Court of King's Bench of Alberta

Citation: Murray v Windsor Brunello Ltd, 2025 ABKB 299

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Date: 20250514
Docket: 1501 00629
Registry: Calgary

Between:

Donald Murray and Linda Murray

Plaintiffs

- and -

Windsor Brunello Ltd, KAPO Fenster und Türen GMBH, Sebastian Bade operating as CS Eurohaus, Luxus Haus Imports Ltd and Alberta Engineering Ltd

Defendants

- and -

KAPO Fenster und Türen GMBH and Luxus Haus Imports Ltd

Third Parties

Costs Decision
of the
Honourable Justice EJ Sidnell

Introduction

[1] This decision relates to costs arising from a multiparty construction defects trial reported at: ***Murray v Windsor Brunello Ltd***, 2024 ABKB 281 (the ***Trial Decision***). Terms defined in the ***Trial Decision*** and used in this Costs Decision have the meanings ascribed to them in the ***Trial Decision***.

[2] The Murrays claimed damages against AEL, WBL, KAPO, Luxus and Mr. Bade, jointly and severally, in the amount of $1,650,293.46, inclusive of GST, plus costs, in relation to the

construction of the Murrays' Residence. The damages arose from the lack of functionality of the Great Room Sliding Doors and the Master Bedroom Sliding Doors.

[3] I found that the Murrays successfully proved their breach of contract claim against WBL and that WBL was liable to the Murrays in the amount of $914,946.59, plus pre-judgment interest pursuant to the *Judgment Interest Act*, RSA 2002, c J-1, from April 4, 2023, to the date of the ***Trial Decision***, plus costs.

[4] I dismissed:

(a) the Murrays' claims against the other defendants, AEL, KAPO, Luxus and Mr. Bade, for:

(i) negligent provision of services or for negligent supply of shoddy goods or structures; and

(ii) a breach of a duty to warn;

(b) WBL's third party claim against KAPO and Luxus;

(c) KAPO's Notice of Co-defendant against WBL, Luxus and Mr. Bade;

(d) Luxus' Notice of Co-defendant against WBL, KAPO and Mr. Bade; and

(e) AEL's third party claim against KAPO.

[5] The ***Trial Decision*** was issued on May 17, 2024, and I directed the parties to contact me within 30 days if they could not resolve the issue of costs. On June 18, 2024, in response to a request that the parties delay addressing costs pending an appeal, I advised the parties that costs had to be "addressed now and [could not] await the outcome of the appeal" of the ***Trial Decision***. I heard nothing back and assumed that the parties had resolved the issue of costs.

[6] Notwithstanding the ***Trial Decision*** direction, on November 27, 2024, I received a request for a 90-minute hearing to address costs, together with a proposal that at least some of the parties would file affidavit evidence and briefs. By Endorsement, I directed the parties to provide their respective submissions on costs in writing, the last of which was due January 3, 2025. I noted that I would advise the parties if an oral hearing was required. I have determined that an oral hearing is not required. This is my decision on the issue of costs arising from the ***Trial Decision***.

Positions of parties claiming costs

[7] The Murrays seek an award of costs against WBL. Luxus and Mr. Bade (collectively, the Successful Defendants) seek an award of costs against the Murrays. The parties' respective positions are set out below.

The Murrays

[8] Relying on ***McAllister v Calgary***, 2021 ABCA 25, the Murrays seek costs in the amount of:

(a) $398,231.09[1] from WBL, based on 45% of their reasonable legal fees and 100% of their disbursements; or, in the alternative,

1 Fees: $287,570.50, plus disbursements: $91,697.20, plus applicable GST

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(b) $240,099.25[2] in costs based on Column 4 of Schedule C of the *Alberta Rules of Court*, AR 124/2010.

[9] The Murrays submit that WBL vigorously defended the action and rely on the decision regarding WBL's Notice to Admit Facts and AEL's purported Reply to Notice to Admit Facts: ***Murray v Windsor Brunello Ltd***, 2023 ABKB 375 (the ***Notice to Admit Decision***). At para 25 of the ***Notice to Admit Decision***, I found that WBL served a Notice to Admit Facts "almost immediately before the trial commenced [which] would preclude some parties from testing that evidence by cross-examination, would be contrary to trial fairness and prejudicial to those other parties". At para 26 of the ***Notice to Admit Decision***, I noted a concern that proffering the Reply, which was purportedly prepared on behalf of a party that was not a legal entity, could have also been an abuse of process.

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[10] As to the costs of the Successful Defendants, and relying on ***Sanderson v Blyth Theatre Company***, [1903] 2 KB 533 (CA), the Murrays seek a *Sanderson* order, whereby the costs of the Successful Defendants would be paid directly by WBL. A *Bullock* order follows the principles set out in ***Bullock v London General Omnibus Company & others***, [1904-07] All ER 44 (CA). *Bullock* orders are similar to *Sanderson* orders except that the costs of the successful defendant are paid by the plaintiff, and the plaintiff would be entitled to reimbursement from the unsuccessful defendant for those costs.

[11] Relying on ***Calderbank v Calderbank***, [1975] 3 All ER 333 (CA), the Murrays further submit that, on May 29, 2023, they issued a *Calderbank* offer to WBL, Luxus, Mr. Bade, and a party against whom the claim was discontinued by consent at the commencement of the trial (the Murrays' *Calderbank* Offer). The Murrays' *Calderbank* Offer was left open until June 1, 2023 at 1:00 p.m. Given its delivery at 6:57 p.m. on May 29, 2023, the Murrays' *Calderbank* Offer was open for 2½ days. The Murrays' *Calderbank* Offer was to settle the action for $830,000, plus costs and disbursements, and was in addition to the settlement of $125,000 that the Murrays entered into with the insurer of AEL.

