Court of King's Bench of Alberta

Citation: A.G. Clark Holdings Ltd v 1352986 Alberta Ltd, 2024 ABKB 180

Date: 20240328
Docket: 1103 14128
Registry: Edmonton

Between:

A.G. Clark Holdings Ltd, Giebelhaus Developments Ltd and CB Partners Corporation

Plaintiffs

- and -

1352986 Alberta Ltd, Redleaf Properties Corporation, 1354178 Alberta Ltd and 1352992 Alberta Ltd

Defendants

Costs Endorsement
of
Applications Judge L.R. Birkett

Introduction

[1] This is the ruling on costs following my decision on a Special Chambers application brought under s 53 of the former *Builders' Lien Act*, RSA 2000, c B-7 [*BLA*]. That decision is reported at ***A.G. Clark Holdings Ltd v 1352986 Alberta Ltd***, 2023 ABQB 219 [***A.G. Clark Holdings***].

[2] The parties have been in this litigation for more than a decade. The dispute was over the payment due to the plaintiffs, referred to as Clark Builders, from the defendants, referred to as Redleaf, under the construction contract between Clark Builders and the Owner 1352986 Alberta Ltd. The contractor Clark Builders brought a s 53 *BLA* pre-trial application for a judgment declaring its liens valid in the amount of its outstanding invoices.

[3] Having regard to the state of the record and the issues, I found it possible to fairly resolve the dispute on a summary basis, with no genuine issue requiring a trial. I concluded in paragraphs 122 to 125 of ***A.G. Clark Holdings***, that:

> The Clark Builders liens are valid in the amount of the outstanding invoices, being $475,350.80 plus GST in the amount of $23,767.54 for a total amount of $499,118.34 plus interest at the Interest Rate defined in the Construction Management Contract from the date that such payments became due until the date that payment in full is received by Clark Builders.
>
> Clark Builders shall have judgment against the defendant, 1352986 Alberta Ltd, as Owner, in the amount of the outstanding invoices plus GST and interest as set out above. The invoices were rendered pursuant to the Construction Management Contract between these parties and are to be paid in accordance with the contractual terms.
>
> The other defendants, Redleaf Properties Corporation, 1354178 Alberta Ltd and 1352992 Alberta Ltd, collectively referred to as the Lessees, have a caveat registered with respect to a leasehold interest on the lands owned by 1352986 Alberta Ltd. They are not party to the Construction Management Contract. Their liability is for the lien registered against their leasehold interest in the amount of the outstanding invoices plus GST and interest as set out above.
>
> Clark Builders is entitled to the costs of this application and the action. Costs are claimed on a solicitor-client full indemnity basis pursuant to Section (t) of Appendix A of the Construction Management Contract, as a Reimbursable Expense, or in the alternative, costs. If the parties are unable to agree on costs, an application may be made before me in morning chambers.

[4] The parties were unable to agree on costs and an application was brought by Clark Builders before me in morning chambers on November 30, 2023. We adjourned to February 8, 2024 for written submissions. Clark Builders had prepared their Bill of Costs based on their claim to entitlement pursuant to the Contract for solicitor-client full indemnity costs. The defendants argued that party and party costs were appropriate. I requested a Bill of Costs be prepared by Clark Builders pursuant to the appropriate column of Schedule C of the Alberta *Rules of Court*.

[5] I reviewed the written submissions of the parties and compared the two Bills of Costs in preparation for morning chambers on February 8, 2024. Given the lengthy list that morning, counsel wondered if they needed to make further oral submissions or if I could render a decision on costs based on their written submissions. I am able to render a decision without further oral argument and do so through this Costs Endorsement.

Procedural history relevant to the s 53 *BLA* application

[6] Clark Builders filed a statement of claim on September 7, 2011 for payment of unpaid invoices from November 30, 2010 to June 30, 2011 and to declare the liens filed March 11, 2011 valid.

[7] The Redleaf defendants filed a statement of defence on November 2, 2011, along with a counterclaim for expenses, losses, and damages for problems with Clark Builders' management of the project and wrongful registration of the liens.

