In the Court of Appeal of Alberta

Citation: Murray v Windsor Brunello Ltd, 2026 ABCA 275

Date: 20260824
Docket: 2401-0160AC;
2401-0165AC
Registry: Calgary

2401-0160AC

Between:

Donald Murray and Linda Murray

Respondents

\- and -

Windsor Brunello Ltd

Appellant

\- and -

**KAPO Fenster und Türen GmbH,
Sebastian Bade operating as CS Eurohaus, Luxus Haus Imports Ltd,
and Alberta Engineering Ltd**

Respondents

2401-0165AC

Between:

Donald Murray and Linda Murray

Appellants

\- and -

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

Respondents

The Court:

The Honourable Justice Kevin Feehan
The Honourable Justice Bernette Ho
The Honourable Justice Kevin Feth

Memorandum of Judgment

Appeal from the Orders of
The Honourable Justice E.J. Sidnell
Dated the 17th day of May, 2024 and 14th day of May, 2025
(2024 ABKB 281, 2025 ABKB 299, Docket: 1501-00629)

Memorandum of Judgment

The Court:

I. Overview

[1] Donald and Linda Murray appeal, and Windsor Brunello separately appeals, a residential construction decision of a trial judge, in which the Murrays were granted judgment against Windsor of $958,622.33 plus costs, had their claims dismissed against Alberta Engineering, KAPO, Sebastian Bade operating as CS Eurohaus, and Luxus Haus, and in which all notices against co-defendants and third party claims amongst all parties were dismissed: ***Murray v Windsor Brunello Ltd***, 2024 ABKB 281.

[2] The Murrays also appeal the costs decision of the trial judge dismissing their application for a *Sanderson* order, where the costs of successful defendants are paid directly by the unsuccessful defendants, or a *Bullock* order, where the costs of the successful defendants are paid by the plaintiff who is entitled to reimbursement from the unsuccessful defendants for those costs: ***Sanderson v Blyth Theatre Company***, [1903] 2 KB 533 (CA); ***Bullock v London General Omnibus Company & others***, [1907] 1 KB 264, [1904-07] All ER 44 (CA); ***Murray v Windsor Brunello Ltd***, 2025 ABKB 299.

[3] The residential construction appeal turns on interpretation of an oral contract between the Murrays and Windsor, a second oral contract between the Murrays and Alberta Engineering, and claims for negligent supply of shoddy goods or structures, negligent misrepresentation or performance of a service, and breach of a duty to warn against Windsor, Alberta Engineering, KAPO, Mr Bade, and Luxus. The negligence claims turn on the application of principles governing recovery for pure economic loss.

[4] The appeal of the Murrays is allowed in part; the appeal of Windsor is allowed in part; and the Murrays' costs appeal is dismissed.

II. Brief Facts

[5] In 2011, the Murrays decided to build a residence in Wheatland County, east of Strathmore, Alberta. The house was designed with over 8800 square feet on the first and second floors, 3400 square feet of finished basement, and an attached four-car garage.

[6] This appeal arises over the supply and installation of Great Room windows and sliding doors, and Master Bedroom sliding doors. The Great Room windows and sliding doors are more than 24 feet in height, with five levels of windows. On the ground floor, there are four 10-feet-high, sliding glass doors 32-feet-wide, opening onto a patio. Those doors slide between a lower

guide track and an intermediate guide track and guide headers. Above the Great Room sliding doors and the intermediate guide track are four 2-feet-high fixed-pane transom windows, again 32-feet-wide.

[7] Immediately above the fixed-pane transom windows is a structural steel intermediate beam installed in the horizontal orientation, 32 feet in length, supported on each side by I-beam columns. This initial structural steel was later supplemented with additional vertical and diagonal hollow structural steel supports on each side.

[8] Immediately above the intermediate beam are four 10-feet-high fixed-pane windows, 32-feet-wide, referred to as the Upper Windows. Above the Upper Windows are further four 2-feet-high fixed-pane transom windows, referred to as the Upper Transom Windows. The combination of the Upper Windows and the Upper Transom Windows are referred to as the Upper Glazing. Of importance, the Upper Glazing was originally to be hung from the roof beam but was later, after completed design and manufacturing, changed to sit on the intermediate beam, intermediate guide track, and guide headers.

[9] Above the Upper Transom Windows is a roof beam bulkhead and above that an “eyebrow” window.

[10] For illustration, the Great Room windows and doors can be seen in a photo included in the decision below at paragraph 27(c):

[11] The Master Bedroom is located on the second floor of the residence. It contains the Master Bedroom sliding doors which are located at a corner of the Master Bedroom, opening onto a second-storey balcony. This sliding door complex consists of two glass sliding doors installed at a 90-degree angle so the corner of the Master Bedroom is all glass sliding doors. These sliding doors also travel between a floor track and an upper track, hung from 8-foot cantilevered beams.

[12] The Murrays initially hired a custom homebuilder, not a party to this proceeding, to build the residence. That custom homebuilder hired Alberta Engineering to provide engineering services for the project. However, in May 2012, the Murrays parted ways with the custom homebuilder. In this context, the principal of Alberta Engineering contacted Donald Murray about Windsor helping to complete the residence, with Alberta Engineering continuing to provide consulting engineering services.

[13] In June 2012, the Murrays entered a "handshake deal" with Windsor to act as their project manager and construction manager for the construction of the residence, for a flat fee of between \$550-580,000.

[14] Alberta Engineering provided the engineering for the residence. The lead engineer of Alberta Engineering played a dual role on the project, acting as Windsor's lead project manager and Alberta Engineering's consulting engineer.

[15] In July 2012, Windsor contacted Luxus, a Canadian importer for KAPO, an Austrian manufacturer of windows and doors, to supply the Great Room windows and sliding doors and the Master Bedroom sliding doors. Mr Bade, through his sole proprietorship, CS Eurohaus, acted as Luxus' sales agent.

[16] On October 10, 2012, Alberta Engineering prepared the initial structural steel design for the Great Room sliding windows and doors, which structural steel was installed later in October 2012.

[17] In November and December 2012, Mr Bade, and representatives from Luxus, Alberta Engineering, and Windsor, travelled to Austria to consult with KAPO about the design of the Great Room and Master Bedroom windows and sliding doors. The designers at KAPO warned that for the Great Room sliding doors to operate, no weight should be placed on them or on the intermediate guide track and guide headers. The Upper Glazing should be hung from the roof and not be supported on the intermediate beam.

[18] On December 20, 2012, the KAPO shop drawings were provided by Windsor or Alberta Engineering to the retained installer, Emperor Homes.

[19] On January 15, 2013, Alberta Engineering approved the KAPO drawings for the Great Room windows and sliding doors, and Master Bedroom sliding doors. Consistent with KAPO's warning that no weight should be placed on the Great Room sliding doors, intermediate guide track and guide header, the joint project manager for Windsor who was also the consulting engineer for Alberta Engineering noted on the drawings that no weight should be placed on the intermediate beam immediately above the doors. He added that the Upper Glazing should be hung from the roof and not be supported on the intermediate beam.

[20] On February 1, 2013, Alberta Engineering prepared an installation sequence setting out the order in which structural steel, sliding doors, windows, and beams were to be installed.

[21] On April 1, 2013, the KAPO Great Room sliding doors and Master Bedroom sliding doors were delivered to the site. Sometime after delivery, Emperor Homes raised safety concerns about hanging the Upper Glazing from the roof beam. The joint project manager and consulting engineer for Windsor and Alberta Engineering then changed the Upper Glazing plan so that rather than hanging from the roof beam, it would rest on the intermediate beam and guide track, contrary to the advice from KAPO. The project manager/consulting engineer did not advise KAPO of this change in plans. Emperor Homes installed the windows and doors.

[22] During the summer of 2013, stone cladding around the exterior of the KAPO windows and sliding doors was added. There was considerable debate at trial over whether the stone cladding was whole stone or stone veneer.

[23] By October 2013, the Great Room sliding doors and Master Bedroom sliding doors began to bind, making them difficult to open and shut. Over several weeks, that binding became increasingly more pronounced, such that sliding the doors in their respective guide tracks was exceedingly difficult.

[24] By April 10, 2014, the Great Room sliding doors' guide track twisted, causing those sliding doors to be even more difficult to open.

[25] The Murrays moved into their completed residence in September 2014.

[26] In January 2022, Alberta Engineering entered into a *Mary Carter* agreement, ***Booth v Mary Carter Paint Co***, 202 So 2d 8 (Fla 1967), whereby Alberta Engineering settled with the Murrays for $125,000, admitting partial liability in negligence. In July 2022, Alberta Engineering was struck from the Registry of Corporations and ceased to exist pursuant to s 213(4) of the Alberta *Business Corporations Act*, RSA 2000, c B-9.

