CITY OF SCOTTSBLUFF, A MUNICIPAL CORPORATION, APPELLEE, V. WASTE CONNECTIONS OF NEBRASKA, INC., APPELLANT.

809 N.W.2d 725

Filed December 9, 2011. No. S-10-753.

1. **Contracts: Parties: Intent: Words and Phrases.** The term "implied contract" refers to that class of obligations that arises from mutual agreement and intent to promise, when the agreement and promise have simply not been expressed in words. An implied contract arises where the intention of the parties is not expressed but where the circumstances are such as to show a mutual intent to contract.
2. **Contracts: Intent.** If the parties' conduct is sufficient to show an implied contract, it is just as enforceable as an express contract.
3. **Contracts.** A claim that the parties created an enforceable contract generally presents an action at law.
4. **Contracts: Restitution: Unjust Enrichment.** A claim that a court should imply a promise or obligation to prevent unjust enrichment is sometimes referred to as an "implied-in-law contract" or a "quasi-contract." Quasi-contract claims are restitution claims to prevent unjust enrichment.
5. **Contracts: Restitution.** Any quasi-contract claim for restitution is an action at law.
6. **Actions: Contracts: Equity: Restitution.** An action in assumpsit for money had and received may be brought where a party has received money that in equity and good conscience should be repaid to another. When a party uses an assumpsit action in this sense, it is a quasi-contract claim sounding in restitution.
7. **Judgments: Appeal and Error.** In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. An appellate court does not reweigh the evidence but considers the judgment in a light most favorable to the successful party and resolves evidentiary conflicts in favor of the successful party. And that party is entitled to every reasonable inference deducible from the evidence.
8. ____: ____. An appellate court independently reviews questions of law decided by a lower court.
9. **Contracts.** Contract interpretation presents a question of law.
10. **Contracts: Restitution.** When a plaintiff claims that a contract governs the parties' rights and obligations and, alternatively, that it is entitled to restitution under a quasi-contract claim, a court should address the contract claim first.
11. **Contracts: Restitution: Unjust Enrichment.** Restitution is subordinate to contract as an organizing principle of private relationships, so the terms of an enforceable agreement normally displace any claim of unjust enrichment within their reach.
12. **Contracts: Parties: Intent.** To create a contract, there must be both an offer and an acceptance; there must also be a meeting of the minds or a binding mutual understanding between the parties to the contract.

13. **Contracts: Parties.** A binding mutual understanding or meeting of the minds sufficient to establish a contract requires no precise formality or express utterance from the parties about the details of the proposed agreement; it may be implied from the parties' conduct and the surrounding circumstances.
14. ____: ____. Unless the parties have stated otherwise in an express agreement, extrinsic standards can only provide a basis for understanding a contract.
15. **Breach of Contract: Parties: Intent.** The circumstances must show that the parties manifested an intent to be bound by a contract. Their manifestations are usually too indefinite to form a contract if the essential terms are left open or are so indefinite that a court could not determine whether a breach had occurred or provide a remedy.
16. **Contracts: Parties: Intent.** If the parties' manifestations or conduct shows that they do not intend to be bound by a contract unless they agree upon the price for services and they fail to agree, there is no contract.
17. **Contracts: Proof.** The standard of proof for a quasi-contract claim is a preponderance, or proof by the greater weight, of the evidence.
18. **Restitution: Unjust Enrichment.** To recover under a theory of unjust enrichment, the plaintiff must allege facts that the law of restitution would recognize as unjust enrichment.
19. **Unjust Enrichment: Words and Phrases.** Unjust enrichment means a transfer of a benefit without adequate legal ground. It results from a transaction that the law treats as ineffective to work a conclusive alteration in ownership rights.
20. **Duress.** Normally, a plaintiff cannot recover money voluntarily paid under a claim of right to payment if the plaintiff knew of facts that would permit the plaintiff to dispute the claim and withhold payment. But exceptions exist if the plaintiff shows that its consent was imperfectly voluntary, or ineffective, for a legally recognized reason.
21. **Unjust Enrichment: Restitution: Duress.** Duress is an exception to the voluntary payment rule. If a plaintiff's overpayment to the defendant was induced by duress, the plaintiff can seek restitution to the extent that the defendant was unjustly enriched.
22. **Contracts: Parties: Restitution.** If one party to a contract demands from the other a performance that is not in fact due by the terms of their agreement, under circumstances making it reasonable to accede to the demand rather than to insist on an immediate test of the dispute obligation, the party on whom the demand is made may render such performance under protest or with reservation of rights, preserving a claim in restitution to recover the value of the benefit conferred in excess of the recipient's contractual entitlement.
23. **Duress: Words and Phrases.** Duress is coercion that is wrongful as a matter of law. Lawful coercion becomes impermissible when employed to support a bad faith demand: one that the party asserting it knows (or should know) to be unjustified.
24. **Breach of Contract: Parties: Duress.** Economic duress may be found in threats, or implied threats, to cut off a supply of goods or services when the performing party seeks to take advantage of the circumstances that would be created by its breach of an agreement.

25. **Contracts: Duress.** To be voidable because of duress, an agreement must not only be obtained by means of pressure brought to bear, but the agreement itself must be unjust, unconscionable, or illegal.
26. ____: ____. The economic duress rules apply to modifications of a contract.
27. ____: ____. Whether a plaintiff voluntarily or involuntarily made a payment under a claim of right is a question of fact.
28. **Contracts: Parties: Duress.** A weaker party's assent to a unilateral contract modification, which is to that party's disadvantage, should not be implied from its conduct when the weaker party has shown that its assent was obtained through economic duress.
29. **Restitution: Unjust Enrichment.** The measure of restitution is normally a defendant's unjust gain.
30. **Contracts: Courts.** A court will not supply a term necessary to create a binding contract. Nor will a court rewrite a contract or speculate as to terms of the contract which the parties have not seen fit to include. It is not the province of a court to rewrite a contract to reflect the court's view of a fair bargain.
31. **Contracts.** When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court. This rule applies to circumstances showing that the parties to a binding contract have failed to negotiate a term to cover a future contingency.
32. ____. A court should not engage in a hypothetical bargaining analysis if applying interpretative principles shows that the parties did not agree on a contract term necessary to determining their rights and duties. In that circumstance, it must supply a term that comports with community standards of fairness and policy.
33. ____. Good faith performance excludes an abuse of a power to specify the terms of a contract.

Appeal from the District Court for Scotts Bluff County: LEO DOBROVOLNY, Judge. Affirmed in part, and in part reversed and remanded for further proceedings.

Stephen D. Mossman and Patricia L. Vannoy, of Mattson, Ricketts, Davies, Stewart & Calkins, for appellant.

Howard P. Olsen, Jr., and John F. Simmons, of Simmons Olsen Law Firm, P.C., for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

CONNOLLY, J.

I. SUMMARY

This dispute is over the rates that the appellant, Waste Connections of Nebraska, Inc. (Waste Connections), charged

to dispose of solid waste for the City of Scottsbluff (the City). The parties had two separate contracts. Under the first contract, the City's trucks collected the waste and took it to Waste Connections' transfer station. Waste Connections then hauled the waste to a landfill that it operated. After this contract expired, Waste Connections charged the City $42.50 per ton for temporarily accepting its waste at the transfer station. About a month later, Waste Connections increased the City's rate to $60 per ton.