[8] In September 2015, Clark Builders brought an application pursuant to r 7.3 *Alberta Rules of Court* for summary judgment against the Redleaf defendants for the outstanding invoices. The

Redleaf defendants relied on the March 2, 2016 affidavit of Ming Ying in response. The application was heard in Special Chambers on May 2, 2016 and dismissed, as not being an appropriate case for summary judgment. Costs were awarded to the defendants.

[9] On May 4, 2016, Clark Builders filed an application for summary dismissal of the Owner's counterclaim. That application has not been heard.

[10] On November 20, 2020, Clark Builders brought the application pursuant to s 53 *BLA* for judgment against the Redleaf defendants to declare its liens valid in the amount of the outstanding invoices. The application was supported by the Affidavit Proving Lien of Greg Asselin, sworn December 3, 2018. Mr. Asselin was not questioned on his affidavit.

[11] In response, the Redleaf defendants relied on the same March 2, 2016 affidavit of Ming Ying, which had not been questioned on. They further provided the Affidavits of Curtis Cameron, sworn April 1, 2021 and May 26, 2021. Mr. Cameron is a Professional Quantity Surveyor and the Associate Director, Cost & Project Management of Altus Group Limited. Altus was retained to provide a Cost in Place Estimate Report related to the renovations done by Clark Builders to convert the existing building into the Redleaf Presentation Centre. The final Altus Report dated December 1, 2020 was an exhibit to the May 26, 2021 affidavit. Mr. Cameron was questioned on his affidavits on June 1, 2021. The transcript was filed for the s 53 *BLA* application.

[12] Clark Builders retained LCVM Consultants Inc to provide an opinion in respect of the affidavits and reports filed by Altus. Norman Lux swore an affidavit June 14, 2021 attaching the LCVM Report entitled "Cost in Place Estimate Report in Review of Altus estimations". Mr. Lux was questioned on his affidavit on June 23, 2021. The transcript and his answers to undertakings were filed for the s 53 BLA application.

Procedural history relevant to the litigation

[13] The other steps taken by the parties in advancing this litigation are summarized in Schedule B to the written submissions of Clark Builders in support of this application for costs. In addition to steps set out above, the Summary of Court Action includes the exchange of affidavits of records, interlocutory applications related to disclosure, Part 5 questioning (for discovery) by the defendants, an appeal by the defendants of a disclosure order, and a case management conference. The defendants were successful in several of these applications.

[14] The Bill of Costs prepared pursuant to column 3 of Schedule C details those steps taken in the action which correspond with the specific tariff item numbers. Credit has been given for those items where the defendants were awarded costs.

[15] The Bill of Costs prepared for Clark Builders for fees claimed on a solicitor and own client full indemnity basis lists a series of accounts sent to the client by date sent, the date fees advanced to, and amount of the account. For example: Account dated May 17, 2011 for Fees advanced to May 16, 2011 in the amount of $1,295.00. There are no time details or description of services rendered. Other than the time frame for which the accounts were rendered, there is nothing to indicate what the cost of the various litigation steps were.

Position of the parties

[16] Clark Builders seeks an order awarding costs of the s 53 *BLA* application and the court action in favour of Clark Builders on a full indemnity basis. In the alternative, they seek an order awarding costs to Clark Builders based on 80% of the total incurred legal fees, or such other percentage of such legal fees as the court deems just. They also seek costs of this application on a full indemnity basis.

[17] Clark Builders submits that the Construction Management Contract expressly provides that the legal fees Clark Builders has incurred in the court action to enforce the Owner's payment obligations under the contract are a reimbursable expense that is to be paid on a full indemnity basis.

[18] The position of the Redleaf defendants is that Clark Builders is not entitled to costs on a solicitor-client full indemnity basis and costs should be awarded in accordance with Schedule C, column 3 of the Alberta *Rules of Court*. Costs on an elevated indemnity basis of 80% of solicitor and own client costs is excessive in the circumstances and not asked for in the application.