[27] The matters proceeded to trial for 11 days between June 5 and 19, 2023.

III. Trial Judge's Decision

[28] The trial judge issued a 98-page decision, following three rounds of oral and written closing arguments. She heard evidence from 10 ordinary witnesses, the parties, officers or senior employees of the parties, and seven expert witnesses. She detailed the evidence of all witnesses and indicated where she accepted or rejected their evidence or opinions.

[29] The trial judge found the Murrays contracted with Windsor to act in the dual capacities of project manager and construction manager, and that Windsor would rely on the services of Alberta

Engineering as engineering consultant, providing structural design, and retaining other professional consultants as required. Additionally, Windsor provided site coordination and field inspection. The oral contract included Windsor's obligations as project manager, construction manager, scheduler, coordinator of trades and suppliers, retainer of professional consultants, and all communication on the project.

[30] The trial judge found the Murrays also had an oral agreement with Alberta Engineering "through" Windsor, in which Alberta Engineering would provide consulting and engineering services in compliance with the *Alberta Building Code*, performed with the skill of a reasonably competent professional engineer, using reasonable care and diligence, possessing the necessary skills to undertake those engineering services; and where engineering design was required, a professional engineer would supervise the design of the project; and inspections would be carried out as necessary and work would be reviewed to determine if it was performed in accordance with any relevant design.

[31] The trial judge found she could imply reasonable terms to the contract between the Murrays and Windsor because construction management and project management contracts are the types of contracts in respect of which implied terms have been applied historically, and to fulfill the reasonable intentions of the parties. Customs and usage in the building trade are typically understood by the parties, including complying with applicable building codes, requiring that the work be done in a good and workmanlike manner, utilizing the ordinary skill of those exercising the particular trade, and that materials supplied and installed will be of good quality and reasonably fit for the purpose.

[32] The trial judge found the structural steel for the windows installation was installed before any identification or calculations of general dead loads were undertaken, and Alberta Engineering did not consider or account for the dead load of the stone cladding. As to the Austria trip, the trial judge found a decision was made at that time that the Upper Glazing would be hung from the roof beam so the weight would not bear on the intermediate beam, because the Great Room sliding doors and guide track "could not support any weight and no weight was to be placed on them". That understanding was handwritten on the approved drawings by the joint project manager and consulting engineer for Windsor and Alberta Engineering.

[33] The trial judge found that to hang the Upper Glazing from the roof beam would have required fasteners designed by an engineer, which was never done. As indicated, sometime after the KAPO windows and sliding doors were manufactured and delivered to the site in April 2013, the Upper Glazing installation method was changed to have those windows rest on the intermediate beam. The trial judge found that even before the installation of the sliding doors and guide track, the intermediate beam was sagging under its own weight. The joint project manager and consulting engineer thought that once the Upper Glazing was screwed into place most of the weight would transfer to the outside columns, but that was not effective.

[34] The trial judge found that the Great Room sliding doors began to stick by October 2013, and by April 2014, the guide track was twisting, causing the doors to be "very difficult to open". She also determined those doors were not air-tight, and snow and frost would blow through them into the interior of the Murray residence. She concluded that the installation of turnbuckles to pull out the edge of the guide track temporarily improved the situation, but the difficulty in opening and closing the Great Room sliding doors continued to worsen until they were no longer functional.

[35] The trial judge accepted the evidence of the Murrays' expert that the problem with the Great Room sliding doors was the vertical deflection in the intermediate beam and guide track immediately above those doors, as a result of the vertical load placed on them by the Upper Glazing. She adopted their expert's opinion that the beams and track assemblies supporting and guiding all the doors in question should have been designed to provide greater stiffness or resistance to vertical deflection. Additionally, the trial judge found the dead load from the stone cladding was not considered in the installation sequence, and the binding of the Great Room sliding doors was "coincident with the functionality issues". She further found the intermediate beam was not designed in accordance with the *Alberta Building Code* and the excessive deflection in the intermediate beam and guide track was causing the binding of the Great Room sliding doors.

[36] The trial judge generally rejected the evidence of Windsor's expert in the area of project and construction management, coordination and field inspection, and particularly as to the reason for the binding of the Great Room sliding doors.

[37] The trial judge concluded that the Great Room sliding doors did not function as designed and were not installed in accordance with the approved KAPO shop drawings. Further, Windsor did not advise KAPO of the change in installation method. Installation of the sliding doors occurred before the dead load was applied to the intermediate beam, causing the intermediate beam and guide header to show excessive deflection. She also found the intermediate beam was wrongly installed on its horizontal axis, contributing to the excessive deflection, the additional steel structure was not subject to a structural design approved and stamped by a professional engineer, and the guide track should have been designed to provide greater stiffness or resistance to vertical deflection.

[38] As to the Master Bedroom sliding doors, the trial judge found no evidence the design or manufacture of those doors was in any way deficient or defective. Again, the trial judge accepted the expert opinion of the Murrays' expert that vertical deflection in the structural support of the upper track resulted in the binding of the door frame, exacerbated by the binding of the leading edge of the door against the track at the top of the door. She determined the Master Bedroom sliding doors did not function as designed and the deflection in the cantilevered beams caused those doors to bind.

[39] The trial judge concluded that Windsor had breached its contract with the Murrays by failing to ensure the design and construction were adequately coordinated, in relation to the

structural steel and anticipated dead loads to the Great Room windows and sliding doors, particularly the change in method of installation of the Upper Glazing to rest on the intermediate beam without coordinating that new method of installation with KAPO, and coordinating the installation of the stone cladding without ensuring there would be no impact on the functionality of the sliding doors.

[40] As to the Master Bedroom sliding doors, the trial judge found Windsor failed to provide for the appropriate dead loads, including for the stone cladding and the interior decorative beam, failed to obtain from KAPO the necessary tolerances required for the sliding doors, and failed to properly design the cantilevered beams.

[41] The trial judge concluded that Alberta Engineering breached its contract with the Murrays. Alberta Engineering's design of the structural steel in the Great Room was not compliant with the *Alberta Building Code*, was not performed at the level of a reasonably competent professional engineer, and was not performed with reasonable care and diligence because Alberta Engineering failed to adequately consider the impact of the stone cladding on the deflection of the intermediate beam, and the impact of the deflection of the intermediate beam on the Great Room sliding doors. However, she found that because a breach of contract by Alberta Engineering had not been pleaded by the Murrays, no finding of liability for breach of contract could be made.

[42] The trial judge then addressed the issue of negligence. She determined that those claims should be interpreted as claims for pure economic loss, and that damages could only be recovered for the cost of repair for defective or shoddy products and structures where an imminent danger arising from a dangerous defect is proven: ***Winnipeg Condominium Corporation No 36 v Bird Construction Co***, [1995] 1 SCR 85, paras 12, 20, 21, 26, 29, 35-40, 43, 121 DLR (4th) 193. She found, however, no imminent danger in relation to the Murray residence. She wrote: "In a defective building case, there can be no claim for pure economic loss unless it is proven that there is an imminent danger. This was neither pleaded nor proved". As a result, the Murrays' claims in negligence for the construction of the residence "against all of the defendants must fail".

[43] On negligent misrepresentation or negligent performance of a service, the trial judge held that liability turns on a defendant's undertaking and a plaintiff's reliance, but that to allow claims in these areas against Windsor and Alberta Engineering "would not be just and fair as it would be an unjustified encroachment of tort law into the realm of contract". The trial judge denied claims against KAPO, Luxus, and Mr Bade in negligent misrepresentation and negligent performance of a service because there was no proximity between the Murrays and any of those defendants, and no evidence of representations that the windows and sliding doors were suitable for the Murray residence as ultimately redesigned.

[44] The trial judge also denied the negligent performance of a service or negligent misrepresentation claims against KAPO, Luxus, and Mr Bade by Windsor, for lack of proximity.

[45] On the Murrays' claim that Alberta Engineering had a duty to warn of issues with the KAPO Great Room windows' and sliding doors' size, weight, and intended operation, the trial judge found Alberta Engineering had no part in the selection or ordering of the KAPO Great Room windows and sliding doors. Additionally, Alberta Engineering had no involvement at all with the Master Bedroom sliding doors. The trial judge concluded that the Murrays had no reasonable expectation that Alberta Engineering would have warned them about any aspect of the engineering or design of the windows and sliding doors because no relationship of proximity existed between those parties.

[46] As to whether Windsor owed a duty to warn the Murrays, the trial judge found Windsor knew that no weight was to be placed on the KAPO Great Room windows and sliding doors; however, she also determined the Murrays had no expectation Windsor would alert them to issues related to the size, weight, or intended operation of the KAPO windows and doors. She concluded there was no proximity between the Murrays and Windsor to ground a duty to warn.

