. To succeed on this ground of appeal, Ace Burger must demonstrate that in not addressing the Artista invoices, the Chambers judge made an error that significantly impacted the outcome: see *Saskatchewan (Highways and Infrastructure) v Venture Construction Inc.*, 2020 SKCA 39 at para 34, 447 DLR (4th) 316. Merely pointing out that G&I and Artista are related entities and speculating that, therefore, Artista might not have charged market-value for what it supplied does not establish that the Chambers judge made a palpable and overriding error.

[42] The record shows that Ace Burger did not introduce any evidence to suggest that Artista had charged above-market rates for the goods it supplied to G&I in the renovations, or that otherwise challenged the accuracy, reliability or value of the amounts charged by Artista. As such,

there was nothing before the Court to allow the Chambers judge to find that the amounts charged by Artista were inaccurate or were otherwise wasteful or uneconomical, leaving no reason for the Chambers judge to expressly comment on the Artista invoices.

[43] Finally, I note that the Chambers judge's reasons suggest that he did consider the costs submitted by Artista because he reflected on the balance of the subcontractor and supplier invoices, confirming that the evidence satisfied him that G&I "did what it could to negotiate reasonable terms with its subcontractors and suppliers" (*Decision* at para 74). There is no reason to conclude that the Chambers judge was excluding Artista, a supplier, from other subcontractors and suppliers when he made this statement.

[44] For these reasons, the Chambers judge did not err in his treatment of the evidence respecting Artista. This ground of appeal must also fail.

### **C. No error in treatment of the evidence of Mr. Miller and Mr. Dobranski**

[45] In its third ground of appeal, Ace Burger contends that the Chambers judge erred by stating that he would not treat certain evidence from Mr. Miller and Mr. Dobranski respecting whether the cost of the renovations was reasonable as expert opinion evidence. Ace Burger argues that it did not tender Mr. Miller's or Mr. Dobranski's evidence as expert evidence, and that the information provided in their affidavits was factual and related to their experience with the restaurant renovations and with other projects of a similar nature. In sum, Ace Burger argues that the Chambers judge erred by characterizing this evidence as opinion evidence and then refusing to give it weight.

[46] The Chambers judge had this to say with respect to opinion evidence tendered by Mr. Miller and Mr. Dobranski:

[69] This question brings me then to consider the evidence presented on behalf of 2408 Sask. At the outset, I must comment on the suggestion, implicit in Mr. Miller's affidavit, that this Court should rely upon his expertise in "restaurant builds" in determining the reasonableness of the costs charged. In my view, it would be an error of law for the Court to rely on any such professed expertise. As articulated by the Supreme Court of Canada in *White Burgess Langille Inman v Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 SCR 182, the admissibility and consideration of any expert evidence depends, *inter alia*, on the expert having proper qualifications. Those qualifications now include the willingness and ability of the professed expert to provide evidence that is: (1) impartial; (2) independent; and (3) unbiased. These characteristics pertain not only to subjective opinions of a

professed expert, they also speak to the objective appearance of partiality, lack of independence or bias.

[70] In the present case, I declined to strike portions of the defence affidavits that described the views of Mr. Miller and Mr. Dobranski on the reasonableness of the plaintiff's charges. I did so, however, solely on the grounds that they could be received as statements of the defendant's position. This should not be taken as acceptance of those views as properly qualified expert opinion. As qualified as Mr. Miller and Mr. Dobranski might believe themselves to be, that is of no moment for this Court in assessing the reasonableness of the costs incurred. Further, the fact that 2408 Sask put forward estimates of other contractors is of little significance. It would be a much different consideration if those contractors were properly qualified to express opinions on the reasonableness of the plaintiff's charges and went on to express those opinions through sworn affidavits. No such evidence was presented by either party.

[47] Respectfully, the Chambers judge did not err when he determined that certain portions of Mr. Miller's and Mr. Dobranski's affidavits constituted expressions of opinion, upon which he should not rely. It is well established that affidavits from witnesses, other than qualified expert witnesses, must be confined to the facts. Such affidavits should contain neither statements of opinion nor argument. It was within the Chambers judge's authority to conclude that the statements at issue were statements of opinion and to decline to give them weight. I see no error here.

[48] Further, the Chambers judge did not disregard Ace Burger's evidence respecting the reliability or accuracy of G&I's accounts. He expressly noted that his concerns about the opinion evidence from Mr. Miller and Mr. Dobranski did "not apply to deposition on matters of fact that are clearly distinguished from matters of expert opinion" (*Decision* at para 71), going on to note that statements in their affidavits with respect to the discrepancies contained in G&I's invoices were admissible.