[19] Further, and in the event Clark Builders are entitled to solicitor-client full indemnity costs pursuant to the Construction Management Contract, that agreement was only entered into by Redleaf Enterprises Inc and not the other Redleaf defendants.

[20] Redleaf further submits that Clark Builders should not be receiving any costs for steps necessitated by or taken in relation to Clark Builders' failure to provide a full and complete affidavit of records, the motion for summary judgment, which was dismissed, and the motion for summary dismissal of the Redleaf counterclaim, which was abandoned.

[21] Regardless of the scale used for the costs, Redleaf submits that determination of the amount of those costs ought to proceed to an assessment by the assessment officer.

[22] I agree that the quantum of costs should proceed to an assessment by the assessment officer. However, I need to provide direction as to whether that assessment of costs should be based on solicitor-client full indemnity costs or a percentage of those or other solicitor and client costs or should be based on a single or multiple of the appropriate column of Schedule C.

[23] Clark Builders claims entitlement to solicitor-client full indemnity costs pursuant to the Construction Management Contract. Interpretation of the costs provision in the Contract is required.

Contractual Costs

The Construction Management Contract

[24] I found it helpful to review the summary of the contract provided in the Affidavit Proving Lien sworn by Greg Asselin on December 3, 2018, as set out in paragraph 47 of ***A.G. Clark Holdings***:

> The Construction Management Contract dated July 29, 2009 between 1352986 Alberta Ltd, as Owner and Clark Builders as Construction Manager is attached as exhibit A to Mr. Asselin's affidavit. Mr. Asselin deposes in paragraph 6 of his affidavit to the terms of the Contract related to the contract fee and reimbursable expenses, as follows:

(a) Pursuant to Section A-5 of the Contract, 1352986 agreed to pay to Clark Builders compensation for Clark Builders' services a fee of five percent (5%) of the total cost of the work performed (the "Contract Fee").

(b) Pursuant to Section A-6 and Appendix A to the Contract, 1352986 agreed to pay Clark Builders for certain Reimbursable Expenses with respect to the work and services (the "Reimbursable Expenses"), including the following:

(i) salaries, wages and benefits for Clark Builders' personnel in whatever capacity employed, including wages and benefits paid for labour in the direct employ of Clark Builders (Sections (a) and (b) of Appendix (A); …

(v) the cost of materials, products, supplies, equipment, temporary services, utilities and facilities and hand tools, including transportation and maintenance thereof; rental costs of all tools, machinery and equipment used in the performance of [the] Contract (Section (f) of Appendix A); …

(xi) legal costs incurred by Clark Builders arising out of the performance of the Contract (Section (t) of Appendix A);

(xii) costs incurred by Clark Builders in correcting defects or deficiencies in the work undertaken by Clark Builders' own forces and repairing damages resulting therefrom either during the course of construction or the warranty. Except those arising from a negligent or wilful act of Clark Builders (Section (u) of Appendix A); …

(c) Pursuant to Section A-8(a) of the Contract, 1352986 to make monthly payments on account of Reimbursable Expenses incurred to date, the applicable portion of the Contract Fee, [for] any work performed directly by Clark Builders.

(d) Pursuant to Section A-8(b) of the Contract, if 1352986 failed to make payments as such payments became due, 1352986 agreed to pay interest on all unpaid amounts at the rate of interest at two percent (2%) per annum above the prime interest rate of the Royal Bank of Canada (the "Interest Rate") from the date that such payments became due until that payment in full is received by Clark Builders.

[25] Section (t) of Appendix A reads: "(t) legal costs, incurred by the Construction Manager, arising out of the performance of the Contract;".

[26] Clark Builders submits that the intention of the language used in the contract demonstrates that the parties agreed that all legal costs incurred by Clark Builders, as Construction Manager, arising out of the performance of the contract are to be reimbursed by the Owner to Clark Builders. The express language of the contract does not contain any language limiting the legal costs which were to be reimbursed. The Owner's obligation to pay for the work performed under the contract is part of the Owner's performance of the contract, and arguably the most critical component of the Owner's performance of the contract.