[47] Likewise, the trial judge found that KAPO did not owe the Murrays a duty to warn. KAPO had no direct relationship with the Murrays and there was no evidence KAPO had any information about the structure of the Murray residence or the significant structural issues. She also concluded that Luxus and Mr Bade had no duty to warn the Murrays. Luxus had no direct relationship with the Murrays, except tangentially through Mr Bade, and there was no evidence that any issues relating to structural defects were ever raised with Luxus by Windsor. As for Mr Bade, he was a master carpenter by trade and was active in placing the order with KAPO, but no evidence was shown of any communication between Mr Bade and the Murrays or Windsor relating to structural defects being encountered.

[48] The trial judge also found that KAPO did not owe Windsor a duty to warn. Although she found the guide track was not designed and fabricated to be stiff enough to prevent the binding of the Great Room sliding doors, there was no evidence that KAPO knew or ought to have known it was not sufficient for installation in the Murray residence. Further, no evidence was found to suggest that KAPO ought to have foreseen any damage for which Windsor could be liable.

[49] Finally, the trial judge found that Luxus did not owe Windsor a duty to warn, as there was no evidence Luxus ought to have known that the guide track was not stiff enough for the Murray residence, given the structural deficiencies causing the binding.

[50] In summary, the trial judge found none of the claims for negligence had been proven and all were dismissed.

[51] Having addressed liability, the trial judge turned to damages. She found no evidence of diminution in the value of the Murray residence; and no remedial work had been undertaken pretrial, other than the installation of the turnbuckles, which was unsuccessful. However, she determined that in some building cases, the plaintiff may legitimately wait for the outcome of trial

before undertaking repair work. The delay in repair was found not to be a failure to mitigate. The trial judge concluded that the Murrays had acted reasonably under the circumstances.

[52] The trial judge accepted the evidence of the Murrays' expert on the scope of construction costs and construction defect correction, as to both the Great Room and the Master Bedroom sliding doors, and rejected the expert opinion of Windsor's expert on remedial work as it did "not provide a possible repair scope and cannot be considered for the purpose of calculating damages". However, the trial judge rejected the Murrays' expert when he included a contingency for collateral damage, entitled "Possible Repairs" to the floor tiling, hardwood flooring, and patio paving.

[53] The trial judge found the extent of the claimed contingencies was not reasonably foreseeable by Windsor and was not naturally arising from the loss in this case. She said the Murrays' expert was "not qualified to give evidence in regard to the likelihood of [collateral] damage". His opinion in this area was speculative and "disproportionately high".

[54] The trial judge also made some adjustments in the claims advanced by the Murrays' expert. She found the stone cladding was not "dry stacked natural stone cladding" but veneer. She did not accept any damages for bonding coverage, as there was no evidence the original construction work was ever bonded, and she reduced the amount for insurance for the remedial work to half the amount claimed.

[55] The trial judge also rejected the evidence of Luxus' professional quality surveyor that the damages for depreciated cost value should be reduced. She found it was not unreasonable for the Murrays to delay undertaking the remedial work until trial and there should be no reduction in damages for that delay. On the other hand, she also rejected the expert opinion that a 17.12% inflation factor should apply between April 2023 and April 2024, instead applying the rates set out in the *Judgment Interest Regulation*, AR 215/2011.

[56] In conclusion, the trial judge set the Murrays' damages at $914,946.59 plus pre-judgment interest of $43,675.74 for a total judgment of $958,622.33 plus costs.

IV. Grounds of Appeal

[57] In the Windsor appeal, it says the trial judge erred in finding:

(a) detailed terms of the oral agreement between the Murrays and Windsor;
(b) Windsor breached terms of the oral agreement with the Murrays;
(c) Windsor's breaches caused the Murrays' damages; and
(d) other parties were not liable to the Murrays.

[58] In the Murray appeal, they say the trial judge erred:

(a) by raising the defence of pure economic loss on her own motion resulting in procedural unfairness;
(b) in the alternative, in her assessment of the applicability of the doctrine of pure economic loss to the facts of this case, resulting in a failure by her to assess tort liability;
(c) in concluding there was no proximity between the parties upon which to base a duty of care or failure to warn; and
(d) by misapprehending applicable legal principles and failing to consider relevant evidence in assessing particular categories of damages.

[59] In the costs appeal, the Murrays say the trial judge erred:

(a) in interpreting and applying the principles for *Sanderson* and *Bullock* orders; and
(b) in concluding a *Sanderson* order should not be granted in this case.

V. Standard of Review

[60] The standard of review on questions of law is correctness, on questions of fact is palpable and overriding error, and on questions of mixed law and fact is palpable and overriding error unless there is an extricable error of law: ***Housen v Nikolaisen***, 2002 SCC 33, paras 7-37, [2002] 2 SCR 235; ***Mikkelsen v Truman Development Corporation***, 2017 ABCA 99, para 10, 67 BLR (5th) 192, leave to appeal denied 2017 CanLII 76782 (SCC); ***Schneider v Homenick***, 2024 ABCA 344, para 14; ***Calgary Co-operative Association v Federated Co-operatives Limited***, 2025 ABCA 142, para 14, leave to appeal denied 2026 CanLII 20156 (SCC).

[61] Palpable and overriding error is a highly deferential standard. "Palpable" means that an error is obvious. "Overriding" means an error goes to the very core of the outcome of a case: ***Benhaim v St-Germain***, 2016 SCC 48, paras 38, 39, [2016] 2 SCR 352; ***Buchner v Long***, 2017 ABCA 382, para 11; ***Peppler Estate v Lee***, 2020 ABCA 282, para 32, leave to appeal denied 2021 CanLII 4698 (SCC); ***R v Kruk***, 2024 SCC 7, paras 97, 98, 433 CCC (3d) 301; ***Calgary Co-operative***, paras 14, 15. "The same deferential standard of review applies to a trial judge's decision to accept or reject expert evidence": ***Alberta v ENMAX Energy Corporation***, 2018 ABCA 147, para 67, leave to appeal to SCC denied 2019 CanLII 14404 (SCC).

[62] Misapprehension of an applicable legal standard and a failure to consider relevant evidence are errors of law reviewable on the correctness standard: ***Evans v Teamsters Local Union 31***, 2008 SCC 20, para 47, [2008] 1 SCR 661; ***Ball v Imperial Oil Resources Limited***, 2010 ABCA 111, para 28, 477 AR 251.

[63] Where a trial court makes fact findings to determine the essential terms of a contract, those findings are reviewed on the palpable and overriding error standard of review: ***942925 Alberta Ltd v Thompson***, 2008 ABCA 81, para 18; ***Marathon Canada Limited v Enron Canada Corp***, 2009

ABCA 31, para 6, leave to appeal denied 2009 CanLII 25565 (SCC). Implication of contractual terms is a question of mixed fact and law and is also subject to review for palpable and overriding error, unless extricable errors of law are present: ***Energy Fundamentals Group Inc v Veresen Inc***, 2015 ONCA 514, para 29, 388 DLR (4th) 672; see also ***Dynamic Furniture Corp v 551148 BC Ltd***, 2012 ABCA 94, para 20.

[64] Whether a defendant owes a duty of care, as a component of proof of negligence, to a plaintiff is a question of law: ***1688782 Ontario Inc v Maple Leaf Foods Inc***, 2020 SCC 35, para 24, [2020] 3 SCR 504.

[65] Costs decisions are highly discretionary, attracting a highly deferential standard of review. They will not be interfered with lightly. They are generally not to be set aside unless a trial judge has made an error in principle such as ignoring relevant factors, or the award is plainly wrong on the standard of palpable and overriding error: ***Abt Estate v Ryan***, 2020 ABCA 133, paras 26-28.

VI. Analysis

A. Oral Agreement between the Murrays and Windsor

[66] In its first ground of appeal, Windsor says the trial judge erred by finding detailed implied terms in its oral agreement with the Murrays, which are not supportable on the record.

[67] Courts may find implied contractual terms where (1) established custom or usage establishes that the parties presumably intended the term; (2) the term is necessary to give business efficacy to the contract, such that the parties presumably intended the term; or (3) the term is implied as a legal incident of a particular class or kind of contract: ***Catre Industries Ltd v Alberta***, 1989 ABCA 243, paras 25-28, 63 DLR (4th) 74, citing ***Canadian Pacific Hotels Ltd v Bank of Montreal*****,** [1987] 1 SCR 711, 232-236, 40 DLR (4th) 385; see also ***Benfield Corporate Risk Canada Limited v Beaufort International Insurance Inc***, 2013 ABCA 200, paras 105-109, 553 AR 204. There is no requirement that the parties thought about a term to support its implication; implied terms may fill a gap "to which the parties did not turn their minds": ***Energy Fundamentals***, para 35. However, terms implied in fact must be reasonable, "have a certain degree of obviousness" and cannot be found in the face of "evidence of a contrary intention on the part of either party": ***MJB Enterprises Ltd v Defence Construction (1951) Ltd***, [1999] 1 SCR 619, para 29; ***Energy Fundamentals***, para 36.