Under the second contract, Waste Connections performed collection and disposal services for the City and charged the same disposal rate that it charged under the first contract. So after the first contract expired, Waste Collections increased the City's rate to $60 per ton under the second contract.

After a bench trial, the district court entered judgment for the City. This appeal presents several contract, quasi-contract, and restitution issues. We affirm in part, and in part reverse and remand for further proceedings.

II. BACKGROUND

Around 1992, the City closed its landfill. To negotiate better rates for using another landfill site, the City and other western communities formed an interlocal organization called SWAP. SWAP is an acronym for Solid Waste Agency of the Panhandle. In November 1996, SWAP contracted with J Bar J Land, Inc., for solid waste disposal services (the SWAP contract) for 10 years, until November 30, 2006. J Bar J Land and another company were Waste Connections' predecessors in interest. Waste Connections acquired the entire operation in 2000, and we will refer only to Waste Connections for ease of discussion.

1. The SWAP Contract

Waste Connections operated a transfer station for collecting and weighing waste from SWAP members before hauling it to its landfill in an over-the-road truck. The SWAP members collected and hauled their solid waste to the transfer station at their own expense. Hauling the waste to the landfill, which was south of Ogallala, Nebraska, required a 200-mile round trip from the transfer station. Waste Connections also collected

the waste for some smaller communities, but the City's waste accounted for about 70 percent of Waste Connection's business. The City wielded most of the voting power on the SWAP board.

The parties amended their agreement in December 1997 and again in November 1998. The amended agreement expired on June 30, 2007. Under the amended agreement, Waste Connections originally charged a $35-per-ton disposal rate. This rate included a base rate of $20.50 per ton, which could increase annually on adjustments pegged to the Consumer Price Index; a scheduled "Tipping Fee," which was paid to the landfill; and a state surcharge. Waste Connections agreed not to charge any SWAP member more than it charged other communities in its service area.

2. Roll-Off Contract

In April 2005, the City entered into an additional and separate contract with Waste Connections, with a 3-year term scheduled to expire on April 30, 2008. The parties refer to this contract as the "roll-off" contract. Under the roll-off contract, Waste Connections leased self-contained compactor units to the City. Waste Connections also provided the City, at no charge, with open roll-off containers for construction waste. The City charged the users of the compactor or roll-off containers; Waste Connections charged the City to collect the units and dispose of their contents at a SWAP-approved facility. The parties agreed that Waste Connections would pay for disposal services under the rate established by the SWAP contract and that the City would reimburse it.

3. Waste Connections Increases Its Rates

Shawn Green, the district manager for Waste Connections, knew that the company's fuel costs would be substantially increasing in January 2006. Beginning in October 2005, the parties disputed the price of Waste Connections' services. Because of increasing fuel costs, Waste Connections sought to increase its rate. The SWAP board refused to agree or only approved a smaller increase. The City began looking at other options and informed Green that it was considering contracting

with the city of Gering, Nebraska, to accept the City's waste at Gering's landfill. Gering was not a SWAP member.

Shortly before the SWAP contract expired, the City informed Green that if the City reached an agreement with Gering, it would terminate the roll-off contract with Waste Connections. Green advised SWAP that Waste Connections wanted another long-term agreement. He offered a 5- or 10-year agreement that allowed the City to retain the lower rate with Consumer Price Index adjustments.

On June 30, 2007, when the SWAP contract expired, Waste Connections' rate was $40.52 per ton. On July 2, the next business day, Waste Connections increased its rate for accepting the City's waste at the transfer station to $42.50 per ton. It charged this rate to any person or entity using the transfer station. The city manager testified that the City knew Waste Connections was losing money and believed that this rate was reasonable.

4. The City Enters Into an Agreement With Gering

Also on July 2, 2007, the City entered into an interlocal agreement with Gering to dispose of its waste at Gering's landfill. Subject to the City's terminating its roll-off contract with Waste Connections, Gering also contracted to provide roll-off and compactor unit services directly to the City's businesses or citizens. But under the landfill agreement, Gering would not begin accepting the City's waste until November 1, 2007. Because of regulatory requirements, Gering could not immediately accept the City's waste. The City did not consider other landfills to be reasonable alternatives to Waste Connections because of their distance or inability to accept the City's volume of waste. So it continued to use Waste Connections' transfer station until Gering could accept the City's waste.

On July 9, 2007, Gering passed a resolution to collect the City's waste, including services for roll-off and compactor units, as soon as the time restriction expired under Neb. Rev. Stat. § 18-1752.02 (Reissue 2007). That section required Gering to wait 1 year, until July 8, 2008, to perform the

collection services that Waste Connections had been performing under the roll-off contract.

On July 10, 2007, Gering notified Waste Connections of its intent to provide the City's waste collection services in 1 year. Green responded that Waste Connections would continue to provide services under the roll-off contract until July 2008 unless otherwise notified.

On August 7, 2007, Waste Connections increased its rate for accepting the City's waste at the transfer station to $60 per ton. It charged the increased rate only to the City. Also in August, Waste Connections increased the disposal rate that it charged the City under the roll-off contract to $60 per ton. Within 2 to 3 weeks of receiving a charge ticket with the increased rate, the City objected to the increase in price. Green responded that the rate reflected its increased costs, including fuel costs. The City terminated its SWAP membership on November 1, when it began taking its waste to Gering's landfill. In May 2008, the City gave Waste Connections 60 days' notice that it was terminating the roll-off contract. The notice stated that the City would consider the contract terminated on July 8.

5. Court's Order

(a) The Court's Award Under the SWAP Contract

In its complaint, the City alleged it was entitled to recover the payments that Waste Connections had received for disposal services above the rate of $42.50 per ton. Under theories of an implied contract and unjust enrichment, the City claimed that Waste Connections received payments in excess of the reasonable value of its services.

Regarding Waste Connections' services under the SWAP contract, the court agreed that Waste Connections had been unjustly enriched by the City's overpayments for its services at the transfer station. The City had continued to pay Waste Connections' charges after it increased its rate to $60 per ton. But the court concluded that the City had protested and had no reasonable alternative but to use the transfer station because of the unexpected delay in gaining access to Gering's landfill. It concluded that the parties had intended to and did continue

their contractual relationship after the SWAP contract expired but had failed to agree on a price.

The court concluded that immediately after the SWAP contract expired, Waste Connections had unilaterally determined that the $42.50-per-ton rate was a reasonable rate. Thus, the court determined that this rate was the best evidence of the reasonable value of its services. It ruled that the City was entitled to the difference between the charges it paid under the reasonable rate of $42.50 per ton and the charges it paid under the unjustified rate of $60 per ton, or $51,280.82. Because it considered the City's payments involuntary under these circumstances, it rejected Waste Connections' defenses of waiver, estoppel, and failure to mitigate.