[27] Redleaf identifies further Reimbursable Expenses listed in Appendix A including:

> (e) the cost of all materials, products, supplies, and equipment incorporated into the Work, including costs of transportation and storage thereof;
>
> (g) rental costs of all tools, machinery and equipment used in the performance of the Contract, whether rented from the Construction Manager or others, including installation, minor repairs and replacements, dismantling, removal, transportation, and delivery costs thereof;
>
> (n) premiums for all bonds and insurances which the Construction Manager is required, by the Contract Documents, to purchase and maintain;
>
> (t) legal costs, incurred by the Construction Manager, arising out of the performance of the Contract.

[28] Redleaf highlights sections (e), (g), and (n) of Appendix A where each expressly and very specifically include the word "all" when identifying the scope of Reimbursable Expenses covered by those provisions. In contrast, section (t) of Appendix A regarding reimbursement of legal costs does not have language as expansive as those other provisions; section (t) does not expressly or specifically use the word "all" to describe the legal costs covered.

[29] Redleaf says this shows an intention on the part of the contracting parties that section (t) should not be read as broadly as Clark Builders now suggests. If it had been the intention of the parties to allow for solicitor-client full indemnity costs, in other words, for "all" legal costs to be reimbursed, such express language would be included in that provision.

[30] Redleaf points out that section (t) of Appendix A does not expressly state Clark Builders is to be paid its solicitor-client full indemnity costs; it says only "legal costs". Redleaf submits that the language in the contract, including both the words used and those not used, is of assistance when attempting to now ascertain the parties' intentions as it relates to the legal costs contemplated in section (t).

[31] A review of the principles of contractual interpretation is necessary.

Interpretation of the Contract

[32] The leading case on interpretation of contracts is ***Sattva Capital Corp v Creston Moly Corp***, 2014 SCC 53, quoting from the headnote:

> Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix of the contract.

[33] Justice Rothstein discussed this further at paragraph 57 of ***Sattva***:

> ... The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (citation omitted).

[34] Applying these principles to the Construction Management Contract between Clark Builders, as Construction Manager, and 1352986 Alberta Ltd, as Owner, I find that Section (t) Appendix A covers exactly what it says: "legal costs, incurred by the Construction Manager,

arising out of the performance of the Contract". Reading the provision for costs in light of the entire contract, I conclude that the Owner is contractually bound to reimburse Clark Builders for legal costs Clark Builders incurs in its performance of the Contract as Construction Manager. Section (t) of Appendix A cannot reasonably be interpreted to cover reimbursement for legal costs, whether solicitor and own client or otherwise, incurred by Clark Builders in enforcing the Owner's obligation to pay.

[35] Article A-6 provides that in addition to the Contract Fee stipulated in Article A-5, the Owner agrees to pay the Construction Manager for the Reimbursable Expenses he incurs as defined by Appendix A. Article A-6 and Appendix A dovetail in listing typical expenses that the Construction Manager would incur arising out of the performance of the Contract, such as salaries, wages and benefits; the cost of materials, products, supplies and equipment; premiums for bonds and insurances; etc. Article A-6 (xi) lists: legal costs incurred by Clark Builders arising out of the performance of the Contract and refers to Section (t) of Appendix A.

[36] Given the other items covered in Article A-6 and Appendix A, the logical conclusion is that Section (t) allows the Construction Manager to be reimbursed for his legal costs arising out of his performance of the Contract. It does not allow Clark Builders to be reimbursed for its legal costs in pursuing payment from the Owner. Had it been the intention of the parties that Article A-6 (xi) and Appendix A (t) would allow Clark Builders to be reimbursed legal costs arising from the non-payment by the Owner, in addition to payment of legal costs arising from the Construction Manager's performance of the Contract, the Contract could have been specifically worded to say so.