[12] Adding together the Murrays' *Calderbank* Offer with the AEL settlement amounts to $955,000, plus interest and costs. On this basis, WBL asserts that the Murrays did not beat the Murrays' *Calderbank* Offer because the Murrays' judgment was $40,053.41 short of that total amount.

[13] I find that the Murrays beat the Murrays' *Calderbank* Offer. The fact that the Murrays recovered $125,000 from AEL, who I found was not liable to the Murrays (see ***Trial Decision*** at paras 329-332, 354 and 539), does not affect the Murrays' *Calderbank* Offer to the other defendants.

[14] The Murrays offered to settle with WBL, Luxus, Mr. Bade, and a party against whom the claim was discontinued before trial, for $830,000, plus costs. The Murrays' recovery against WBL was $914,946.59, plus interest and costs. The Murrays beat the Murrays' *Calderbank* Offer by $84,946.59, plus interest of $43,675.74.

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2 Fees on Column 4 of Schedule C $109,575, multiplied by a factor of 1.25 for a total of $136,968.75, plus disbursements: $81,856.71, plus other charges: $9,840.49, plus applicable GST, for a total of $240,099.25. I note that the Murrays' Bill of Costs contains a minor calculation error as it claims the total is $240,099.35. Further, I have not considered the total figure used in paragraph 22(b) of the Murrays' first costs brief as that about appears to contain a calculation error.

[15] As a result of beating the Murrays' *Calderbank* Offer, the Murrays seek double costs against WBL from May 29, 2023.

Luxus

[16] Luxus seeks $130,578.29 in costs against the Murrays on the basis of Column 4 of Schedule C of the *Rules*, except that it seeks costs from WBL in relation to the application leading to the ***Notice to Admit Decision***.

[17] Luxus submits that it beat the *Calderbank* offers it issued (collectively, the Luxus *Calderbank* Offers):

(a) on May 1, 2023, to the Murrays to pay $116,000, all inclusive, in exchange for a *Pierringer* agreement[3], which expired May 17, 2023; and

(b) on May 25, 2023, to contribute $116,000, all inclusive, to a global settlement in favour of the Murrays, which it left open for one week.

[18] Luxus seeks one set of costs to May 1, 2023, and double costs thereafter.

[19] Luxus recognizes that the Murrays may seek a *Bullock* or *Sanderson* Order but takes no position on that application.

[20] Luxus points out that it was both a defendant and third party defendant in this action, and that it was entirely successful.

Mr. Bade

[21] Mr. Bade was self-represented during the years leading up to and at the trial. Mr. Bade attended the trial only on select days. Mr. Bade is represented by counsel in relation to the determination of costs.

[22] Relying on ***Park Avenue Flooring Inc v EllisDon Construction Services Inc***, 2016 ABQB 332, Mr. Bade seeks $40,788.89[4] in costs under Column 4 of Schedule C.

[23] As a self-represented litigant through the pre-trial steps and to the end of the trial, Mr. Bade submits that he was required to spend a significant amount of time and resources defending the claim against him. Mr. Bade states that he lost significant work opportunities because of the attention that this action demanded. Mr. Bade notes that as an individual, a judgment against him would have had a significant personal effect on him. I note that Mr. Bade was named as a defendant in the action as a result of the work that he carried on as "CS Eurohaus". I know of no reason that Mr. Bade could not have incorporated his business and assume that it was his choice to carry on his business as an unincorporated sole proprietorship.

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3 See ***Amoco Canada Petroleum Co Ltd v Propak Systems Ltd***, 2001 ABCA 110 at para 3:

> ... They have entered into a type of settlement agreement known as a "Pierringer agreement" named after ***Pierringer* v. *Hoger et al.***, 124 N.W. (2d) 106 (Wis. S.C. 1963), the Wisconsin case in which this type of agreement was first considered. Such agreements permit some parties to withdraw from the litigation, leaving the remaining defendants responsible only for the loss they actually caused, with no joint liability. As the non-settling defendants are responsible only for their proportionate share of the loss, a Pierringer agreement can properly be characterized as a "proportionate share settlement agreement".

4 Fees: $35,090, plus disbursements: $5,698.89, inclusive of GST

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[24] Mr. Bade notes that Rule 10.31(5) grants a court discretion to award costs to a self-represented litigant in “an amount or part of an amount equivalent to the fees specified in Schedule C”.

[25] Applying the Rule 10.33 factors, Mr. Based submits:

(a) he was successful;

(b) he agreed to contribute to a global settlement offer issued by the defendants but provided no evidence of what this entailed;

(c) the issues were complex, and there were numerous expert reports; and

(d) his conduct was reasonable and did not unnecessarily lengthen or delay the action.

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[26] I will address the Rule 10.33 factors below, but at this point note that Mr. Bade did remarkably well as a self-represented litigant in a complex civil case. He was articulate and appropriate, and I agree that he did not lengthen or delay the trial.

Positions of the parties responding to a claim of costs against them

The Murrays

In response to Luxus

[27] The Murrays take issue with Luxus including $3,240 for item 4 of Schedule C in its Bill of Costs, as the only Notice to Admit issued was the one that was the subject of the ***Notice to Admit Decision***. As I noted at paragraph [16], Luxus seeks costs for the ***Notice to Admit Decision*** as against WBL and not the Murrays. However, the Murrays point out that there was no notice or admission that resulted in expediting the trial, as described in item 4 of Schedule C:

> Notice to admit facts, opinion or non-adverse inference or the admission of any of these if, in the opinion of the Court, the notice or admission resulted in expediting the case or better defining the matters in question.