(b) The Court's Award Under the Roll-Off Contract

The court determined that the roll-off contract was valid and in effect until Gering took over providing those services. It recognized that the disposal rate under the roll-off contract was determined by reference to the SWAP contract and that the roll-off contract failed to specify how the rate would be determined after the SWAP contract expired. The court concluded, however, that the roll-off contract did not authorize Waste Connections to unilaterally increase the disposal rate beyond the last rate that the SWAP board had authorized under the SWAP contract, which was $40.52 per ton. But in its pleadings, the City had asked for the difference in charges between the $42.50-per-ton rate and $60-per-ton rate. So to calculate what Waste Connections should have charged the City, the court used the $42.50-per-ton rate as a judicial admission of the correct charges. It concluded that Waste Connections was unjustly enriched by the amount that it had received above the rate of $42.50 per ton. It awarded the City $48,124.11 for these overpayments.

III. ASSIGNMENTS OF ERROR

Waste Connections assigns that the district court erred as follows:

(1) ruling that the expired SWAP contract controlled the disposal rate under the roll-off contract;

(2) failing to apply a clear and convincing burden of proof to the City's unjust enrichment claim;

(3) concluding that justice and fairness required Waste Connections to refund any charges to the City;

(4) failing to require the City to articulate a specific legal principle permitting it to recover under a theory of unjust enrichment;

(5) finding that after the SWAP contract expired, the reasonable disposal rate was $42.50 per ton;

(6) finding that Waste Connections' fee of $60 per ton was unjust without addressing Waste Connections' reasons for charging the fee;

(7) failing to apply the requirements for an implied contract theory of recovery to the extent that the court relied on this theory;

(8) failing to address Waste Connections' claim that the City should be estopped from claiming that the increased rate was unjust because it had voluntarily paid the charges under this rate;

(9) failing to find that the City had waived its right to recover any of the increased charges by its actions or inactions;

(10) ruling that the City was not required to mitigate its damages for its payments made under the roll-off contract; and

(11) ruling that the evidence failed to show that the City had failed to mitigate its damages.

IV. NATURE OF THE CITY'S CLAIMS

Before addressing Waste Connections' assignments of error, it would be helpful to determine the type of action that is under review and, thus, our standard of review. The parties' arguments and the court's order reflect some confusion about the distinction between implied contracts and quasi-contracts and whether an unjust enrichment claim is an action at law or at equity. So we pause to clarify these issues.

1. Implied Contracts Versus Quasi-Contracts

[1-3] The term "implied contract" refers to that class of obligations that arises from mutual agreement and intent to promise, when the agreement and promise have simply not

been expressed in words. An implied contract arises where the intention of the parties is not expressed but where the circumstances are such as to show a mutual intent to contract.[1] If the parties' conduct is sufficient to show an implied contract, it is just as enforceable as an express contract.[2] A claim that the parties created an enforceable contract generally presents an action at law.[3]

[4] In contrast, a claim that a court should imply a promise or obligation to prevent unjust enrichment is sometimes referred to as an "implied-in-law contract" or a "quasi-contract." A quasi-contract is not a contract. These claims are distinct from implied contract claims. Quasi-contract claims are restitution claims to prevent unjust enrichment.[4] Quasi-contractual obligations do not arise from an agreement. The law imposes them when justice and equity require the defendant to disgorge a benefit that he or she has unjustifiably obtained at the plaintiff's expense.[5] The defendant's liability arises under the law of restitution, not contract.[6] In our analysis, the term "implied contract" refers only to an "implied-in-fact contract."

2. Nature of Quasi-Contract Claims

[5] Although in many contexts the traditional distinctions between law and equity have been abolished, whether an action is one in equity or one at law determines an appellate court's

---

[1] See, *Turner v. Fehrs Neb. Tractor & Equip.*, 259 Neb. 313, 609 N.W.2d 652 (2000); *Kaiser v. Millard Lumber*, 255 Neb. 943, 587 N.W.2d 875 (1999).

[2] See Restatement (Second) of Contracts § 4 & comment *a*. (1981).

[3] See, *Donaldson v. Farm Bureau Life Ins. Co.*, 232 Neb. 140, 440 N.W.2d 187 (1989); *Gard v. Pelican Publishing Co.*, 230 Neb. 656, 433 N.W.2d 175 (1988).

[4] See 1 Dan B. Dobbs, Dobbs Law of Remedies § 4.2(3) (2d ed. 1993).

[5] See, *Professional Recruiters v. Oliver*, 235 Neb. 508, 456 N.W.2d 103 (1990); *Siebler Heating & Air Conditioning v. Jenson*, 212 Neb. 830, 326 N.W.2d 182 (1982), quoting 66 Am. Jur. 2d *Restitution and Implied Contracts* § 2 (1973); *First Nat. Bank v. Fairchild*, 118 Neb. 425, 225 N.W. 32 (1929); Dobbs, *supra* note 4, § 4.1(1).

[6] Restatement (Third) of Restitution and Unjust Enrichment § 1, comment *a*. (2011).

scope of review.[7] As stated, quasi-contract claims are restitution claims. Historically, restitution, in different forms, developed separately in both courts of law and courts of equity.[8] All quasi-contract claims developed out of the assumpsit form of action, which a party brought in a court of law.[9] So we hold that any quasi-contract claim for restitution is an action at law.[10]

3. Claims Presented in City's Complaint

Without attempting to characterize the City's action, Waste Connections agrees that this is an action at law. But it argues that it is not a contract action. Some of the City's claims, however, are enforceable contract claims. The City alleged that the parties continued to perform their obligations under the SWAP contract after it expired. The parties litigated this issue at trial, and the court ruled that the parties had continued their relationship under the SWAP contract. The court also ruled that the roll-off contract was valid and in force. So we consider enforceable contract claims to be a part of this action.[11] As stated, the City's claim that the parties created an enforceable contract is an action at law.[12]

But the City also purported to raise two separate theories of recovery: an implied contract and unjust enrichment. It alleged that an agreement that the City would pay the reasonable value of Waste Connections' services was implied. And it alleged that Waste Connections had been unjustly enriched by its excessive charges. But the City did not claim that Waste Connections had breached an implied contract. Instead, it asked the court to order Waste Connections to disgorge the City's overpayments that it had received.

---

[7] See *State ex rel. Wagner v. Amwest Surety Ins. Co.*, 274 Neb. 121, 738 N.W.2d 813 (2007).

[8] See Dobbs, *supra* note 4, §§ 1.1 and 1.2.

[9] See *id.*, §§ 4.2(1) and 4.2(3).

[10] See Restatement (Third) of Restitution and Unjust Enrichment, *supra* note 6, § 4, comments *c.* and *d.*

[11] See Neb. Ct. R. Pldg. § 6-1115(b).

[12] See, *Donaldson, supra* note 3; *Gard, supra* note 3.

[6] We have held that

> [a]n action in assumpsit for money had and received may be brought where a party has received money [that] in equity and good conscience should be repaid to another. In such a circumstance, the law implies a promise on the part of the person who received the money to reimburse the payor in order to prevent unjust enrichment.[13]

When a party uses an assumpsit action in this sense, it is a quasi-contract claim sounding in restitution. Restitution is predominantly the law of unjust enrichment.[14] And we have stated several times that an assumpsit action for money had and received is an action at law.[15]

Because the City sought to disgorge overpayments to prevent unjust enrichment, its allegations presented an assumpsit claim for restitution[16] under the alleged continuation of the SWAP contract and the roll-off contract. And the court granted restitution by imposing a quasi-contractual obligation. We conclude that the City's purported separate theories of "implied contract" and "unjust enrichment" claims presented a quasi-contract claim, which is an action at law.