[68] Canadian courts regularly imply terms for oral contracts with construction contractors, including where those terms are generally applicable to project managers or construction managers. The terms include that work will be done in a good and workmanlike manner, the workers employed will possess the ordinary skill of those exercising the particular trade, and the materials will be of good quality and reasonably fit for the purpose for which they were intended. Common implied terms also include that the contractor will build in accordance with the applicable

building code: ***G Ford Homes Ltd v Draft Masonry (York) Co Ltd***, (1984) 1 DLR (4th) 262, 265, 266, 268, 43 OR (2) 401; Thomas G Heintzman et al, *Heintzman, West & Goldsmith on Canadian Building Contracts*, 5th ed (Toronto; Thomson Reuters, 2020), § 4:51. This does not mean that other implied terms, discernible from the evidence or arising as a legal incident of a particular class of contract, may not also be found by a trial judge in the proper circumstances.

[69] The trial judge found the contract between the Murrays and Windsor was an oral agreement for the work of a construction manager and project manager and found that it "falls to the court in such a situation to look at the surrounding circumstances to determine the scope of the contract". When interpreting oral contracts, there is "greater flexibility in the nature of the evidence which is admissible to prove the contents of the contract and the meaning of the language used by the parties": ***Dynamic Furniture***, para 19, quoting G.H.L. Fridman, *The Law of Contracts in Canada*, (5th ed, 2006), 440. In this context, the conduct of the parties—including their conduct after the formation of the contract—has been considered relevant to the determination of implied terms: ***Ter Keurs Bros Inc v Last Mountain Valley (Rural Municipality)***, 2021 SKCA 55, para 45; see also ***Schluessel v Margiotta***, 2018 ABQB 615, paras 13-14.

[70] The trial judge set out a detailed list of approximately 30 express and implied terms including that Windsor would undertake field inspections, attend the Austria trip, coordinate all project professionals, trades, and suppliers, and take on responsibility for the performance of architectural services where no architect was engaged to provide such services. However, creating such complex, granular terms was an error in principle. As explained below, we uphold the trial judge's finding of a contract between the Murrays and Windsor with fewer and more generalized terms than those she identified, some of which were not supported by the evidence.

[71] There is no palpable and overriding error in the trial judge's finding of the conventional implied terms or the more specific terms in respect of coordination of engineering consultants. The trial judge found that Windsor agreed to coordinate trades and suppliers, and undertake field inspections to review their work to determine if it generally was performed in a good and workmanlike manner, was performed by workers possessing the ordinary skill of those exercising the particular trade, incorporated materials that were of good quality and reasonably fit for the purpose for which they were used, and met the requirements of the *Alberta Building Code.*

[72] These implied terms were supported by evidence of the relationship between the Murrays and Windsor, and by custom and usage in the construction industry. Windsor admitted in its statement of defence that it acted as construction manager for the Murrays' residence. The evidence at trial, as well, was that one of the officers of Windsor acted as project manager and was its representative in charge of overseeing all aspects of construction. The trial judge found as fact that Windsor handled the scheduling, sequencing, and supervision of the construction. Windsor retained and instructed most of the trades and suppliers, including Mr Bade, Luxus, Emperor

Homes, and others. Windsor sourced and ordered the KAPO windows and sliding doors and provided the KAPO shop drawings to the installers.

[73] In respect of engineering, the trial judge found Windsor agreed to ensure consulting engineers were engaged as necessary, to coordinate such engineering consulting, and to be the point of contact between the Murrays and the professional engineers. The evidence was that Windsor was responsible for providing information to Alberta Engineering and to have a representative on site to supervise the work being done, and that Alberta Engineering had a key role in the genesis of the deal between Windsor and the Murrays and how they carried out that deal.

[74] The trial judge found the following key facts: the principal of Alberta Engineering first contacted Donald Murray about Windsor helping to finish the house; Windsor's "sales pitch" in striking the deal with the Murrays included a reference to the proposed lead project manager for Windsor also being a professional engineer; and after the deal was made, that same individual ultimately took on a "dual role" as Windsor's lead project manager for the house while also serving as a consulting engineer at Alberta Engineering and being the "key contact" at Alberta Engineering for engineering services supplied to Windsor for the Murray residence.

[75] We are satisfied the trial judge therefore reasonably concluded that a term of the contract between Windsor and the Murrays included coordinating with and communicating with Alberta Engineering, and trades and suppliers, to ensure they each had the necessary information to perform their work adequately, and to undertake field inspections to ensure the work of trades and suppliers was consistent with the usual implied standards set out above. It was also reasonable for her to find an express or implied contractual term of requiring the Murrays to pay Windsor a flat rate for these services. We therefore uphold the contractual terms set out at paragraph 235(b)(i, iii, and iv), 235(d)(iii), 235(f) in respect of communication with engineering consultants and trades and suppliers only, and 235(g) of the decision below.

[76] Windsor argues the trial judge's finding that Alberta Engineering "undertook inspections" is inconsistent with her conclusion that Windsor was responsible for field inspections. But given the dual role of the joint project manager/consulting engineer and the close relationship between Windsor and Alberta Engineering in the contractual arrangement between the Murrays and Windsor, the finding that Alberta Engineering undertook some inspections does not undermine the finding that Windsor took on an overarching obligation for field inspections. In light of the evidence of the parties' intentions and conduct, the practical realities of what was necessary to carry out their agreement, and custom and usage in the construction industry, there is no reviewable error in the trial judge's implication of terms set out above.

[77] However, many other detailed implied terms found by the trial judge are not supportable on the record and must be set aside. The trial judge erred in principle by drawing a general conclusion that "all three grounds for implying a term" applied, without linking each implied term

she found to a particular basis in law or fact. To take one example, the trial judge found that a term of Windsor's contractual obligations as construction manager included "attending the Austria Trip as the Murrays' representative to ensure that it was appropriate to proceed with the manufacture of the KAPO Windows and Doors". This term could not be implied by custom and usage in the industry nor as a matter of law, nor did the evidence support it in fact as a matter of the parties' presumed intention.

[78] As Windsor points out, the Austria trip was only arranged when Donald Murray became uneasy after an additional deposit was sought for the KAPO windows and doors. This unexpected circumstance was not reasonably within the presumed intention of the parties. Further, the trial judge found as fact that it was Luxus, not the Murrays or Windsor, that arranged for and paid the expenses of the Austria trip. Nothing is "obvious" about a contractual term requiring Windsor to represent the Murrays on a visit to Austria, nor is such a term necessary to give business efficacy to the oral agreement between the Murrays and Windsor. The trial judge erred in principle in finding this and the other detailed implied terms of the oral agreement between the Murrays and Windsor, except for those terms specifically endorsed above.

B. Windsor's Liability for Breach of Contract

[79] In its second and third grounds of appeal, Windsor argues that even if some of the implied terms found by the trial judge are upheld, she nonetheless erred in finding it breached the contract and that those breaches caused damages.

[80] Windsor says it was Alberta Engineering which undertook inspections, including of the wood truss roof system, and was responsible for calculating the dead load of the stone cladding. Windsor argues that Alberta Engineering's responsibility was to convey information between the parties that might impact the design of the doors. Alberta Engineering devised the installation sequence of February 1, 2013, and modified it upon installation of the sliding doors sometime after delivery of the windows and doors in April 2013. Windsor says it was Mr Bade and Luxus who were provided with the information about KAPO's design and manufacture of the sliding doors, and the details of the south wall structure for accommodating those sliding doors.

[81] Windsor submits the trial judge erred in finding it unilaterally changed the installation method from hanging the Upper Glazing from the roof. Windsor relied upon Alberta Engineering to provide guidance and advice on the installation method for those windows. If there was a lack of coordination on the project, this breakdown occurred between Mr Bade, Luxus, and KAPO and was not its responsibility.

[82] Windsor says it was not responsible for the cantilevered beams in the Master Bedroom. Alberta Engineering advised Windsor about adding additional steel supports and a third-party was responsible to provide engineering of the Murrays' wood joist floor and wood truss roof system.

It was Alberta Engineering, Windsor says, that provided the information on the Master Bedroom sliding door tolerance and deflection limits.

[83] Windsor said it provided all necessary information to all professionals, and it should not be faulted that other professionals did not do their jobs properly.