[28] The Murrays also assert that, notwithstanding that Luxus states in its brief that it has not claimed for all of the Questioning on the basis that it was not in attendance for it all, Luxus has claimed for Questioning that was not attended by its counsel.

[29] The Murrays submit that the maximum amount that Luxus can claim is $92,959.12[5], if the Luxus *Calderbank* Offers entitle Luxus to claim double fees after the first one was served.

In response to Mr. Bade

[30] Relying on ***LaTrace v Warkentin Building Movers Virden Inc***, 2021 ABCA 377, the Murrays submit that, as a self-represented litigant, Mr. Bade is not entitled to costs and that ***Park Avenue Flooring*** is distinguishable.

[31] The Murrays also assert that Rule 10.41(2)(d) precludes Mr. Bade’s claim for $1,440.60, representing his portion of the costs of mediation. Further, the Murrays submit that because Mr. Bade was a party to the action, he cannot recover travel costs to attend the trial in the amounts of $1,066.37 and $554.

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5 $88,532.50, plus GST $4,426.62

[32] The Murrays argue that Mr. Bade's Bill of Costs should be reduced from $40,788.89 to $2,769.82.[6]

WBL

In response to the Murrays

[33] WBL acknowledges that the Murrays are entitled to an award of costs in the amount of $169,437.31, which WBL says is based on single column 4 of Schedule C and the Murrays' Bill of Costs and is explained in a footnote in WBL's Costs Brief as:

> Fees $69,955, Disbursements $81,573.38, "other charges" $9,840.49, $8,068.44 - $161,368.87

[34] It is not clear how, or on what figures, WBL makes its calculation.

[35] WBL submits, in the alternative, that the Murrays should be entitled to no more that $240,099.25[7] in costs.

[36] WBL opposes the Murrays' application for a *Sanderson* order.

In response to Luxus

[37] WBL agrees with the Murrays' submission that Luxus should be limited to an amount of no more than $92,959.12 under Column 4 of Schedule C.

In response to Mr. Bade

[38] WBL submits that Mr. Bade is entitled to costs at the low end of $2,769.82, as proposed by the Murrays, and at the high end of $7,436.35; however, the numbers provided by WBL would result in costs awarded to Mr. Bade in the amount of $8,487.69.[8]

Issues

[39] The following issues must be considered in determining the costs arising from the ***Trial Decision***:

> Issue 1: What costs are the Murrays entitled to as successful plaintiffs?
>
> Issue 2: What are the costs to which the Successful Defendants are entitled?
>
> Issue 3: What is the impact of the various *Calderbank* offers?
>
> Issue 4: Should a *Sanderson* order be granted requiring WBL to pay the costs of the Successful Defendants?

Issue 1: What costs are the Murrays entitled to as successful plaintiffs?

[40] On a costs application, Rule 10.31(1) directs the Court to first consider the factors set out in Rule 10.33. Rule 10.33(1) sets out factors that may be considered in making a costs award. The following factors are relevant to costs in this case:

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6 $2,637.92, plus GST

7 I have used the corrected amount, see footnote 2

8 Fees: $5,400, plus GST on fees of $270, plus disbursements of $4,258.29 (GST inclusive), less mediation costs of $1,440.60 (GST assumed inclusive as not specified)

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(a) the result of the action and the degree of success of each party;

(b) the amount claimed and the amount recovered;

. . .

(d) the complexity of the action;

(e) the apportionment of liability;

. . .

(g) any other matter related to the question of reasonable and proper costs that the Court considers appropriate.

[41] I have combined some of these factors for the purpose of the discussion below.

Result of the action, the degree of success of each party, and the amounts claimed and recovered

[42] The Murrays claimed $1,650,293.46 against WBL and were successful against WBL in the amount of $914,946.59, plus pre-judgment interest, and costs. Pre-judgment interest from April 4, 2023 to May 17, 2024 is $43,675.74, for a total of $958,622.33.

[43] The Murrays' degree of success against WBL was fairly high. Both the amount that the Murrays claimed and the amount of the judgment place them under Column 4 of Schedule C.

[44] The Murrays were unsuccessful in their claim against the Successful Defendants. The corollary is that the Successful Defendants were successful in defending against the claim brought against them by the Murrays and their degree of success was the highest it could be.

[45] The Successful Defendants were successful in the claim brought against them by co-defendant KAPO; however, no party seeks costs against KAPO and KAPO did not participate in the trial.

[46] Mr. Bade and KAPO were successful in the claim brought by co-defendant Luxus, though KAPO seeks no costs, and Mr. Bade seeks costs only against the Murrays.

[47] Luxus and KAPO were successful in the third party claim brought by WBL, though KAPO seeks no costs, and Luxus only seeks costs against WBL in relation to the ***Notice to Admit Decision***.

[48] AEL and KAPO did not participate in the trial, but I found that they were not liable for any of the claims made against them. Luxus and Mr. Bade participated in the trial and I found that they were not liable for any of the claims made against them.