V. STANDARD OF REVIEW

[7-9] In a bench trial of a law action, the trial court's factual findings have the effect of a jury verdict and will not be disturbed on appeal unless clearly wrong. We do not reweigh the evidence but consider the judgment in a light most favorable to the successful party and resolve evidentiary conflicts in favor of the successful party. And that party is entitled to every reasonable inference deducible from the evidence.[17] But

---

[13] *In re Margaret Mastny Revocable Trust*, 281 Neb. 188, 201, 794 N.W.2d 700, 711 (2011).

[14] Restatement (Third) of Restitution and Unjust Enrichment, *supra* note 6, § 1, comment *b*.

[15] See, e.g., *Kissinger v. Genetic Eval. Ctr.*, 260 Neb. 431, 618 N.W.2d 429 (2000).

[16] See *Fackler v. Genetzky*, 257 Neb. 130, 595 N.W.2d 884 (1999).

[17] See *Hastings State Bank v. Misle, ante* p. 1, 804 N.W.2d 805 (2011).

we independently review questions of law decided by a lower court.[18] Contract interpretation presents a question of law.[19]

VI. ANALYSIS

1. Charges for Disposal Services at the Transfer Station After the SWAP Contract Expired

(a) The Parties Were Not Bound by the Terms of the Expired SWAP Contract

Waste Connections argues that the court erred in concluding that it could not charge $60 per ton, because the SWAP contract no longer governed the price of its services. It argues that the SWAP contract expired by its terms on June 30, 2007. The City concedes that the SWAP contract expired on this date. But it contends that because Waste Connections continued to provide services and the City continued to use its services, an implied contract arose between the parties that required the City to pay the reasonable value of the disposal services.

[10,11] When a plaintiff claims that a contract governs the parties' rights and obligations and, alternatively, that it is entitled to restitution under a quasi-contract claim, a court should address the contract claim first. We have held that a contract claim will supersede a quasi-contract claim arising out of the same transaction to the extent that the contract covers the subject matter underlying the requested relief.[20] Stated differently, restitution is subordinate to contract as an organizing principle of private relationships: "[T]he terms of an enforceable agreement normally displace any claim of unjust enrichment within their reach."[21] So we first address the City's claim that the parties were continuing to perform their SWAP contract obligations.

---

[18] *Johnson v. Johnson, ante* p. 42, 803 N.W.2d 420 (2011).

[19] See *Brook Valley Ltd. Part. v. Mutual of Omaha Bank*, 281 Neb. 455, 797 N.W.2d 748 (2011).

[20] See *Professional Recruiters, supra* note 5.

[21] Restatement (Third) of Restitution and Unjust Enrichment, *supra* note 6, § 2, comment *c*. at 17.

The parties obviously could have agreed to extend the SWAP agreement before it expired.[22] But the contract did not provide for automatic renewals, and the City concedes that it expired. Whether they intended to be bound by a new contract with the same terms presents a factual question, and, except in the clearest cases, the question is for the finder of fact to resolve.[23]

Following the City's lead, the court mistakenly conflated the implied contract claim with the City's quasi-contract claim. But the question is, aside from whether Waste Connections was unjustly enriched: Did the circumstances show that the parties intended to be bound by the same terms of their expired contract?

[12,13] To create a contract, there must be both an offer and an acceptance; there must also be a meeting of the minds or a binding mutual understanding between the parties to the contract.[24] A binding mutual understanding or meeting of the minds sufficient to establish a contract requires no precise formality or express utterance from the parties about the details of the proposed agreement; it may be implied from the parties' conduct and the surrounding circumstances.[25]

In limited circumstances, the parties' failure to specify an essential term does not prevent the formation of a contract. The Restatement (Second) of Contracts[26] provides that "the actions of the parties may show conclusively that they have intended to conclude a binding agreement, even though one or more terms are missing or are left to be agreed upon." The parties' reference to an extrinsic standard can render an essential term reasonably certain.[27] Sometimes, a court can also ascertain

---

[22] See, *Pennfield Oil Co. v. Winstrom*, 272 Neb. 219, 720 N.W.2d 886 (2006); *Moreland v. Transit Auth. of Omaha*, 217 Neb. 775, 352 N.W.2d 556 (1984).

[23] See *Gerhold Concrete Co. v. St. Paul Fire & Marine Ins.*, 269 Neb. 692, 695 N.W.2d 665 (2005).

[24] *Id.*

[25] *Id.*

[26] Restatement (Second) of Contracts, *supra* note 2, § 33, comment *a*. at 92.

[27] See, *Gerhold Concrete Co., supra* note 23; *Davco Realty Co. v. Picnic Foods, Inc.*, 198 Neb. 193, 252 N.W.2d 142 (1977).

the meaning of a party's promise by referring to the parties' course of dealing with each other, or a general reasonableness standard.[28]

[14-16] But unless the parties have stated otherwise in an express agreement, extrinsic standards can only provide a basis for understanding a contract.[29] The circumstances must still show that the parties manifested an intent to be bound by a contract. And their manifestations are usually too indefinite to form a contract if the essential terms are left open or are so indefinite that a court could not determine whether a breach had occurred or provide a remedy.[30] "The more important the uncertainty, the stronger the indication is that the parties do not intend to be bound[.]"[31] As relevant here, if the parties' manifestations or conduct shows that they do not intend to be bound by a contract unless they agree upon the price for services and they fail to agree, there is no contract.[32]

We agree with Waste Connections that the parties were not operating under the terms and conditions of the expired SWAP contract, despite failing to agree on the price of services. The parties' conduct showed that the price of services would have been an essential term to any agreement to extend that contract and that Waste Connections never agreed to be bound by those terms. Moreover, their conduct did not show an intent to be bound by the expired contract in any other sense. So the court was clearly wrong in concluding that Waste Connections was accepting the City's waste at the transfer station under an implied agreement to continue the terms of the SWAP contract.

(b) An Implied Contract Existed for Temporary Services

Despite the court's incorrect conclusion that the parties were operating under the terms of the expired SWAP contract,

---

[28] See Restatement (Second) of Contracts, *supra* note 2, § 33.

[29] See, e.g., *id.*, § 223.

[30] See *id.*, § 33.

[31] *Id.*, comment *f.* at 95.

[32] See *id.*, comment *e.*

the evidence showed that the parties were operating under an implied contract for temporary disposal services. But the new contract did not require the court to supply a missing term.

The city manager testified that he believed the parties were operating under the SWAP agreement based on his conversations with Green, the district manager for Waste Connections. Because of these conversations, he understood that Waste Connections would continue to accept the City's waste at the transfer station and that the City would pay for its services. The city manager clearly meant that Waste Connections would continue to accept the City's waste until the Gering landfill was available because after this date, the City would be using Gering's landfill. And Green knew that Waste Connections would be providing its services only until the Gering landfill became available to the City in November.

These negotiations established that Waste Connections had agreed to temporarily accept waste from the City's trash trucks at its transfer station until November 1, 2007. Green testified that before the SWAP contract expired, he had informed the mayor that if the parties did not reach an agreement for a SWAP contract, the price of Waste Connections' services would go up substantially. Immediately after the SWAP contract expired, Waste Connections increased its rate at the transfer station to $42.50 per ton. This price was reflected on each charge slip that the City's drivers received from the transfer station and on the City's monthly invoice. The City manifested its assent to Waste Connections' price by paying for its services without protest.