[84] We are satisfied the trial judge reasonably concluded that the Great Room structural steel was designed and installed prior to the identification of dead loads and that Windsor was responsible for providing Alberta Engineering information on any dead loads that might impact that structural steel, including the stone cladding. The joint project manager for Windsor and consulting engineer for Alberta Engineering gave instructions to the installer, Emperor Homes, on the installation method for the KAPO windows and sliding doors, but did not provide the installer with the Alberta Engineering drawings on which the installation sequence appeared.

[85] The trial judge found that Windsor had failed to coordinate installation of the KAPO windows and sliding doors and changed the installation method in April 2013, and was aware KAPO instructed that no pressure was to be put on the intermediate beam or guide track, without notifying or seeking advice from KAPO. Windsor knew that Emperor Homes had expressed concern about hanging the Upper Glazing from the roof beam, as had been contemplated by the original design, necessitating changes to the installation method. Windsor was required to discuss those proposed changes with KAPO before changing the installation method, and the trial judge found that it did not. It was reasonable for the trial judge to find there was no design for the additional structural steel made prior to its installation, as no design documentation was produced at trial.

[86] As to the Master Bedroom sliding doors, the evidence was that Windsor did not provide any load or deflection calculations to the installation subcontractor, and those doors should not have been installed without more engineering assessment and advice.

[87] The trial judge found Windsor's breach of contract caused the following categories of damages:

> (a) the cost to remove and replace the Great Room Structural Steel with a structure that has limited deflection and will not bind the Great Room Sliding Doors;
>
> (b) the cost to repair or replace the Great Room Sliding Doors that are binding in part due to the deflection in the [intermediate beam];
>
> …
>
> (d) the cost to remove and replace the Cantilevered Beams with a structure that has limited deflection and will not bind the Master Bedroom Sliding Doors; and

(e) the cost to repair or replace the Master Bedroom Sliding Doors that are binding because of the deflection in the Cantilevered Beam

The trial judge's findings with respect to causation were based on her fact finding and her weighing the expert evidence before her. The trial judge accepted the evidence of the Murrays' expert, and rejected Windsor's challenges to it, on a number of key points. Windsor has failed to establish a palpable and overriding error in her determinations with respect to causation.

[88] In summary, while we have found the contract between the Murrays and Windsor had fewer and more generalized terms than those implied by the trial judge, Windsor nonetheless breached its contractual obligations to the Murrays by failing to properly coordinate the installation of the windows and sliding doors, particularly with respect to engineering services. These contractual breaches caused the damages found by the trial judge noted above. On this basis, we affirm the trial judge's conclusion that Windsor is liable to the Murrays in breach of contract.

C. *Liability of Parties Other than Windsor*

[89] Windsor's fourth ground of appeal intersects with the Murrays' appeal on the issue of negligence. Windsor filed third party claims in negligence against KAPO and Luxus. Third party claims are not made against the other defendants, but Windsor pleaded the *Contributory Negligence Act*, RSA 2000, c C-27. Windsor argues the trial judge erred in dismissing the claims against Luxus and KAPO in negligent misrepresentation, relying on the Murrays' arguments on the same point. Windsor also argues Luxus and KAPO breached their duty to warn Windsor. Lastly, again relying on the Murrays' arguments, Windsor argues the trial judge erred in failing to apportion liability as between Bade, Luxus, KAPO and Alberta Engineering. These issues are best addressed in the context of the main arguments in respect of the claims in negligence raised in the Murrays' appeal, as set out below.

D. *Pure Economic Loss and Negligence*

i. *Procedural Fairness*

[90] The Murrays' first ground of appeal is that the trial judge raised the issue of pure economic loss of her own motion, amounting to a denial of procedural fairness because she purportedly invoked a defence that was not pleaded: ***McDonald v Fellows***, 1979 ABCA 224, para 10, 105 DLR (3d) 434; ***Poulos v Caravelle Homes Ltd***, 1997 ABCA 18, para 2, 49 Alta LR (3d) 385; ***MNP (Next Friend of) v Bablitz***, 2006 ABCA 245, paras 4, 7-10, [2006] 12 WWR 397, leave to appeal denied 2007 CanLII 11897 (SCC); ***Paniccia Estate v Toal***, 2012 ABCA 397, para 32; ***Magnan v Brandt Tractor Ltd***, 2008 ABCA 345, paras 24, 25, 96 Alta LR (4th) 247; ***Canada Trust Company (McDiarmaid Estate) v Alberta (Infrastructure)***, 2021 ABCA 53, paras 14-16, 458 DLR (4th) 545; ***Malton v Attia,*** 2016 ABCA 130, paras 51-54, 398 DLR (4th) 350. In those cases, a trial judge, without advising the parties, or receiving further written and oral submissions,

and without an amendment of the pleadings, made a decision on the basis of an issue not pleaded, not discovered, nor addressed during evidence at trial. In ***MNP***, the parties were recalled to provide further submissions on the issue after liability was decided but prior to the determination of causation and damages.

[91] The Murrays wrongly refer to the doctrine of pure economic loss as a “defence”. It is a form of loss, unconnected to personal injury or damage to property, which may in certain circumstances be recoverable in negligence: ***Maple Leaf Foods***, paras 17-19. The categories of pure economic loss, discussed below, are merely legal analytical tools to assist the court in identifying whether a duty of care is made out in negligence: ***NPS Farms Ltd v Progress Land Services Ltd***, 2002 ABQB 735, para 18; ***Maple Leaf Foods***, para 22.

[92] Negligence was clearly pleaded by the Murrays. In their Amended Amended Statement of Claim, para 18, they stated the defendants owed them duties of care including to install the windows and doors in a good and workmanlike manner, provide engineering services in accordance with the standard of a professional engineer, and avoid causing loss and damage in the provision of defective products. At paragraph 21, they specifically pleaded negligence of the defendants and in particular for their loss and damages to tear out and reinstall all doors and windows to replace the defective products. This case is therefore different from ***MNP*** where the trial judge’s theory of causation involved a matter of fact that needed to be pleaded to be put in issue and was not. Here the application of pure economic loss is a legal question put in issue by the Murrays’ pleading as to duty of care, breach of the standard of care, damages, and causation, associated with the allegedly defective products and services.

[93] Eleven months after the evidence at trial had been completed, the trial judge requested submissions on ***Maple Leaf Foods*** and pure economic loss, a purely legal issue, arising out of the facts found at trial and the broader negligence analysis. The parties were given full opportunity to address this legal issue and did so. There was no breach of procedural fairness in this circumstance.

ii. Pure Economic Loss

[94] Pure economic loss is unconnected to a physical or mental injury to a plaintiff’s person, or to physical damage to property: ***Maple Leaf Foods***, para 17. Recovery for pure economic loss in negligence requires proof of the usual elements of negligence: duty of care, proof of the standard of care, breach of the standard of care, causation, and damages: para 18. Two recognized categories of pure economic loss are at issue in this appeal: negligent misrepresentation or performance of a service and negligent supply of shoddy goods or structures; ***Deloitte & Touche v Livent Inc (Receiver of)***, 2017 SCC 63, para 30, [2017] 2 SCR 855; ***Maple Leaf Foods***, paras 20, 21.

[95] These categories are merely analytical tools to determine whether a duty of care arises as a result of a sufficiently proximate relationship as determined in an *Anns/Cooper* analysis: ***Anns v Merton London Borough Council***, [1977] 2 All ER 492 (HL); ***Cooper v Hobart***, 2001 SCC 79,

[2001] 3 SCR 537. A duty of care requires both proximity of a close and direct relationship, and reasonable foreseeability of injury: ***Maple Leaf Foods***, paras 23, 24, 30, 31.

[96] Recovery for pure economic loss caused by the negligent supply of shoddy goods or structures only exists where the defective product or structure causes a "real and substantial danger" with "the capacity to cause serious damage to other persons and property": ***Winnipeg Condominium Corporation No 36 v Bird Construction Co***, [1995] 1 SCR 85, paras 21, 36, 38, 121 DLR (4th) 193; ***Blacklaws v Morrow***, 2000 ABCA 175, para 62, 261 AR 28. This is consistent with manufacturers' obligation to warn of danger inherent in the use of their products: ***Ding v Canam Super Vacation Inc***, 2024 BCCA 102, paras 126-128, 133; ***St Isidore Co-op Limited v AG Growth International Inc***, 2019 ABQB 763, paras 49-54, aff'd 2020 ABCA 447, para 34; ***Hollis v Dow Corning Corp***, [1995] 4 SCR 634, para 21, 129 DLR (4th) 609.