[49] Although the Murrays claimed against WBL in contract and all of the defendants in negligence, I found that the Murrays were only successful against WBL in contract. Further, I found that AEL had a contract with the Murrays and breached it, but that the Murrays could not recover against AEL for its breach of contract because that was not pleaded. I also found that none of the Murrays' claims against the defendants succeeded in negligence. In the result, the Murrays were successful only against WBL in their breach of contract claim and damages were proven in the amount of $914,946.59, plus pre-judgment interest, and costs.

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Complexity of the action

[50] The action was relatively complex, and seven experts testified, in addition to fact witnesses, some of whom were engineers.

[51] However, some of the complexity of this trial could have been more efficiently managed:

(a) the configuration of the KAPO Windows and Doors and associated structure was not contentious and should have been the subject of an agreed statement of facts (***Trial Decision*** at para 28), and:

(i) agreed terminology for each of the elements of the building would have benefited all parties, the experts, and the Court, so that consistent terminology could have been used for each of the elements of the building; and

(ii) agreement as to the non-contentious configuration of the KAPO Windows and Doors, together with agreed terminology, would have reduced both the amount of time required for trial and, to some extent, the complexity of the trial; and

(b) the sequence of events was mostly non-contentious, and had the sequence of events been contained in an agreed statement of facts (***Trial Decision*** at para 87):

(i) it would have aided the parties in focusing their evidence on the areas of dispute rather than having to prove non-contentious facts; and

(ii) the amount of time required for trial would have been reduced.

Any other matter related to the question of reasonable and proper costs

[52] In this case, there was no conduct of a party that tended to shorten the action; however, there were opportunities to make the trial less complex and to shorten the amount of trial time: see for example paragraph [51].

[53] In addition, WBL used trial time by attempting to rely on a Reply to Notice to Admit provided at 11:00 pm on the day before trial, which was purportedly provided by a corporation that had been struck from the corporate registry and had ceased to exist: ***Notice to Admit Decision*** at para 19. During the trial, WBL submitted that the purpose of the Notice to Admit and the Reply to Notice to Admit was to obtain evidence as between WBL and AEL. In its costs submissions, WBL asserts that the Notice to Admit Facts was served in an attempt to shorten the trial. It is true that had WBL been successful then the AEL representative would not have to have been called as a witness. However, if WBL was able to rely on the Notice to Admit Facts and the Reply to the Notice to Admit Facts, the other parties would have been deprived of an opportunity to test that evidence: ***Notice to Admit Decision*** at para 25. Given the timing of the Notice to Admit Facts and the Reply to the Notice to Admit Facts, and the fact that the admitting party had ceased to exist, I do not think that this conduct can be seen in a positive light as suggested by WBL in its costs submissions.

Rule 10.33(2) considerations

[54] In addition to the factors set out in Rule 10.33(1), Rule 10.33(2) provides that a court may consider a number of further factors, and I find that the following are relevant to this case:

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(a) the conduct of a party that was unnecessary or that unnecessarily lengthened or delayed the action or any stage or step of the action;

. . .

(d) whether any application, proceeding or step in an action was unnecessary, improper or a mistake;

. . .

(h) any offer of settlement made, regardless of whether or not the offer of settlement complies with Part 4, Division 5.

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[55] The factors noted in Rule 10.33(a) and (d) are relevant as a result of the concerns I have described in paragraph [52] (lack of agreed terminology and agreed statement of facts) and paragraph [53] (the ***Notice to Admit Decision***). In addition, there were offers of settlement that are relevant to costs in this case: Rule 10.33(h). I will address the impact of the offers of settlement under Issue 3.

Percentage costs to be awarded to the Murrays

[56] Having considered the relevant Rule 10.33 factors, the options under Rule 10.31 may be considered. There is no application under Rule 10.31(1)(b) and the applicable rule is Rule 10.31(1)(a).

[57] In ***McAllister*** at para 30, the Court of Appeal noted that where costs are to be awarded as "reasonable and proper costs that a party incurred" under Rule 10.31(1)(a), the options for achieving that outcome are set out in Rule 10.31(3).

[58] In ***McAllister*** at para 29, the Court of Appeal also noted that using Schedule C tariff costs (Rule 10.31(3)(a)) is but one basis for a reasonable and proper costs award and discussed other options upon which an award can be based:

(a) no reference to Schedule C (Rule 10.31(3)(a));

(b) awarding costs pursuant to a multiple, proportion or fraction of an amount set out in Schedule C (Rule 10.31(3)(b)); or

(c) awarding a percentage of assessed costs (Rule 10.31(3)(d)).

[59] I find that the Schedule C tariff is not an appropriate basis for calculating the Murrays' costs. This trial was relatively complex, and many of the steps required to bring this case to trial are not reflected in the items listed in Schedule C.

[60] As I pointed out in ***Signalta Resources Limited v Canadian Natural Resources Limited***, 2024 ABKB 115 at para 47, there is no line item in Schedule C for experts. In any case in which there is expert opinion evidence, there will also be associated efforts to obtain and prepare the expert, and to present the expert opinion evidence at trial. That is not to say that any litigation with expert evidence should not have costs determined in accordance with the Schedule C tariff costs, only that reliance on expert evidence is one factor to be considered when determining costs. In this case, seven experts were qualified, and the Murrays called three of them.