[37] On the contrary, what is to be paid by the Owner to the Construction Manager and how payment is to be made are covered in Articles A-5 and A-8 of the Contract. There are no provisions in Article A-5 or A-8 for payment of legal costs.

[38] Section A-8(b) of the Contract provides that if the Owner 1352986 failed to make payments as such payments became due, 1352986 agreed to pay interest on all unpaid amounts from the date that such payments became due until that payment in full is received by Clark Builders. Looking at the Contract as a whole, if the parties had also intended that the Owner pay solicitor and own client full indemnity costs to Clark Builders for collection of those failed payments, this would have been a logical place to make that provision.

[39] To read into Article 6-A (xi) and Appendix (t) an agreement to pay solicitor and own client full indemnity costs for enforcement of the Owner's obligation to pay would be "to deviate from the text such that the court effectively creates a new agreement" (***Sattva*** at paragraph 57).

[40] Clark Builders is not entitled to contractual full indemnity costs.

Enhanced Costs

[41] In the alternative to contractual full indemnity costs, Clark Builders submits that the circumstances of this court action give rise to an award of elevated costs on the basis of 80% of its solicitor and own client costs.

[42] Pursuant to r 10.29 and 10.31 of the *Alberta Rules of Court*, the court has discretion to order costs that depart from Schedule C costs.

[43] The Redleaf defendants submit that costs on an elevated basis of 80% are inappropriate. Costs should be awarded based on Schedule C, column 3.

The *Rules of Court*

[44] Rule 10.29 is the general rule for payment of litigation costs and provides that a successful party to an application, a proceeding or an action is entitled to a costs award against the unsuccessful party.

[45] Rule 10.31 allows the court to order one party to pay to another party, as a costs award, the reasonable and proper cost that a party incurred on an application or to take proceedings or carry on an action, or any amount that the court considers to be appropriate including, an indemnity to a party for that party's lawyer's charges.

[46] In making a costs award, the court may consider any or all of the matters described in rule 10.33 and any other matter related to the question of reasonable and proper costs that the court considers appropriate.

[47] Rule 10.31(2)(d) precludes the fees or other charges of an expert unless the court otherwise orders.

Costs awards

[48] For the last three years, successful litigants frequently seek enhanced "***McAllister*** costs" arguing entitlement to a percentage of their solicitor and own client fees because Schedule C costs are inadequate.

[49] In ***McAllister v Calgary (City),*** 2021 ABCA 25, the appellant argued that the costs award at trial was not reasonable because it did not provide him with a sufficient level of indemnification for the costs he actually incurred. By way of introduction, the Court of Appeal pointed out that "the costs being awarded in this case where the costs of prosecuting a claim from Statement of Claim to judgment in a protracted piece of litigation involving arguably novel liability." See para 3 ***McAllister***.

[50] The Court addressed the role of Schedule C in making costs awards, as well as other type types of costs awards. The Court in ***McAllister*** reviewed the provisions for costs in the *Rules of Court*, as summarized in paragraphs 25 - 27:

> Thus, in making a costs award under 10.31(1)(a), as in this case, the court is provided with a menu of orders it may make with respect to costs. Rule 10.31(3)(a) expressly provides that "all or part of reasonable and proper costs" may be ordered, "with or without reference to Schedule C." This suggests significant discretion on the part of a trial judge in implementing a reasonable and proper costs award and would appear to clearly permit an order for a lump sum percentage of legal costs. Rule 10.31(3)(d) expressly permits such a costs award. Rule 10.31(3)(b) permits the court to make an order directing the unsuccessful party to pay the successful party an amount equal to a multiple, a proportion or a fraction of an amount set out in any column of the Tariff of Recoverable Fees in Schedule C.
>
> It is important to note that the options set forth in Rule 10.31(3) are expressly linked to Rule 10.31(1)(a), which permits the court to award "the reasonable and proper costs that a party incurred".

> What comes out of this analysis of the Rules is that a costs award made with reference to Schedule C is only one of several options open to a court in awarding costs to a successful party and that awarding a percentage of assessed costs is expressly authorized.