[97] The cost of repairing non-dangerous defects in building structures and products does not generally implicate rights protected under tort law and is better addressed in the law of contract. Recovery in negligence is limited to the cost to repair or prevent that real and substantial danger: ***Winnipeg Condominium***, para 35; ***Maple Leaf Foods***, para 49. For pure economic loss claims founded in negligent supply of shoddy goods or services "... courts will not lightly impose a duty in tort to insure against pure economic loss, in circumstances where the parties could have but chose not to provide for such insurance in contract": ***Maple Leaf Foods***, para 70.

[98] Under their second ground of appeal, the Murrays argue the trial judge committed a foundational error in characterizing their defective structure claim as seeking recovery for pure economic loss. They say their claim is for ordinary property damage. They point to the trial judge's findings of physical damage to the home, including the sagging guide track for the Great Room sliding doors, deflection in the cantilevered and intermediate beams, and damage to the Upper Glazing as a result of the long period of deflection. This theory was argued before the trial judge, who properly rejected it as "complex structure theory".

[99] The Murrays claim that the windows and doors have caused damage to other parts of the home, which should be recoverable as ordinary property damage. However, the Supreme Court in ***Winnipeg Condominium***, para 15, rejected the idea that damage to one part of a complex structure caused by a defect in an interdependent part of the same structure could be treated as ordinary property damage, relying on ***Murphy v Brentwood District Council***, [1990] 2 All ER 908 (HL), 928:

> The reality is that the structural elements in any building form a single indivisible unit of which the different parts are essentially interdependent. To the extent that there is any defect in one part of the structure it must to a greater or lesser degree necessarily affect all other parts of the structure. Therefore any defect in the structure is a defect in the quality of the whole and it is quite artificial, in order to impose a legal liability which the law would not otherwise impose, to treat a defect

> in an integral structure, so far as it weakens the structure, as a dangerous defect liable to cause damage to 'other property'.
>
> A critical distinction must be drawn here between some part of a complex structure which is said to be a 'danger' only because it does not perform its proper function in sustaining the other parts and some distinct item incorporated in the structure which positively malfunctions so as to inflict positive damage on the structure in which it is incorporated.

[100] Where one part of a complex structure does not perform its proper function, causing damage to other parts internal to the same structure, the essence of the loss is the shoddy quality of the structure as a whole. Thus, rather than seeking to recover damage *caused* by a defect, the plaintiff is seeking to repair the defect inherent to the complex structure itself; "[i]n effect, the plaintiff seeks to restore the bargain which he or she had anticipated at the time of purchasing the product or building structure in question": Russell Brown, *Pure Economic Loss in Canadian Negligence Law* (Markham, ON: LexisNexis Canada, 2011) at 135, 144. Per ***Winnipeg Condominium***, the cost to repair such internal defects is pure economic loss, and recoverable in tort only where the defect causes a real and substantial danger.

[101] The trial judge found the physical damage to the home was not caused by defective windows and doors being incorporated into and damaging an existing structure. Rather, she found, "[t]he Great Room Structural Steel affected the Great Room Windows and Doors and the Master Bedroom structure affected the Master Bedroom Sliding Doors", concluding "as elements of one complex structure, it cannot be said that one part damaged another part".

[102] The trial judge correctly reasoned that she was bound by ***Winnipeg Condominium*** to treat the defects in the home as pure economic loss. Further, the trial judge found the defective operation of the Great Room sliding doors and windows and Master Bedroom sliding doors did not create a real and substantial danger. On this basis, she correctly found no duty of care in the negligent supply of a shoddy structure: ***Winnipeg Condominium***. That disposes of this branch of the duty of care analysis.

[103] The other issue in the pure economic loss analysis is whether any of the parties owed a duty of care to the Murrays for negligent misrepresentation or negligent performance of a service. That turns on whether there was a sufficient degree of proximity and reasonable foreseeability of injury: ***Livent*** and ***Anns/Cooper***.

[104] In allegations of negligent misrepresentation or performance of a service, proximity is established by the defendant's undertaking and the plaintiff's reliance on that undertaking: ***Livent***, para 30; ***Maple Leaf Foods***, para 32. "[I]t is the *intended effect* of the defendant's undertaking upon the plaintiff's autonomy that brings the defendant into a relationship of proximity" with the plaintiff and therefore creates a duty of care: ***Maple Leaf Foods***, para 34 (emphasis in original).

Liability may only be imposed where the plaintiff's reliance falls within the purpose of the defendant's undertaking: para 35. That invites the question as to whom the undertaking was made, and whether the party receiving the undertaking changed its position by reliance on that undertaking, paras 39, 40.

[105] Because proximity informs the foreseeability inquiry in negligent misrepresentation or negligent performance of a service claims, proximity must be considered prior to assessing foreseeability of injury: ***Maple Leaf Foods***, para 62. That requires an examination as to whether such a close and direct relationship existed that it would be "just and fair having regard to that relationship to enforce a duty in law": ***Livent***, para 25, citing ***Cooper***, paras 32, 34; ***Maple Leaf Foods***, para 63. There must be an investigation as to whether proximity has been made out by reference to established or analogous categories of approximate relationships: ***Livent***, paras 26-28; ***Maple Leaf Foods***, para 64. If not, a full *Anns/Cooper* proximity analysis is in order: ***Cooper***, para 34; ***Livent***, para 29; ***Maple Leaf Foods***, para 66.

[106] The relationships between these parties do not fall within a recognized category of proximity: ***Maple Leaf Foods***, paras 75-83; ***Plas-Tex Canada Ltd v Dow Chemical of Canada Ltd***, 2004 ABCA 309, 357 AR 139; ***376599 Alberta Inc v Tanshaw Products Inc***, 2005 ABQB 300, 379 AR 1; ***Country Style Food Services Inc v 1304271 Ontario Ltd*** [2004], 200 OAC 172, 7 DLR (4th) 171. This case, therefore, requires a full proximity analysis, by examining the nature of the relationships and reasonable foreseeability of injury.

[107] The recognition of a novel proximate relationship depends on "characteristics of the parties' relationship and the circumstances of each particular case": ***Livent***, para 27. In this analysis it is essential to distinguish between the proximate relationship of the Murrays and Windsor, and the Murrays and other defendants.

[108] The trial judge analyzed the Murrays' negligent performance of a service claims against Windsor and Alberta Engineering together, but it is not necessary to assess her treatment of negligent performance of a service as against Windsor. The trial judge found Windsor liable to the Murrays in contract and that this liability was co-extensive with any liability it might also have in negligence. The Murrays do not argue that they should be entitled to a different measure of damages in tort rather than contract. We have affirmed the trial judge's conclusion that Windsor is liable to the Murrays in breach of contract and as such, it is unnecessary to consider whether Windsor was also liable to the Murrays in negligence – either for negligent performance of a service or breach of a duty to warn.

[109] The trial judge, however, did not find liability for a breach of contract between the Murrays and Alberta Engineering because such a claim had not been pleaded. Instead, the Murrays pleaded that Alberta Engineering was liable in negligent performance of a service. In terms of the relationship between the Murrays and Alberta Engineering, the trial judge found "the Murrays had a relationship with, and received an undertaking from [Alberta Engineering] to perform [its]

services in a manner that would correspond with" what she had identified as its obligations under their oral contract, including an obligation to provide engineering services for the home in compliance with the *Code*, performed with reasonable care and diligence at a level of skill of a reasonably competent professional engineer. She also found that the Murrays reasonably relied on Alberta Engineering's undertaking to perform engineering services.

[110] Given the proximate nature of the relationship between the Murrays and Alberta Engineering, and the failure of Alberta Engineering to properly carry out those portions of the oral contract noted above, the trial judge said there was a reasonable foreseeability of injury to the Murrays. The relationship grounding the duty of care is established through the direct interactions between the Murrays and Alberta Engineering, and specifically through the joint lead project manager and consulting engineer.

[111] Despite these findings, the trial judge said this head of damage failed; the Murrays could not be successful against Alberta Engineering in negligent performance of a service. The trial judge said the Murrays could have protected their interests in allocating the risk by contract, such that "allowing the claim in negligent performance of a service against [Alberta Engineering] would not be just and fair as it would be an unjustified encroachment of tort law into the realm of contract". Because she found a contract between the Murrays and Alberta Engineering, she reasoned that these parties could have anticipated risk and allocated it by way of a contractual term.