[61] In ***McAllister*** at para 51, the Court of Appeal explained the reasons for setting an award of costs at 40-50% of indemnification of reasonable and proper costs:

> As a general principle, we see no reason to depart from the 40-50% level of indemnification approved by this Court in *Weatherford CA* and *Hill v Hill*. It provides a reasonable guideline upon which the level of indemnification implied by the phrase "reasonable and proper costs" may be measured under the Rules. However, we refrain from defining with any precision the level of indemnification required in any given case. All we say is that the level of indemnification must be both meaningful and reasonable. The court's discretion to move up or down from that level having regard to the factors set forth in Rule 10.33 or in Rule 10.2(1) remains intact. Also, the level of indemnification may be higher or lower than the 40-50% depending on how the litigation was conducted and other factors not necessarily having anything to do with the conduct of the litigation.

[62] In this case, I find that the appropriate level of indemnification is 35% of the Murrays' reasonable and proper costs. I have set the amount at 35% for all of the reasons I have discussed above, including:

(a) the loss of efficiency that I find resulted from the Murrays proceeding with a relatively complex trial without an agreed statement of facts (or notice to admit, served at an appropriate time in advance of the trial), considering that in this case many of the contextual facts, and terminology, were not contentious; and

(b) the reason for, and the result of, the ***Notice to Admit Decision***, which was instigated by WBL and on which WBL was not successful, and which required a pause in the trial evidence to argue and to decide.

[63] In summary, the Murrays are entitled to 35% of their reasonable and proper legal costs, plus 100% of their reasonable disbursements (which shall include reasonable expert fees and disbursements but shall not include fees for experts who did not give evidence at the trial), plus applicable taxes. The Murrays costs, disbursements, and taxes, together with the applicable increase resulting from the Murrays' *Calderbank* Offer as described in paragraph [86] (collectively, Murrays' Costs) shall be determined by an Assessment Officer under Rule 10.31(2)(b)(ii). WBL shall pay the Murrays' Costs once determined by an Assessment Officer.

Issue 2: What are the costs to which the Successful Defendants are entitled?

Luxus

[64] Luxus submits that it is entitled to costs on the basis of single Column 4 of Schedule C. Costs on a percentage basis could have been considered for Luxus for the same reasons that the Murrays are entitled to costs as a percentage of their reasonable and proper costs. However, since costs are sought only on the basis of single Column 4 of Schedule C, I am prepared to award costs on that basis as Luxus was entirely successful, and the amount that the Murrays claimed was within the range of Column 4 of Schedule C.

[65] I agree with the Murrays that item 4 of Schedule C does not apply to the application giving rise to the ***Notice to Admit Decision***. Further, I am not persuaded that it would be appropriate, in this case, to parse out unidentified costs for the application giving rise to the ***Notice to Admit Decision****,* which application was heard during the trial, and reapportion the responsibility for paying for them. Costs are not usually allocated on an issue-by-issue basis: ***Hogarth v Rocky Mountain Slate Inc***, 2013 ABCA 116 at para 12.

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[66] The Murrays, and WBL, take issue with certain items claimed in Luxus' Bill of Costs. These can be determined by an Assessment Officer.

[67] I find that Luxus is entitled to costs on single Column 4 of Schedule C, plus 100% of its reasonable disbursements (which shall include reasonable expert fees and disbursements but shall not include fees for experts who did not give evidence at the trial), plus applicable taxes. Luxus' costs, disbursements, and taxes, together with the applicable increase resulting from Luxus' *Calderbank* Offers as described in paragraph [88] (collectively Luxus' Costs), shall be determined by an Assessment Officer under Rule 10.31(2)(b)(ii). The Murrays shall pay Luxus' Costs once determined by an Assessment Officer.

Mr. Bade

[68] Relying on Rule 10.31(5) and ***Park Avenue Flooring***, Mr. Bade seeks costs on Column 4 of Schedule C.

[69] In ***Hogarth*** at paras 8-9, the Court of Appeal addressed the purpose of a costs award and concerns regarding costs awarded to self-represented litigants:

> ... The primary purpose of a costs award is to partly indemnify the successful party for the costs of the litigation ... Since a self-represented litigant does not incur any legal fees, the ordinary objective of indemnification is not achieved. Costs awards do, however, achieve other purposes: they can be used to encourage settlement, or to prevent frivolous, vexatious or harassing litigation, and they can also be used to encourage economy and efficiency during litigation. Rule 10.31(5) ensures that those purposes of a costs award can be achieved even where a party is self-represented.
>
> Previous decisions have observed that awarding costs to self-represented litigants raises difficult policy issues. The expectation that costs might be received can actually invert the usual objectives of costs, by encouraging litigation and discouraging settlement "because of an anticipated windfall to the unrepresented litigant that could result from a costs award": ***Dechant v Law Society of Alberta*** ... As ***Dechant*** observed ... self-represented litigants do not necessarily bear a greater personal burden ...

[70] In ***Dechant v Law Society of Alberta***, 2001 ABCA 81 at para 16, the Court of Appeal noted that while self-represented litigants spend their own time, represented litigants also spend their own time for which they are not compensated, and went on to say at para 16:

> ... Thus, applying an identical costs schedule to both represented and unrepresented litigants will work an inequity against the represented litigant who, even with an award of costs, will be left with some legal fees to pay and no compensation for a personal investment of time. What the Rules do provide is that both kinds of litigants are to be paid for their out-of-pocket expenses.

[71] At para 17 of ***Dechant***, the Court of Appeal noted that there was a concern that self-representation could become an occupation. That concern does not apply here as Mr. Bade did not commence the litigation; rather, he successfully defended himself against the Murrays' claim.

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[72] In ***Goold Estate v Ashton***, 2017 ABCA 315 at para 4, the Court of Appeal noted that costs are intended to indemnify the successful party for legal fees incurred, and that under Rule 10.31(5) costs should be awarded in exceptional circumstances.