[51] The *Rules* provide this framework for assessing costs and making costs awards, however "they provide little guidance as to what quantum of costs indemnification constitutes 'reasonable and proper costs'". See para 25 ***McAllister***.

[52] The primary purpose of a costs award is to provide a reasonable indemnification of costs incurred. See paragraph 33 of ***McAllister***:

> A "reasonable and proper costs" award involves a payment by the unsuccessful party to the successful party to indemnify the successful party for expenses incurred as a result of the conduct of the unsuccessful party. The primary purpose of a costs award is to indemnify the successful party in respect of the expenses sustained either defending a claim that in the end proved unfounded (if the successful party was the defendant), or in pursuing a valid legal right (if the plaintiff prevailed) (*Okanagan Indian Band* at para 21). The indemnification is not intended to be complete. Nevertheless, a reasonable level of indemnification of costs incurred is the primary purpose of costs awards.…

[53] The Court of Appeal in ***McAllister*** notes at paragraph 34: "…traditional principles supporting costs awards continue to govern the law of costs in cases where there are no special factors that would warrant a departure from them" and at paragraph 37: "It is accepted that indemnification of the successful party should not normally provide full indemnity for all legal fees and disbursements. Instead, a typical costs award (i.e. party and party costs) is intended to be 'a partial indemnity for the expenses to which the recipient has been put as a result of the litigation'".

[54] The Court concludes at paragraph 41: "In Alberta, the weight of authority is that party and party costs should normally represent partial indemnification of the successful party at a level approximating 40 to 50% of actual costs".

[55] The Court specifically refers to paragraphs 11 and 12 of ***Weatherford Canada Partnership v Artemis Kautschuk und Kunstoff-Technik GmbH***, 2019 ABCA 92 (citations omitted):

> The discretion to award costs must be exercised judicially and in line with the factors in r 10.33… The general rule is that costs are awarded on a party and party basis, and that this should represent partial indemnification of the successful party – approximately 40-50% of actual costs….
>
> Party and party costs balance two competing interests: the unfairness of requiring a successful party whose conduct is not blameworthy to bear any costs and the chilling effect on parties bringing or defending claims if the unsuccessful party is required to bear all the costs…. The result of this balance is the concept of partial indemnification through party and party costs to the successful party.

[56] However, the Court recognized at footnote 2 of ***McAllister*** that "it is unclear whether Schedule C has ever provided indemnification of 40 to 50% of actual solicitor-client fees."

[57] A judge may order one party to pay to another a percentage of assessed costs, pursuant to rule 10.31(3)(d) as a means of determining the reasonable and proper cost that the party incurred under rule 10.31 (1)(a). “In order to determine whether the costs incurred are reasonable and proper, they must be assessed, either by the party opposite, or by the judge or by an assessment officer.” That assessment of costs may require reference to the considerations in rule 10.2(1) to determine what is the reasonable amount that the successful lawyer is entitled to for the services that lawyer performed for its client. “Reasonable costs reasonably incurred is what the percentage must be based on. The incurring of the costs must be reasonable and the amount of the cost incurred must also be reasonable.” See paragraph 46 of ***McAllister***.

[58] At paragraphs 48 and 49 the Court in ***McAllister*** concludes:

> That the lawyer’s charges are reasonable as between solicitor and client is not the end of the assessment. Consideration must also be given in assessing the reasonableness of requiring the unsuccessful party to indemnify the successful party for a percentage of them.
>
> Resorting to Schedule C simply to avoid these assessments may not be appropriate if Schedule C does not yield an appropriate level or scale of indemnification; that is, a reasonable or meaningful level of indemnification.

[59] This requires a closer look at Schedule C. At paragraph 54 in ***McAllister*** the Court points out that Schedule C has been referred to as a “very crude method by which to assess costs” and at paragraph 55: “… Schedule C arbitrarily selects certain steps in a lawsuit and compensates parties for taking them, but it omits other steps which can be just as significant to advancing the litigation, and often just as costly.”