[112] Here, however, the trial judge was in error. There is no general prohibition against concurrent liability in tort and contract. The claim in tort, however, may be limited or negated by specific terms in the contract: ***BG Checo International Ltd v British Columbia Hydro and Power Authority,*** [1993] 1 SCR 12, 26 – 29, 99 DLR (4th) 577, citing ***Central Trust Co v Rafuse***, [1986] 2 SCR 147, 159,160, 204-206, 31 DLR (4th) 481. The Court said in ***BG Checo***, 27:

> So a plaintiff may sue either in contract or in tort, subject to any limit the parties themselves have placed on that right by their contract. The mere fact that the parties have dealt with a matter expressly in their contract does not mean that they intended to exclude the right to sue in tort. It all depends on <u>how</u> they have dealt with it.
>
> Viewed thus, the only limit on the right to choose one's action is the principle of primacy of private ordering -- the right of individuals to arrange their affairs and assume risks in a different way than would be done by the law of tort. It is only to the extent that this private ordering contradicts the tort duty that the tort duty is diminished. [emphasis in original]

[113] That general proposition of law was adopted by this Court in ***Condominium Corporation No 0522151 (Somerset Condominium) v JV Somerset Development Inc***, 2022 ABCA 193, paras 24, 30; ***Driving Force Inc v I Spy-Eagle Eyes Safety Inc***, 2022 ABCA 25, paras 22, 23. See also

Bruce Feldthusen, *Economic Negligence*, 6th ed, (Toronto: Thomson Reuters Canada, 2012) 132; and Allen M Linden et al, *Canadian Tort Law*, 13th ed (Toronto: LexisNexis Canada, 2026) 458.

[114] Concurrent liability in tort and contract was treated as unproblematic in ***Livent***, para 114, on a claim for pure economic loss founded in negligent misrepresentation and negligent performance of a service. Nothing in ***Maple Leaf Foods*** supports a general rule against concurrent liability in tort and contract in the context of negligent misrepresentation and negligent performance of a service, but only in negligent supply of shoddy goods or structures, where parties should not be allowed to use tort to circumvent contractual arrangements: paras 67, 68, 71-73, 90.

[115] Professor Russell Brown, writing extra-judicially in *Pure Economic Loss in Canadian Negligence Law*, 351, says in a rights-based theory of negligence, concurrent liability in tort and contract is not objectionable in claims for negligent misrepresentation and negligent performance of a service, because the duty in tort protects a different right than the duty in contract.

[116] Other commentators have observed that in the context of negligent performance of a service cases, "[w]hen the defendant makes the undertaking directly to the plaintiff the same facts will often support an action in both negligence and contract": Feldthusen, 129; and "[t]he basis of liability in these [negligent performance of a] service cases may also exhibit a close relationship to liability in contract, and concurrent liability is not unlikely": Linden et al, 458. Conversely, according to Professor Brown, 135, where a plaintiff's loss arises from negligent supply of shoddy goods, "the plaintiff seeks to restore the bargain which he or she had anticipated at the time of purchasing the product or building structure in question".

[117] The error of the trial judge here is that she resorted to the shoddy supply of goods and structures analysis in ***Maple Leaf Foods*** as a basis to exclude a duty of care for negligent misrepresentation or negligent performance of a service. The two are not mutually exclusive nor are they subsumed within each other. Each is subject to its own analytical considerations, including with respect to concurrent liability. As noted by Professor Brown, 386, "it might well happen that the same negligent act or omission generates a reliance-based loss arising from the defendant's negligent performance of a service, *and* a construction defect which poses a real and substantial danger to building inhabitants" (emphasis in original).

[118] Here, the construction defect in the Murrays home did not present a real and substantial danger, properly foreclosing a duty of care in negligent supply of a shoddy structure. But the fact-finding of the trial judge as to the relationship between the Murrays and Alberta Engineering, and Alberta Engineering's acts and omissions that amounted to breach of contract, establishes liability for negligent performance of a service.

[119] Proximity and foreseeability in ***Livent***, paras 35, 39, 55, are clearly established on the facts found by the trial judge. Concerns about concurrent liability in tort and contract should not have negated this duty of care. The Murrays' third ground of appeal in respect of Alberta Engineering

is allowed. Windsor's fourth ground of appeal in respect of Alberta Engineering is also allowed; while it does not have a third-party claim against Alberta Engineering, Alberta Engineering is jointly and severally liable to the Murrays for damages.

[120] The trial judge reasoned in her alternative analysis that if Alberta Engineering was liable, it would only be liable for the Great Room damages, not the Master Bedroom damages. There is no reason to interfere with this alternative decision. Windsor and Alberta Engineering are jointly and severally liable for the Great Room damages, but Windsor is solely liable for the Master Bedroom damages. Quantum of damages between the Murrays and Alberta Engineering was settled in their *Mary Carter* agreement.

E. KAPO, Luxus, and Mr Bade: negligent performance of a service and duty to warn

[121] The Murrays do not identify any reviewable error in the trial judge's conclusions that there was no liability of KAPO, Luxus, or Mr Bade to the Murrays in negligent performance of a service.

[122] Windsor's negligent misrepresentation claim against these parties is that they misrepresented the windows and doors were reasonably fit for the intended purpose. The trial judge rejected this claim on the facts. She found Windsor had failed to meet its burden to establish either the defendant's undertaking or the plaintiff's reliance. No palpable and overriding error is shown in this determination by the trial judge.

[123] As to the duty to warn, it is unnecessary to consider the trial judge's analysis of this claim as against Alberta Engineering, given the negligence finding above. In respect of KAPO, Luxus, and Mr Bade, the trial judge properly concluded both the Murrays' and Windsor's duty to warn claims raised novel duties of care subject to a full proximity analysis. The trial judge determined the Murrays' duty to warn claims against KAPO, Luxus, and Mr Bade failed for lack of expectations and reliance. This finding was sound and supports the conclusion that no novel duty to warn to protect against pure economic loss should be recognized: see ***Cooper v Hobart***, 2001 SCC 79, paras 34, 36, [2001] 3 SCR 537. Likewise, there is no basis to intervene in the trial judge's rejection of Windsor's duty to warn claim against KAPO, Luxus and Mr Bade, having found no expectation or reliance between the parties.

F. Damages

[124] The Murrays assert the trial judge erred in her assessment of some heads of damage: in finding the stone cladding was a stone veneer rather than full stone, and in not awarding an amount for collateral damage contingencies because she determined that loss was hypothetical and not reasonably foreseeable. These conclusions were based on the trial judge's decision as to what portions of evidence should be adopted from various experts. She did not agree with the Murrays' expert that there was a reasonable chance of future loss; see ***Argus Machine Co Ltd v Stan's Power Tong Service Ltd***, 1988 ABCA 370, para 19, 64 Alta LR (2d) 150.

[125] The Murrays also say the trial judge erred in not awarding general damages for inconvenience and upheaval. The trial judge found "[t]he only evidence on this point was very general commentary and there was no evidence to establish such a claim in law or fact".

[126] No palpable and overriding error is demonstrated in the trial judge's assessment of the expert evidence, nor in her analysis with respect to future contingencies or general inconvenience. As the Murrays had not actually remediated their residence at the time of trial, the decisions reached by the trial judge, based upon her assessment of the expert evidence, were reasonable.

G. <u>Summary on the Merits</u>

[127] In summary, we have reached the following conclusions in the Murrays' and Windsor's appeals on the merits:

- Liability of Windsor: The trial judge's finding that Windsor is liable to the Murrays in breach of contract is affirmed. It is unnecessary to consider the Murrays' appeal of the trial judge's finding that Windsor was not liable to the Murrays in negligence, because we affirmed Windsor's liability in breach of contract, and no party argued that the measure of damages in this case should differ depending on contractual rather than tort liability. Windsor is liable to the Murrays for both the Great Room and Master Bedroom damage, in the quantum found by the trial judge.

- Liability of Alberta Engineering: The trial judge's finding that Alberta Engineering is not liable in negligence is set aside. Alberta Engineering is liable to the Murrays for the Great Room damages. Quantum of damages as between Alberta Engineering and the Murrays is already settled by their *Mary Carter* agreement. The practical effect of this result is that Windsor is now entitled to seek contribution from Alberta Engineering in respect of the Great Room damages.

- Liability of KAPO, Luxus and Mr Bade: The trial judge's dismissal of all claims against KAPO, Luxus and Mr. Bade is affirmed.

H. <u>Costs</u>

[128] The Murrays sought costs of $398,231.09 from Windsor based on 45% of their reasonable legal fees, and 100% of their disbursements, or in the alternative $240,099.25 based on Column 4 of Schedule C of the *Alberta Rules of Court*, AR 124/2010.

[129] The Murrays also sought a *Sanderson* or *Bullock* order. In a *Sanderson* order the costs of successful defendants are to be paid directly by the unsuccessful defendants and in a *Bullock* order the costs of the successful defendant are paid by the plaintiff who is entitled to reimbursement from the unsuccessful defendants.

[130] The Murrays made a *Calderbank* offer, ***Calderbank v Calderbank***, [1975] 3 All ER 333, to Windsor and other defendants on May 29, 2023, left open for less than three days, in the amount of $830,000 plus costs and disbursements. That offer excluded the proceeds already received by the Murrays through the *Mary Carter* agreement with Alberta Engineering of $125,000. The trial judge found the trial judgment exceeded the global settlement figure by $84,946.59 plus interest of $43,675.74. Windsor therefore failed to accept a more favourable pre-trial settlement offer. Consequently, the Murrays sought double costs from May 29, 2023 to the end of the trial.