[49] As such, the Chambers judge neither erred by disregarding admissible evidence nor by determining that he would place no weight on unqualified statements of opinion. It follows that this ground of appeal must also fail.

**D. Expert evidence is not required to conclude that a contractor's account is accurate**

[50] Finally, Ace Burger argues that the Chambers judge erred by holding, in the absence of expert evidence, that the value of the work performed by G&I was reasonable.

[51] No party submitted any expert evidence. Ace Burger proffered two estimates from contractors who were not qualified as experts and asked the Court to find that G&I's expenses were unreasonable, in part, because of this evidence. The Chambers judge concluded that the estimates proffered were of little significance, but commented that he would have afforded them more weight if the contractors had been properly qualified to express their opinions (*Decision* at para 70).

[52] Ace Burger suggests that it was absurd for the Chambers judge to have accepted G&I's sworn assertion that it incurred the invoiced expenses in the completion of the renovations, but then to have suggested that Ace Burger should have provided expert evidence to demonstrate that those expenses were not reasonable. It says that doing so improperly placed the burden of proof on Ace Burger to disprove the "reasonableness" of G&I's account and was an error.

[53] I am not persuaded that the Chambers judge erred as Ace Burger alleges. The Chambers judge found that G&I had met "the burden of showing that the costs reflected in [its invoice] were [not] incorrect or unreliable". He also found that G&I had negotiated "reasonable terms with its subcontractors and suppliers" (*Decision* at para 74). Again, because no estimate existed to compare against the final cost of the renovations, the reasonableness of G&I's final account was not at issue. What was at issue was the accuracy and reliability of G&I's accounts.

[54] At the first stage of the inquiry into whether costs are proven under a cost-plus contract, a contractor does not need expert evidence to prove the accuracy of its costs. At this stage, the plaintiff contractor's obligation is to establish that its costs were incurred for the work being performed under the contract and the costs claimed are accurate. This requirement must be met before the onus shifts to the opposing party to demonstrate that the costs incurred are incorrect, unreliable, or otherwise wasteful. As was identified by the Chambers judge, it is at this *second* stage of the review where expert evidence might assist, particularly if the opposing party is attempting to demonstrate that a cost claimed was wasteful or unreasonable. In such circumstances, a comparable might be useful. However, a comparable often involves an expression of opinion – which, in litigation, needs to be a qualified (expert) opinion. This is what the Chambers judge was getting at when he noted in *Decision* at para 70 that the evidence put forward by 2408 Sask of

estimates provided by other contractors was opinion evidence. For such evidence to be admissible, it must come from a properly qualified expert.

[55] The Chambers judge's observation that a comparable estimate involved an expression of opinion – and that such an opinion needs to be proffered by an expert – did not improperly shift the burden of proof onto Ace Burger. Although the parties presented argument on the question of the nature of the burden of proof and its shifting character, in most cases where a judge is called upon to decide an issue in civil litigation, the burden of proof seldom matters. To this end, in *Yorkton (City) v Mi-Sask Industries Ltd.*, 2021 SKCA 43, [2021] 6 WWR 18, Barrington-Foote, J.A. provided a helpful overview of the differences between the various burdens of proof, and then said:

[34] However, the question of who bears the persuasive burden is generally of no moment in a civil proceeding. Simply put, if the trier of fact can reach a conclusion in relation to an issue, the persuasive burden does not play a part in the decision-making process. It is only if the judge cannot reach a conclusion because the evidence is so evenly balanced that the persuasive burden becomes relevant. In those circumstances, the party that bears but has failed to discharge the persuasive burden will lose on that issue: *Cop v Saskatchewan Government Insurance*, 2019 SKCA 75 at para 53, [2019] 2 WWR 396.

[56] The Chambers judge determined that, on a balance of probabilities, G&I had established the accuracy and economical nature of its accounts. He expressly commented that there was no admissible evidence to challenge the reasonableness of the costs claimed (*Decision* at para 70). Thus, the shifting burden of proof was of no consequence because, on the whole of the admissible evidence, the Chambers judge concluded that G&I had proven its claim.

[57] In conclusion on this point, the Chambers judge did not err by holding that G&I had adequately proven the accuracy of its accounts, nor did he improperly shift the burden of proof onto Ace Burger. This ground of appeal must also fail.