It is true that Waste Connections simultaneously raised its price to $42.50 per ton for any individual customer bringing solid waste to the transfer station. But despite that action, Waste Connections would not have accepted the City's volume of waste without planning, and its negotiations with the City showed that it was not treating the City as just another customer. If that were true, in August 2007, it would have also raised its price to $60 per ton for all customers. In sum, the evidence showed that the parties negotiated for services, that the City assented to Waste Connections' price ($42.50 per ton), and that an implied contract existed between the parties for temporary disposal services at the transfer station.

Although the City continued to pay for Waste Connections' services when it increased the disposal rate to $60 per ton, it did so under protest. The City's restitution claim raised only the $60-per-ton disposal rate. Having determined that an implied contract for temporary services existed, we consider Waste Connections' claims that the court incorrectly applied unjust enrichment principles.

(c) Standard of Proof for Quasi-Contract Claims

Before reaching the merits of Waste Connections' challenge to the unjust enrichment ruling, we address its argument that the court erred in failing to require clear and convincing proof for any unjust enrichment claim. Waste Connections contends that a clear and convincing standard of proof applied here. But the cases it cites show only that we have applied a clear and convincing burden of proof in actions to impose a constructive trust for the defendant's alleged fraud or constructive fraud.[33]

[17] An action to impose a constructive trust is an equitable action.[34] In contrast, we do not impose a clear and convincing burden of proof for fraud claims in actions at law.[35] As discussed, a quasi-contract claim is an action at law. We recognize that some courts have imposed a clear and convincing standard of proof in actions to avoid a contract because of duress.[36] But the City was not seeking to avoid a contract. It was seeking to recover an overpayment under a valid contract to prevent unjust enrichment. Courts generally require proof by a preponderance, or the "greater weight," of the evidence for quasi-contract

---

[33] See, *Eggleston v. Kovacich*, 274 Neb. 579, 742 N.W.2d 471 (2007), citing *Trieweiler v. Sears*, 268 Neb. 952, 689 N.W.2d 807 (2004).

[34] See *Johnson v. Anderson*, 278 Neb. 500, 771 N.W.2d 565 (2009).

[35] See, *Four R Cattle Co. v. Mullins*, 253 Neb. 133, 570 N.W.2d 813 (1997); *Tobin v. Flynn & Larsen Implement Co.*, 220 Neb. 259, 369 N.W.2d 96 (1985).

[36] See 28 Samuel Williston, A Treatise on the Law of Contracts § 71:10 (Richard A. Lord ed., 4th ed. 2003).

claims.[37] We conclude that a preponderance standard is appropriate here.

(d) While the Parties Were Operating Under Their Implied Contract, the City Paid Waste Connections' $60-Per-Ton Rate Under Economic Duress

Relying on our decision in *Wrede v. Exchange Bank of Gibbon*,[38] Waste Connections contends that the court erred in failing to require the City to articulate a specific legal principle underlying its theory of unjust enrichment. In *Wrede*, we stated:

> Although it appears we have not expressly so written heretofore, there must be some specific legal principle or situation which equity has established or recognized to bring a case within the scope of assumpsit for money had and received. . . . Stated otherwise, one who is free from fault cannot be held to be unjustly enriched merely because one has chosen to exercise a legal or contract right.[39]

We have stated this rule in other cases since *Wrede* was decided.[40] But as we have explained, much of the law of restitution developed in actions at law. So this rule is incorrect to the extent that it implies that a restitution claim for unjust enrichment is always an action in equity. As stated, an assumpsit action for money had and received is a quasi-contract claim for restitution, which presents an action at law. So the rule also incorrectly implies that a plaintiff must advance an equitable theory of recovery to prevail in an action at law.

[18] The confusion reflected in this rule stems from the equitable nature of restitution liability even when it is imposed

---

[37] See, e.g., *Key Pontiac, Inc. v. Blue Grass Sav. Bank*, 265 N.W.2d 906 (Iowa 1978); 66 Am. Jur. 2d *Restitution and Implied Contracts* §§ 87 and 164 (2011).

[38] *Wrede v. Exchange Bank of Gibbon*, 247 Neb. 907, 531 N.W.2d 523 (1995).

[39] *Id.* at 917, 531 N.W.2d at 530.

[40] See, *Kissinger, supra* note 15; *Kramer v. Kramer*, 252 Neb. 526, 567 N.W.2d 100 (1997).

in an action at law. It is also true that a court exercises its equitable powers when it determines a just and equitable restitution remedy. But the nature of the remedy does not determine the nature of the cause of action. Restitution constitutes "an independent basis of liability in common-law legal systems—comparable in this respect to a liability in contract or tort."[41] And as explained, the origin of that liability could have been in an action at law or equity. So we clarify our holding in *Wrede* as follows: To recover under a theory of unjust enrichment, the plaintiff must allege facts that the law of restitution would recognize as unjust enrichment.

[19] This rule does not mean that the decisional law must have recognized a specific fact pattern as unjust enrichment. Unjust enrichment is a flexible concept. The Restatement (Third) of Restitution and Unjust Enrichment[42] clarifies that its categories of unjust enrichment do not constitute an exclusive list. But it is a bedrock principle of restitution that unjust enrichment means a "transfer of a benefit without adequate legal ground."[43] "[I]t results from a transaction that the law treats as ineffective to work a conclusive alteration in ownership rights."[44]

[20] The issue here involves Waste Connections' purported unilateral modification of its agreement with the City for temporary services by increasing its rate to $60 per ton. Normally, a plaintiff cannot recover money voluntarily paid under a claim of right to payment if the plaintiff knew of facts that would permit the plaintiff to dispute the claim and withhold payment.[45] But exceptions exist if the plaintiff shows that its

---

[41] See Restatement (Third) of Restitution and Unjust Enrichment, *supra* note 6, § 1, comment *a*. at 3.

[42] See Restatement (Third) of Restitution and Unjust Enrichment, *supra* note 6.

[43] *Id.*, § 1, comment *b.* at 6.

[44] *Id.* at 5.

[45] See, *Malec v. ASCAP*, 146 Neb. 358, 19 N.W.2d 540 (1945); Restatement (Third) of Restitution and Unjust Enrichment, *supra* note 6, § 6, comment *e*.; 66 Am. Jur. 2d, *supra* note 37, § 92. Compare *First Nat. Bank, supra* note 5.

consent was imperfectly voluntary, or ineffective, for a legally recognized reason.[46]

[21,22] One of the exceptions to the voluntary payment rule is duress.[47] If a plaintiff's overpayment to the defendant was induced by duress, the plaintiff can seek restitution to the extent that the defendant was unjustly enriched.[48] The Restatement (Third) of Restitution and Unjust Enrichment specifically includes restitution claims for performance in excess of contractual requirements that result in the recipient's unjust enrichment:

> (1) If one party to a contract demands from the other a performance that is not in fact due by the terms of their agreement, under circumstances making it reasonable to accede to the demand rather than to insist on an immediate test of the dispute obligation, the party on whom the demand is made may render such performance under protest or with reservation of rights, preserving a claim in restitution to recover the value of the benefit conferred in excess of the recipient's contractual entitlement.[49]

[23] "Duress is coercion that is wrongful as a matter of law."[50] "Lawful coercion becomes impermissible when employed to support a bad-faith demand: one that the party asserting it knows (or should know) to be unjustified."[51] Coercion does not include hard bargaining, but it can include circumstances in which

> the stronger party exploits the other's vulnerability in a manner that passes the bounds of economic self-interest. Legitimate self-interest (and lawful coercion) encompasses the usual freedom to deal with another on one's

---

[46] See Restatement (Third) of Restitution and Unjust Enrichment, *supra* note 6, ch. 2, Introductory Note. Compare *Wendell's, Inc. v. Malmkar*, 225 Neb. 341, 405 N.W.2d 562 (1987).