[131] Luxus sought costs against the Murrays of $130,578.29, based on costs to May 1, 2023, under Column 4 of Schedule C of the *Rules of Court* and double costs thereafter because of more favourable *Calderbank* offers made to the Murrays on May 1 and May 25, 2023. Luxus also sought costs against Windsor arising from an earlier Notice to Admit decision of the trial judge: ***Murray v Windsor Brunello Ltd***, 2023 ABKB 375.

[132] Although Mr Bade was self-represented in this action, except when making submissions on costs, he requested $40,788.89 under Column 4 of Schedule C, because he expended extraordinary time and resources defending the claims in excess of what an interested, involved represented litigant might spend: ***Park Avenue Flooring Inc v EllisDon Construction Services Inc***, 2016 ABQB 332, paras 90, 95, 98.

[133] Windsor argued the Murrays were entitled to an award of costs only in the amount of $169,437.31, based on single Column 4 of Schedule C; or in the alternative, no more than $240,099.25 and that Luxus should be limited to $92,959.12 under Column 4 of Schedule C and Mr Bade to costs of between $2,769.84 and $7,436.35.

[134] In the costs decision, the trial judge relied on the principles in r 10.33(1) of the *Rules of Court*, balancing the result of the action and degree of success of each party, the amount claimed and amount recovered, the complexity of the action, apportionment of liability, and other matters she considered reasonable and proper. She found the Murrays' degree of success against Windsor was "fairly high" but only in contract, not in negligence, and the amount of the judgment placed the costs award under Column 4 of Schedule C of the *Rules of Court*. She found the Murrays were unsuccessful in their claims against the remaining defendants.

[135] The trial judge found the action was relatively complex and seven experts testified, but the complexity of the trial could have been more efficiently managed.

[136] Pursuant to r 10.33(2), the trial judge also considered the conduct of the parties in applications, proceedings, steps in the action, and offers of settlement. She referenced this Court's decision in ***McAllister v Calgary (City)***, 2021 ABCA 25, paras 29, 30, 51, which describes a discretionary recovery guideline for a costs award of 40 to 50% of actual expenditures. Considering all factors, the trial judge determined the appropriate level of indemnification was 35% of the Murrays' reasonable and proper costs and 100% of their reasonable disbursements

before applying a multiplier for the Murrays' *Calderbank* offer. She referred the quantification of the costs award to an Assessment Officer, including reasonable expert fees, disbursements, taxes, and the increase resulting from the *Calderbank* offer.

[137] The trial judge awarded costs to Luxus, on the basis of single Column 4 of Schedule C, plus 100% of reasonable disbursements, as it was entirely successful, other than the application giving rise to the Notice to Admit decision. Other items in dispute were referred to calculation by an Assessment Officer.

[138] For Mr Bade, after reviewing case law about costs awards for self-represented litigants, the trial judge found exceptional circumstances for awarding costs to him, granting him 25% of single Column 4 of Schedule C, plus 100% of reasonable disbursements, taxes, and again, referral to an Assessment Officer.

[139] As to the various *Calderbank* offers, the trial judge found the Murrays' *Calderbank* offer was a reasonable and genuine compromise and gave a costs advantage if accepted. She found that offer was unreasonably rejected and the Murrays fared better at trial than if the offer had been accepted. However, she found the offer was left open only for two and a half days immediately before commencement of the trial, which was not "adequate time for consideration ... to entitle them to a doubling of their costs". She noted that by comparison, a formal offer under r 4.24(3) offer requires an offer to remain open for two months or until the start of the trial. On the basis of the "short duration" to accept the *Calderbank* offer, the trial judge awarded a costs increase based on a fees multiplier of 1.5, rather than double costs, for all the Murrays' costs incurred after the service of the *Calderbank* offer of May 29, 2023.

[140] The Luxus' *Calderbank* offer to the Murrays of $116,000 had been left open for 16 days, and a later offer to contribute to a global settlement in the same amount was left open for 7 days. The trial judge found those offers were reasonable and genuine compromises and gave a cost advantage if accepted. She also found those offers were unreasonably rejected and Luxus fared better than if the offers were accepted, such that the recoverable fees in the costs award to Luxus should be doubled for all costs incurred after service of its first *Calderbank* offer.

i. *Sanderson* and *Bullock* orders

[141] The trial judge found that a *Sanderson* order was not reasonable and just in this case. She noted the "general rule" that "a successful plaintiff pays the cost of a successful defendant". She found that Windsor "did not cause [Luxus and Mr Bade] to be added to the action" and she could find no principled reason for transferring the risk for non-recovery of costs to the successful defendants.

[142] The trial judge expressly relied on the tripartite test in ***Abt Estate,*** paras 71, 73, 75, citing ***Palechuk v Fahrlander***, 2008 ABCA 10, para 5, [2008] 4 WWR 265, leave to appeal to SCC

denied 2007 CanLII 11277 (SCC): a) the applicant must show it was reasonable for the plaintiff to join the successful defendants, b) there is no good reason to deprive the successful defendants of their costs, and c) the unsuccessful defendants were wholly responsible for the action. The Murrays contend the trial judge correctly found that they reasonably joined all the defendants in one action but erred in her interpretation and application of the second and third elements of the test. For the second element of the test, the Murrays say the trial judge incorrectly adopted the four factors set out in ***House v Baird***, 2017 ONCA 885, para 92, which in turn references ***Moore (Litigation Guardian) v Weinecke***, 2008 ONCA 162, paras 45-50, 290 DLR (4th) 509: a) whether the defendants tried to blame each other, b) whether the unsuccessful defendants caused the successful defendants 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 costs. They contend the Alberta case law simply asks "whether it is fair and just to require the unsuccessful defendant to pay the costs of the successful defendant": ***Barbe v Evans***, 2021 ABQB 796, para 9; ***UBG Builders Inc (Re)***, 2017 ABQB 791, paras 13, 17. More specifically, they argue that the inquiry at this stage is focused on their conduct of the litigation, including whether keeping the successful defendants in the action was reasonable, rather than examining the conduct of the defendants, which they assert is the focus of the ***House*** factors.

[143] We find no error in the trial judge's approach. She correctly recognized that the second element of the ***Abt Estate*** test required her to consider whether "it is just that [Windsor] should, either directly or indirectly, have to pay the costs of the Successful Defendants": Costs Decision at para 95. In making her findings under that element, she took some guidance from the ***House*** factors. Those factors are not incompatible with the overarching inquiry. The first ***House*** factor, for example, considers whether the defendants were making allegations against each other, which can be relevant to whether a plaintiff reasonably kept one or more defendants in the action. After reviewing the ***House*** factors in detail, the trial judge noted that Windsor was found liable under its contract but all the negligence claims in the action were dismissed. The implication is that the trial judge was concerned about the Murrays' decision to maintain the negligence claims. She then concluded at paragraph 102: "Based on all of the circumstances of this case", it would not be just to grant a *Sanderson* order requiring Windsor to pay the cost of the successful defendants. The trial judge was not required to exhaustively canvas all the considerations informing the exercise of her discretion, especially when she was clearly alive to the relevant considerations.

[144] The third criterion is not used to determine whether a *Sanderson* or *Bullock* order should be granted, but rather to determine which type of order to grant if the first two criteria are met. The trial judge found it was unnecessary for her to make that determination, given her decision that neither order would be appropriate. In determining which type of order would be the most appropriate, the court is to consider the ability of the unsuccessful defendant to pay, and whether the successful plaintiff or successful defendant should bear the risk of a non-recovery of costs: ***Abt Estate***, para 76. The trial judge referenced both criteria in concluding that if she was incorrect and a *Sanderson* or *Bullock* order should be granted, a *Bullock* order would be more appropriate.

[145] The decision of the trial judge not to grant a *Sanderson* or *Bullock* order was discretionary, fair and reasonable under the circumstances. We find no error in principle or other reason to interfere.

VII. Conclusion

[146] The Murray appeal is allowed in part; the Windsor appeal is allowed in part; and the Murray costs appeal is dismissed.

Appeal heard on December 11, 2025

Memorandum filed at Calgary, Alberta
this 24th day of August, 2026

Feehan J.A.

Authorized to sign for: Ho J.A.

Feth J.A.

Appearances:

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A. Gray, KC
for Donald and Linda Murray

E. A. Carrasco
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KAPO Fenster und Türen GmbH (no appearance)

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D. A. Shepherd
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Alberta Engineering Ltd (no appearance)