[73] In ***LaTrace*** at para 5, the Court of Appeal discussed costs being awarded to self-represented litigants in cases where exceptional circumstances "serve at least one of the policy reasons for which costs awards are made, apart from indemnification". The Court noted other policy reasons for costs awards, including encouraging settlement, preventing frivolous, vexatious or harassing litigation, and encouraging economy and efficiency during litigation.

[74] Here, the litigation was relatively complex. Mr. Bade, however, did not fully participate in the trial and it is apparent from his Bill of Costs that he did not fully participate in all pre-trial steps. Mr. Bade's circumstances are not the same as the corporation represented by a self-represented litigant in ***Park Avenue Flooring***, and I find that case is distinguishable on its facts.

[75] On the other hand, Mr. Bade filed a Statement of Defence, had some involvement with the conduct of the litigation, participated in a mediation with the other parties and agreed to contribute to a settlement in some manner, attended for a portion of the trial, and filed a closing brief.

[76] Given the nature of this relatively complex case, and considering Mr. Bade's involvement in it, I find that there are exceptional circumstances for awarding costs to Mr. Bade. The exceptional circumstances support the policy reasons of encouraging settlement, and economy and efficiency during litigation. Mr. Bade defended the action through trial. Before the trial, he participated in a mediation in an attempt to settle the litigation, and he agreed to participate in a global settlement offer. To deprive Mr. Bade of all costs, although successful, would have the corollary effect of the Murrays paying no costs for unsuccessfully pursuing Mr. Bade. Awarding no costs in this case, would not promote the policy reasons of encouraging settlement, or economy and efficiency in litigation.

[77] However, I find that because Mr. Bade is a self-represented litigant, he is not entitled to costs equivalent to a represented party. In this case, I find it appropriate to set the amount of Mr. Bade's costs at 25% of single Column 4 of Schedule C, to reflect the fact that Mr. Bade did not incur any costs of retaining counsel.

[78] I find that Mr. Bade is entitled to 25% of his costs on single Column 4 of Schedule C, plus 100% of his reasonable disbursements, plus applicable taxes, as against the Murrays. Mr. Bade's reasonable disbursements shall not include Mr. Bade's travel to or from the trial, or his portion of the cost of the mediation.

[79] In the event that Mr. Bade and the Murrays cannot agree to the amount of these costs, then Mr. Bade's Schedule C costs and reasonable disbursements shall be determined by an Assessment Officer under Rule 10.34(1). The Murrays shall pay Mr. Bade's costs once agreed to by Mr. Bade and the Murrays, or determined by an Assessment Officer.

Issue 3: What is the impact of the various *Calderbank* offers?

[80] The Murrays and Luxus rely on their respective *Calderbank* offers.

[81] In ***ILI's Painting Services Ltd v Homes by Bellia Inc***, 2020 ABQB 372, Devlin J provided a useful summary of the law relating to *Calderbank* offers. In ***ILI's Painting*** at para 21, Devlin J noted that there is no particular language that must be used for a *Calderbank* offer to be valid, and

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he quoted from ***Bruen v University of Calgary***, 2019 ABCA 275. At para 8 of ***Bruen***, the Court of Appeal said:

> The costs rules respecting offers are designed to encourage the principled and reasonable settlement of litigation, and to deter litigants from taking unreasonable positions. In order to attract costs consequences, offers must be realistic, reasonable and represent a *bona fide* compromise or other articulable reason for settlement ...

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[82] At para 27 of ***ILI's Painting***, Devlin J also referred to the factors applicable to *Calderbank* offers, which were set out by Loparco J in ***Kent v MacDonald***, 2020 ABQB 29 at para 16:

> ... In exercising its discretion with respect to awarding double costs as a result of a *Calderbank* offer, the Court should consider whether:
>
> a) the offer was a reasonable, genuine compromise;
>
> b) it gave a cost advantage if accepted;
>
> c) adequate time for consideration was provided;
>
> d) the offer was unreasonably rejected; and
>
> e) the party making the offer fared better than if the offer was accepted.

[83] As Devlin J discussed in ***ILI's Painting*** at paras 35-36, informal offers do not presumptively lead to an award of double costs, but an informal offer that leaves none of the ***Kent*** factors wanting suggests a starting point of double costs. In ***ILI's Painting*** at para 36, Devlin J explained the difference between a starting point and a presumption:

> ... The difference between a starting point and a presumption is subtle but significant. A starting point tells one where to begin the analytical journey, but vests that point with no normative weight as the "right" outcome. A presumption, on the other hand, defines the correct end-point unless that presumptive result is positively displaced ...

Murrays' *Calderbank* Offer

[84] The Murrays' *Calderbank* Offer was a reasonable and genuine compromise and it gave a cost advantage if accepted. The Murrays' Calderbank Offer was unreasonably rejected. The Murrays fared better than if the offer was accepted.

[85] However, the Murrays' *Calderbank* Offer was only left open for 2½ days until Thursday June 1, 2023, at 1:00 p.m., a few days before the trial began on Monday, June 5, 2023. I find that adequate time for consideration was not provided by the Murrays to entitle them to a doubling of their costs. By comparison, and subject to certain exceptions, Rule 4.24(3) requires a formal offer to remain open for two months, or until the start of the trial, whichever occurs first, before a plaintiff is entitled to double costs under Rule 4.29(1).

[86] Because of the short duration of the Murrays' *Calderbank* Offer, which expired before the start of the trial, I find that it is appropriate to award costs on a 1.5 basis for all of the Murrays' Costs incurred after the service of the Murrays' *Calderbank* Offer on May 29, 2023.