[47] See, *Malec, supra* note 45; *First Nat. Bank, supra* note 5.

[48] See Restatement (Third) of Restitution and Unjust Enrichment, *supra* note 6, § 14, and comment *g*.

[49] *Id.*, § 35(1) at 571.

[50] *Id.*, § 14(1) at 181.

[51] *Id.*, comment *g*. at 188.

> own terms or not at all. So long as the stronger party is not responsible for the other's vulnerability, driving a hard bargain does not constitute duress. But the exploitation of a superior bargaining position will predictably be found wrongful when the stronger party seeks additional leverage by exploiting a vulnerability to which the weaker party (in dealing the stronger) is not properly subject.
>
> . . . Threats to exercise what would normally be a legal right may constitute duress when employed to achieve an advantage unrelated to the interests that the legal right is supposed to protect.[52]

Threatening to take advantage of business exigency to impose unjust demands is commonly referred to as "economic duress" or a "business compulsion." We have stated that "[t]he doctrine of business coercion [or economic duress] is directed at some inequalities in bargaining power."[53] And we have clarified that duress can occur even if the defendant had a legal right to take a threatened action:

> This rule has been stated in a form which arguably implies that no threat is wrongful unless there would be independent liability for the threatened act. . . . If the implication was made, the rule was overstated. An unjust and inequitable threat is wrongful, although the threatened act would not be a violation of a duty in the sense of an independent actionable wrong in the law of crimes, torts, or contracts.[54]

[24] Economic duress may be found in threats, or implied threats, to cut off a supply of goods or services when the performing party seeks to take advantage of the circumstances that would be created by its breach of an agreement.[55] We have

---

[52] *Id.* at 190.

[53] See *McCubbin v. Buss*, 180 Neb. 624, 627, 144 N.W.2d 175, 178 (1966).

[54] *Id.* at 628, 144 N.W.2d at 178. Accord *First Data Resources, Inc. v. Omaha Steaks Int., Inc.*, 209 Neb. 327, 307 N.W.2d 790 (1981).

[55] See, Restatement (Third) of Restitution and Unjust Enrichment, *supra* note 6, § 14, comment *g*.; Restatement (Second) of Contracts, *supra* note 2, § 175, comment *b.*

applied the doctrine of economic duress in a case involving circumstances similar to those in this appeal.

In *Carpenter Paper Co. v. Kearney Hub Pub. Co.*,[56] a newspaper publisher had a year-to-year contract with a distributor to supply it with newsprint until either party canceled the contract. The distributor later decided that it was more profitable for it to purchase all the newsprint from its sole paper mill source and sell it directly to its customers. As a direct seller, the distributor increased its price per ton. The publisher paid the increased price under protest until it could obtain supplies from a different source. We agreed that it had no other practical source for newsprint.

We rejected the publisher's argument that the parties were still operating under their express contract. We concluded that the parties' conduct showed they had mutually agreed to cancel the contract. But we concluded that their further transactions constituted a new agreement to which the economic duress doctrine applied:

> We think the making of a contract may be done under such circumstances of business necessity or compulsion as will render the same involuntary and entitle the party so coerced to recover back any money paid thereunder or excuse him from performing the contract. . . . The same would be true of an agreement obtained to cancel an existing contract and to enter into a new one.[57]

[25] We adopted the following economic duress rule: "'To be voidable because of duress, an agreement must not only be obtained by means of pressure brought to bear, but the agreement itself must be unjust, unconscionable, or illegal.'"[58] We stated that the distributor had a right to sell the newsprint on a more profitable basis unless it made "unjust demands upon

---

[56] *Carpenter Paper Co. v. Kearney Hub Pub. Co.*, 163 Neb. 145, 78 N.W.2d 80 (1956).

[57] *Id.* at 151, 78 N.W.2d at 83-84.

[58] *Id.* at 151, 78 N.W.2d at 84, quoting *Newland v. Child*, 73 Idaho 530, 254 P.2d 1066 (1953). Accord, *Kosmicki v. State*, 264 Neb. 887, 652 N.W.2d 883 (2002); *First Data Resources, Inc., supra* note 54.

[the publisher] in view of all the circumstances then existing."[59] Under the new agreement, the distributor increased its price by 4.6 percent over the direct mill price. We concluded that this increase did not result in an unjust agreement: "We do not find such a raise to be unjust, considering the increased cost of doing business which occurred during these years, and certainly not a factual situation which would permit the [publisher], on the grounds of business compulsion, to avoid the effect of its agreement . . . ."[60]

[26] Under the Restatement's principles, we believe that these economic duress rules apply to modifications of a contract also. But the facts here are different from those in *Carpenter Paper Co.*

[27] Whether a plaintiff voluntarily or involuntarily made a payment under a claim of right is a question of fact.[61] The court specifically found that the City was in a disadvantaged bargaining position because it had to dispose of 40 tons of solid waste each day. It specifically found that the City had no reasonable alternative immediately available for disposing of its waste except to pay Waste Connections' $60-per-ton rate.

This finding was not clearly wrong. We also note that the City could not have litigated its dispute with Waste Connections before paying for its services when it had no reasonable alternative for disposing of its waste. The issue is whether Waste Connections took advantage of the circumstances to impose unjust demands. Unlike the facts in *Carpenter Paper Co.*, here there was evidence to support a finding that Waste Connections was exploiting the exigency that its denial of services would create by unjustifiably increasing its price only for the City.

---

[59] *Carpenter Paper Co., supra* note 56, 163 Neb. at 152, 78 N.W.2d at 84.

[60] *Id.* at 153, 78 N.W.2d at 84.

[61] See, *Raintree Homes v. Village of Long Grove*, 389 Ill. App. 3d 836, 906 N.E.2d 751, 329 Ill. Dec. 553 (2009); *Crown Life Ins. Co. v. Smith*, 657 So. 2d 821 (Ala. 1994); *Speckert v. Bunker Hill Arizona M. Co.*, 6 Wash. 2d 39, 106 P.2d 602 (1940). See, also, *Kosmicki, supra* note 58, citing *Lustgarten v. Jones*, 220 Neb. 585, 371 N.W.2d 668 (1985).

In contrast to the 4.6-percent price increase that we considered in *Carpenter Paper Co.*, Waste Connections' $60 rate represented a 41-percent price increase over the $42.50 rate that the City had agreed to pay immediately after the SWAP contract expired. It increased its price by this amount in the span of a month, immediately after it learned that the City would terminate the roll-off contract in a year. And it did not charge this price to any other customer using its services.