Luxus *Calderbank* Offers

[87] The Luxus *Calderbank* Offers consisted of an offer to the Murrays directly, left open for 16 days, and an offer to contribute the same amount to a global settlement, left open for seven days.

The Luxus *Calderbank* Offers were reasonable and genuine compromises and gave a cost advantage if accepted. The Luxus *Calderbank* Offers were unreasonably rejected. Luxus fared better than if the offer was accepted.

[88] The Luxus *Calderbank* Offers were left open first for 16 days, directly to the Murrays, and then for seven days as a contribution to a global offer. In the circumstances of this case, I find that Luxus provided an adequate time for consideration of the Luxus *Calderbank* Offers, in particular for the Murrays to consider the first one for a period in excess of two weeks. I find that it is appropriate to double Luxus' Costs for all costs incurred after the service of the first of the Luxus *Calderbank* Offers on May 1, 2023.

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Issue 4: Should a *Sanderson* order be granted requiring WBL to pay the costs of the Successful Defendants?

[89] The Murrays seek a *Sanderson* order to require WBL to pay the costs of the Successful Defendants. WBL submits that it would be inappropriate to make a *Sanderson* order in this case. For the reasons that follow, I agree that this is not an appropriate case in which a *Sanderson* order should be granted.

[90] *Sanderson* orders and *Bullock* orders are an exception to the general rule. The general rule is that a successful plaintiff recovers costs from an unsuccessful defendant, and a successful plaintiff pays the costs of a successful defendant.

[91] In ***Garrioch v Sonex Construction Ltd***, 2017 ABCA 262 at para 5, the Court of Appeal noted that there was little practical difference between a *Bullock* order and a *Sanderson* order, if all of the parties are solvent.

[92] In ***Abt Estate v Ryan***, 2020 ABCA 133 para 71, citing ***Palechuk v Fahrlander***, 2008 ABCA 10 at para 5, the Court of Appeal articulated the test to be applied in Alberta for determining whether a *Sanderson* order or *Bullock* order should be granted:

> The granting of a ***Sanderson*** or ***Bullock*** order in Alberta involves applying a tri-partite test; an applicant must show that "(a) it was reasonable for the plaintiff to join the successful defendant(s), (b) there is no good reason to deprive the successful defendant of his costs, and (c) the unsuccessful defendant was wholly responsible for the action" ...

1. Was it reasonable for the Murrays to join the successful defendants in the action?

[93] I find it was reasonable for the Murrays to join the defendants in one action because:

(a) the claims against all defendants, to the extent of their respective involvement, related to alleged defects in the Murray Residence, in particular: (1) the Great Room Windows and Doors and the associated structure; and (2) the Master Bedroom Sliding Doors, and the associated structure; and

(b) the same damages were claimed against all of the defendants, to the extent of their respective involvement.

2. Is there no good reason to deprive the successful defendant of its costs?

[94] In ***Abt Estate*** at para 73, the Court of Appeal described this element of the test "as simply a judicial discretion to refuse a ***Sanderson*** or ***Bullock*** order in appropriate circumstances" and

quoted from ***Allen (Next friend of) v University Hospitals Board***, 2000 ABQB 965 at para 12, where Perras J said:

> By requiring that there be "good cause" to deprive the successful defendant of costs, the Alberta courts seem to be merely identifying a circumstance that would justify a court's exercise of discretion to deny a ***Bullock*** or ***Sanderson*** order. This factor could be captured within a broader inquiry, by simply requiring that a judge "be satisfied that it is just that the unsuccessful defendant should, either directly or indirectly, have to pay the costs of the successful defendant.

[95] Based on the above, I must be satisfied that it is just that WBL should, either directly or indirectly, have to pay the costs of the Successful Defendants, which is somewhat different than being satisfied that there is "no good reason to deprive the successful defendant of its costs".

[96] In ***House v Baird***, 2017 ONCA 885 at para 92, the Ontario Court of Appeal articulated factors to consider in a *Sanderson* order application if the threshold issue of whether it was reasonable for the plaintiff to join several defendants in one action is resolved in the affirmative:

(a) whether the defendants tried to blame each other;

(b) whether the unsuccessful defendant caused the successful defendant to be added as a party;

(c) whether the causes of action were independent of each other; and

(d) the plaintiff's ability to pay the costs.

[97] Regarding the first ***House*** factor, WBL filed a Third Party Claim against Luxus and KAPO. KAPO did not participate in the trial and does not seek costs. Luxus seeks costs as a Successful Defendant. To the extent that it filed a Third Party Notice, WBL tried to blame KAPO and Luxus, and Luxus was successful in defending that claim. However, as WBL also points out, WBL and Luxus collaborated during the trial and presented some expert evidence jointly.

[98] Luxus successfully defended against WBL's Third Party Claim, and there is no principled reason for having the Murrays pay Luxus' costs of defending WBL's Third Party Claim, if those costs were incremental and could be identified. However, none of the parties submitted that WBL should be responsible for Luxus' defence costs related to the Third Party Claim so apportionment of Luxus' Costs (which did not distinguish between the main claim and the third party claim) between the Murrays and WBL is not considered.

[99] Regarding the second ***House*** factor, the Murrays claimed against WBL and the Successful Defendants from the commencement of the action. There is no basis on which to find that WBL caused the Successful Defendants to be added as parties to the action.