Green had admitted that by raising its rate to $60 per ton only for the City, Waste Connections was attempting to compensate for losing the City's business under the SWAP contract. At trial, Green stated that he had meant that Waste Connections could not reduce its workforce at the transfer station if it had to keep enough people to handle the City's waste. But before Green learned that the City intended to cancel the roll-off contract, Green's only complaint to the City had been Waste Connections' increasing fuel costs, not its personnel costs.

Green admitted that Waste Connections had particularly wanted to keep the roll-off contract with the City. But he denied that the company had increased its disposal rate only for the City because it had learned the City would terminate the roll-off contract. Green also admitted that Waste Connections' fuel costs had decreased significantly in the month before it increased its rate to $60 per ton for the City. He maintained, however, that Waste Connections had imposed the increased price because it was operating the transfer station at a loss. He stated that Waste Connections did not increase the fees for other users of the transfer station because they were small in comparison.

But the court obviously did not find Green's explanations credible. It found no economic justification for Waste Connections' charging the City $17.50 more per ton than it charged to smaller volume customers. The court noted Green's deposition testimony in finding that the $60-per-ton rate was intended to compensate Waste Connections for its loss of the City's business to Gering. It concluded that Waste Connections' attempt to cover its anticipated losses was not a valid justification for its price increase.

Under our standard of review, we cannot say that the court's findings were clearly wrong. Sufficient evidence supported its finding that the City was not voluntarily paying the $60-per-ton rate. The record showed that the City had no reasonable alternative and that Waste Connections took advantage of the circumstances that its denial of services would have created to unjustly enrich itself. Because the facts support a finding of economic duress, we conclude that the court did not err in determining that the City was entitled to restitution. That brings us to Waste Connections' claim that the court incorrectly determined the restitution award.

(e) Court's Restitution Award Was Correct

Waste Connections contends that even under the City's unjust enrichment claim, the court erred in requiring it to disgorge any part of the payments that the City made to it under its $60-per-ton rate. It argues that it had the right to charge whatever rate it wished after the SWAP contract expired. It contends that justice and fairness did not require it to disgorge the City's payments when it was operating the transfer station at a loss. We disagree.

As explained, the parties were operating under an implied contract for temporary services after the SWAP contract expired. Waste Connections agreed to provide these temporary services, and the City agreed to pay its increased rate of $42.50 per ton. But Waste Connections' later increase of its rate to $60 per ton was a unilateral modification of the contract, to which the City assented under economic duress and for which no new consideration existed.

We recognize that our decision in *Carpenter Paper Co.* seems to require a court to consider whether a defendant's profit from an unjust demand was reasonable before concluding that the defendant was unjustly enriched. Because duress does not include hard bargaining, that may be a relevant factor in determining whether a party used duress to obtain unfair advantage in negotiating a new contract after a previous one has expired. In some negotiations for a new contract, a relevant consideration is whether a party exploited the other's vulnerability in a manner that passes the bounds of

economic self-interest.[62] But we conclude that this reasoning does not apply when a plaintiff has proved that its assent to a unilateral modification of an implied contract was obtained under duress.

[28] We have held that the parties may orally modify the terms of a written executory (not fully performed) contract after its execution and before a breach has occurred, without any new consideration.[63] But a modification of an existing contract that substantially changes the liability of the parties requires mutual assent.[64] That assent may be express or implied.[65] But a weaker party's assent to a unilateral contract modification, which is to that party's disadvantage, should obviously not be implied from its conduct when the weaker party has shown that its assent was obtained through economic duress. Without any new consideration or negotiations for the modification, a court should not analyze whether the defendant's profit from the duress was reasonable.

We conclude that because the City did not voluntarily assent to the modification, it did not change the implied contract. That is, the City's contractual liability under the implied contract obligated it to pay $42.50 per ton for disposal services.

[29] The measure of restitution is normally a defendant's unjust gain.[66] When a party to a contract shows that because of duress, it agreed under protest to the other party's demands for overperformance of its obligation, it may seek restitution for "the value of the benefit conferred in excess of the recipient's contractual entitlement."[67] So the court correctly determined that the City was entitled to recover its involuntary payments

---

[62] See Restatement (Third) of Restitution and Unjust Enrichment, *supra* note 6, § 14, comment *g*.

[63] See, e.g., *Pennfield Oil Co., supra* note 22.

[64] See, e.g., *Whorley v. First Westside Bank*, 240 Neb. 975, 485 N.W.2d 578 (1992).

[65] See *Waite v. A. S. Battiato Co.*, 238 Neb. 151, 469 N.W.2d 766 (1991).

[66] See *Smeal Fire Apparatus Co. v. Kreikemeier*, 279 Neb. 661, 782 N.W.2d 848 (2010).

[67] Restatement (Third) of Restitution and Unjust Enrichment, *supra* note 6, § 35(1) at 571.

that were over the City's contractual obligation to pay $42.50 per ton after the SWAP contract expired. We affirm its restitution award for these overpayments.

Because the City protested the charges under circumstances that showed it was reasonable for it to accede to Waste Connections' demand, the court properly rejected Waste Connections' waiver and estoppel claims.[68]

2. Price of Service Under the Roll-Off Contract

(a) Parties' Contentions

The court concluded that because the roll-off contract incorporated the SWAP rate for disposal services, Waste Connections could only charge the last rate that the parties had agreed to ($40.52 per ton) under the SWAP contract. But because the City had judicially admitted that it should pay $42.50 per ton, the court used that rate as the price that the City was obligated to pay. Waste Connections contends that the court erred in using the $42.50 rate. It agrees with the court's ruling that the roll-off contract was valid and in effect after the SWAP contract expired on June 30, 2007. But because the roll-off contract's rate could no longer be determined by referring to the SWAP contract, Waste Connections contends that after the SWAP contract expired, it could charge whatever it wished under the roll-off contract.

The City contends that if the court had not used the last price agreed to before the SWAP contract expired, it would have been required to find that the parties failed to create a contract because they did not agree on price. It argues that this result would be untenable because the parties clearly intended to continue performing the roll-off contract even after the SWAP contract expired. Alternatively, the City contends that even if the parties did not agree on the price of services, they were operating under an implied contract and that Waste Connections was only entitled to the reasonable value of its services. It argues that the court determined the reasonable

---

[68] See *id.*

value of Waste Connections' disposal services was $42.50 per ton.

(b) Parties Created a Binding Contract

[30] We disagree with the City that the roll-off contract would be unenforceable if the parties failed to agree on the price for services in the event that they did not continue their relationship under the SWAP contract. It is true that a court will not supply a term necessary to create a binding contract.[69] Nor will a court rewrite a contract or speculate as to terms of the contract which the parties have not seen fit to include.[70] It is not the province of a court to rewrite a contract to reflect the court's view of a fair bargain.[71] But this is the unusual case of a contract that was sufficiently definite in forming a binding agreement but failed to clarify the parties' rights and duties in the event of a contingency that they both assumed would not occur.

In their written roll-off contract, the parties agreed on the services to be performed through April 30, 2008. Before that term expired, however, the parties had stated in writing their intent to continue performing their obligations under the contract until July 2008. So the contract was modified to include the longer term. The roll-off contract also contained a term for the price by incorporating the rate charged under the SWAP contract.

In sum, the roll-off contract contained all the terms that the parties would have considered essential to form a binding agreement: subject matter, price, and duration. And the parties clearly intended to be bound by their agreement. They simply failed to negotiate a foreseeable contingency: that SWAP and Waste Connections might not continue the SWAP contract or create a new one for a period that covered the life of the

---

[69] *Kubicek v. Kubicek*, 186 Neb. 802, 186 N.W.2d 923 (1971).

[70] *Davenport Ltd. Partnership v. 75th & Dodge I, L.P.*, 279 Neb. 615, 780 N.W.2d 416 (2010).

[71] *Berens & Tate v. Iron Mt. Info. Mgmt.*, 275 Neb. 425, 747 N.W.2d 383 (2008).

roll-off contract. Here, the question is what rule governs the gap-filling that the omission in their contract requires.

(c) Court Could Supply a Reasonable Term to Cover the Gap

[31] The Restatement (Second) of Contracts provides a default rule for the omission of terms necessary to determining the parties' obligations under an enforceable contract: "When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court."[72] As this case illustrates, this rule does not apply when the parties' manifestations or conduct show that they do not intend to be bound unless they agree upon a term and they fail to agree. But we agree with this rule, and adopt it, for circumstances showing that the parties to a binding contract have failed to negotiate a term to cover a future contingency.

But under the Restatement principles, the court erred in concluding that it could simply use the last price charged under the SWAP contract or, alternatively, the price that the City had judicially admitted to owing in its complaint. These are not valid default rules when a court concludes that the parties have not agreed on an essential term to cover a contingency.

[32] The first step in an omitted-term case is to determine whether interpretative principles show what the term should be. That is, a court should first consider whether there exists a "tacit agreement or a common tacit assumption" or whether it can supply a term "by logical deduction from agreed terms and the circumstances."[73] But a court should not engage in a hypothetical bargaining analysis if applying interpretative principles shows that the parties did not agree on a contract term necessary to determining their rights and duties. In that circumstance, it must supply a term that "comports with community standards of fairness and policy."[74]

---

[72] Restatement (Second) of Contracts, *supra* note 2, § 204 at 96-97.

[73] See *id.*, comment *c*. at 97.

[74] See *id.*, comment *d*. at 98.

[33] We reject Waste Connections' contention that because a nonnegotiated contingency occurred, Waste Connections could charge the City whatever it wished. Such a term would obviously be contrary to the implied covenant of good faith and fair dealing that every contract carries.[75] Good faith performance excludes an "abuse of a power to specify terms."[76]

But here, neither the agreed-upon terms of the roll-off contract nor the circumstances would permit a court to find the parties had a tacit agreement on the price to use for this contingency. The evidence showed that the parties entered the roll-off contract under the assumption that the rate under the roll-off contract would be the same as the rate under the SWAP contract. By the time the SWAP contract expired, however, they clearly did not agree on the price of disposal services.

Nonetheless, for the period that the parties' implied agreement for temporary services was in effect, we conclude that the court could reasonably supply the price of those services by referring to their implied contract. As discussed, after the SWAP contract expired, the parties were operating under an implied contract for the same services for the next 4 months. In supplying this price as the reasonable value of Waste Connections' services for this 4 months, the court specifically relied on Waste Connections' unilaterally set price of $42.50 per ton. If the City had accepted either of Waste Connections' long-term proposals to continue the SWAP relationship, it would have paid less for disposal services during that 4-month period. So we conclude that the court properly used the $42.50-per-ton rate. This price was indicative of what Waste Connections considered to be a fair price in the absence of a long-term commitment from the City.

But whether the court correctly applied this rate to the remaining 8 months of the roll-off contract is less certain. After the 4-month term of the implied contract expired, there was no unilateral price to rely on to show what Waste Connections considered to be a fair price, absent a long-term commitment

---

[75] See *RSUI Indemnity Co. v. Bacon, ante* p. 436, 810 N.W.2d 666 (2011).

[76] Restatement (Second) of Contracts, *supra* note 2, § 205, comment *d.* at 101.

from the City. We do not consider the $60-per-ton rate to be indicative of a fair price. The evidence supported the court's finding that Waste Connections was using its superior bargaining position to compensate itself for losing the City's future business.

It is true that the evidence showed that the roll-off contract was profitable to Waste Connections under its $42.50-per-ton rate. But Waste Connections presented evidence that its fuel costs were increasing by the end of the 4-month period. So the court could not simply supply the $42.50 rate to the remaining 8 months of the roll-off contract without considering whether this rate was fair and reasonable to both parties. So we remand this cause for the limited purpose of determining a reasonable price to supply for Waste Connections' services for the period from November 1, 2007, when the implied contract expired, to July 8, 2008, when the roll-off contract expired.

In supplying the reasonable price of Waste Connections' services on remand, the court may consider the fair market value of disposal services in the region when Waste Connections' services were rendered.[77] This factor could include the price that Waste Connections was charging to other municipalities in the area for comparable services. The court should also consider whether its solution treats the parties evenhandedly given their objectives.[78]

Finally, "[b]oth the meaning of the words used and the probability that a particular term would have been used if the question had been raised may be factors in determining what term is reasonable in the circumstances."[79] As applied here, this factor permits the court to consider the profit margin that Waste Connections had previously considered reasonable under the parties' roll-off contract and whether its increased fuel costs were affecting that margin.

---

[77] See, *Sachau v. Sachau*, 206 N.J. 1, 17 A.3d 793 (2011); *KW Const. v. Stephens & Sons Concrete*, 165 S.W.3d 874 (Tex. App. 2005).

[78] See *Browning-Ferris Industries v. Casella*, 79 Mass. App. 300, 945 N.E.2d 964 (2011).

[79] Restatement (Second) of Contracts, *supra* note 2, § 204, comment *d*. at 98.

We emphasize, however, that the court correctly determined that Waste Connections' mitigation of damages defense was without merit in this case. The issue here is an omitted term, not whether the City could have avoided damages.[80]

VII. CONCLUSION

We conclude that the parties did not intend to be bound by the terms of their expired SWAP contract. But we conclude that they were operating under an implied contract for Waste Connections to temporarily accept the City's waste at the transfer station until the City began taking its waste to a new landfill.

We affirm the court's conclusion that during the time the parties were operating under the implied contract, the City involuntarily paid Waste Connections' charges after Waste Connections significantly increased its rate. We conclude that Waste Connections obtained the City's assent to its unilateral modification of the price for services through economic duress. The modification was therefore invalid, and Waste Connections was unjustly enriched by the overpayments. We affirm the court's restitution award for the full amount of these overpayments under the implied contract.

Under the parties' roll-off contract, we conclude that the parties formed a binding agreement despite their failure to negotiate a term for a foreseeable contingency. Because they were bound by the contract, the court could supply a term for this contingency—the reasonable value of Waste Connections' services when the contingency occurred. But we reverse the court's determination of the reasonable value of Waste Connections' services and remand the cause for further proceedings on this issue.

AFFIRMED IN PART, AND IN PART REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT, J., not participating.

---

[80] See *Borley Storage & Transfer Co. v. Whitted*, 271 Neb. 84, 710 N.W.2d 71 (2006).