[100] Regarding the third ***House*** factor, the causes of action against the defendants had common elements in relation to the claims of negligence, though ultimately, I found that WBL was liable to the Murrays in contract, which was an independent claim against WBL.

[101] Regarding the fourth ***House*** factor, the Murrays addressed WBL's ability to pay (by referring to WBL's policy of insurance) but did not address the Murrays' ability to pay the costs.

[102] WBL did not cause the Successful Defendants to be added to the action and WBL was found liable under its contract with the Murrays', whereas the negligence claim against the Successful Defendants and WBL was dismissed. Based on all of the circumstances of this case, I

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am not satisfied that it would be just to grant a *Sanderson* order requiring WBL to pay the costs of the Successful Defendants.

3. Was the unsuccessful defendant wholly responsible for the action?

[103] I found that WBL was the only defendant liable to the Murrays. In addition, I found that AEL breached its contract to the Murrays but the Murrays did not claim in contract against AEL so there could be no recovery. As discussed in the ***Trial Decision*** at Issue 7, I found that the Murrays' claims in negligence failed against all of the defendants.

[104] In ***Abt Estate*** at para 75, the Court of Appeal discussed how the third consideration is to be interpreted:

> As to the third requirement, responsibility of the unsuccessful defendant for the action, the Court in ***Allen***, para 15, said it is not necessary for the unsuccessful defendant to be wholly responsible for the involvement of the successful defendant in order for a ***Sanderson*** or ***Bullock*** order to issue.

[105] In the quote from ***Abt Estate*** above, the Court of Appeal endorses the comment in ***Allen*** that it is not necessary for the unsuccessful defendant to be wholly responsible for the involvement of the successful defendant in order for a *Sanderson* or *Bullock* order to issue. This appears to be a modification of the factor that was articulated in ***Palechuk*** that "the unsuccessful defendant was wholly responsible for the action", quoted in ***Abt Estate*** at para 71, as set out in paragraph [92].

[106] In ***Abt Estate*** at para 76, the Court of Appeal noted that the third requirement of the test is used to determine whether a *Sanderson* or a *Bullock* order is appropriate. This step would necessarily require a court having already found that it was appropriate for the plaintiff to join all of the defendants in the action and that it is just to require the unsuccessful defendant to pay the successful defendant's costs. In ***Abt Estate*** at para 76, the Court set out the considerations when determining whether to grant a *Sanderson* or a *Bullock* order:

> This requirement serves the purpose of determining which type of order, ***Sanderson*** or ***Bullock*** is appropriate. The two primary considerations in determining which type of order is the most appropriate are the ability of the unsuccessful defendant to pay, and whether the successful plaintiff or successful defendant should bear the risk of the non-recovery of costs ...

[107] This step is not necessary, as I have found that a *Sanderson* order is not just in this case. However, if I am wrong in that conclusion, I note that the evidence at trial was that WBL is no longer an operating entity. However, the Murrays provided some evidence of the ability of WBL to pay costs of the Successful Defendants under WBL's policy of insurance. On the second consideration as to whether the Murrays or the Successful Defendants should bear the risk of non-recovery of costs, there is no principled reason offered, and I find none, for the transfer of the risk of non-recovery of costs to the Successful Defendants. If I am wrong in my analysis of the first two considerations and a *Sanderson* or *Bullock* order should be granted, I would grant a *Bullock* order.

***Sanderson* order conclusion**

[108] Given the comments of the Court of Appeal in ***Abt Estate*** regarding the interpretation of the considerations set out in ***Palechuk***, I have assessed whether a *Sanderson* order is appropriate in this case by considering the following:

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(a) was it reasonable for the plaintiff to join the successful defendants;

(b) is the court satisfied that it is just that the unsuccessful defendant should, either directly or indirectly, have to pay the costs of the successful defendant; and

(c) if a *Sanderson* or *Bullock* order is to be granted, then the court should consider: the ability of the unsuccessful defendant to pay, and whether the successful plaintiff or successful defendant should bear the risk of the non-recovery of costs, to determine which order to grant.

[109] For the reasons noted above, while I have found that it was reasonable for the Murrays to join the Successful Defendants in the action, I am not satisfied that it would be appropriate to grant a *Sanderson* order in this case.

Conclusion

[110] Based on the foregoing, the following costs are ordered:

(a) the Murrays' Costs shall be determined by an Assessment Officer under Rules 10.31(2)(b)(ii) and 10.34(1) and shall be paid by WBL;

(b) Luxus' Costs shall be determined by an Assessment Officer under Rule 10.34(1) and shall be paid by the Murrays;

(c) Mr. Bade is entitled to 25% of single Column 4 of Schedule C costs, plus 100% of his reasonable disbursements, plus applicable taxes, which shall be determined in accordance with paragraphs [78] and [79] and shall be paid by the Murrays; and

(d) the Murrays' application for a *Sanderson* order is dismissed.

[111] Counsel for the Murrays is directed to draft the appropriate order and circulate it to the other parties appearing on the costs application. Once agreed to as to form and content, the order can be submitted to KBFiling to my attention.

Written submissions received on the 13th day of December, 2024, and the 3rd day of January, 2025.
Dated at the City of Calgary, Alberta this 14th day of May, 2025.

E.J. Sidnell
J.C.K.B.A.

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Appearances:

Paul J Stein KC
for Donald Murray and Linda Murray

Erika Carrasco
for Windsor Brunello Ltd

Damian Shepherd
for Luxus Haus Imports Ltd

Colten Harrish
for Sebastian Bade, operating as CS Eurohaus

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