[60] The Court then outlined the utility of Schedule C as a mechanism or method by which a reasonable and proper costs award may be made, including a multiple, proportion or fraction of an amount set out in any column, providing a convenient and transparent foundation for judicial determination of costs. “Schedule C assists judges in making expeditious costs decisions and may, with or without the use of multipliers, provide a reasonable level of indemnity when such indemnity is called for.” Schedule C “may be useful simply as a tool of reference for trial judges to make a “reality check” when fashioning an appropriate costs award”. See paragraphs 58-61 of ***McAllister***.

[61] The Court in ***McAllister*** concluded that the trial judge “misdirected herself as to the applicable law in failing to consider whether costs determined in accordance with Schedule C provided an appropriate level of indemnification to the successful plaintiff.… She did not consider whether… the costs awarded represent the reasonable and proper costs that the plaintiff incurred in prosecuting his claim to a successful conclusion.” The Court allowed the appeal and directed the trial judge to determine a reasonable level of indemnification, either by assessing the reasonableness of the costs herself or delegating to an assessment officer pursuant to rule 10.34. See paragraphs 65 and 66.

[62] The Redleaf defendants submit two more recent Court of Appeal decisions: ***Barkwell v McDonald***, 2023 ABCA 87, where costs are discussed at paragraphs 52 through 61, quoting extensively from ***McAllister***, and ***V.L.M. v Dominey Estate***, 2023 ABCA 382, which is a

memorandum of judgment regarding costs, quoting extensively from ***Barkwell***. The endorsement and restatement of the ***McAllister*** principles is helpful in determining the directions I will give to the assessment officer.

[63] When the successful party seeks a lump-sum or percentage costs award, that party should provide the court, as a benchmark, an assessment of the fees that would be ordered under Schedule C: ***McAllister*** at para 61; ***Barkwell*** at para 54.

[64] The successful party cannot simply assert the quantum of the fees that were charged by counsel and ask the court to apply a percentage; a detailed analysis is required to determine reasonable and proper costs. ***Barkwell*** at para 55.

[65] There is an important distinction between solicitor and own client costs, required to be paid as a matter of contract, and solicitor and client costs, representing the cost that a reasonable client might be required to pay for the services rendered. ***Barkwell*** at para 56, referring to ***Luft v Taylor, Zinkhofer & Conway***, 2017 ABCA 228, at paragraph 77 and 78:

> We would add the following comments about the distinction between solicitor and client costs and solicitor and own client costs, and the propriety of using the latter where the circumstances require more than the usual party and party costs based on Schedule C. … Party and party costs assessed as between a "solicitor and client" include the reasonable fees and disbursements for all steps reasonably necessary within the four corners of the litigation. Costs between "solicitor and own client" allows for "frills or extras" authorized by the client, or which the client should reasonably pay his own solicitor, but which should not fairly be passed on to third parties who become responsible for those expenses.
>
> There is an important distinction between "solicitor and client costs" and "solicitor and own client costs". An award of party and party costs calculated on a solicitor and client basis is rare and exceptional, but an award of solicitor and "own client" costs is virtually unheard of except where provided by contract.

[66] The successful party cannot simply claim a percentage of the fees paid if they are disproportionate to the issues and the amount involved. An important feature of the tariff in Schedule C is that it does not measure how much in fees was paid by the successful party, but rather, gives a rough measure of how much should have been incurred in the ordinary case having regard to the amounts in dispute. ***Barkwell*** at para 57.

[67] The principle that cost awards are designed to partially, but not fully indemnify the successful party and the frequently used rough rule of thumb that costs award should reflect 40% to 50% of the solicitor client costs is not necessarily a reference to the costs paid by the client, but rather to the costs that should reasonably have been incurred given the issues. This principle and rough rule of thumb were used to set the tariff in Schedule C which is why a draft Bill of Costs based on Schedule C should be provided. ***Barkwell*** at para 58.

[68] If the judge decides to make a costs award based on a percentage of solicitor and client costs, "the question is not just whether the solicitor and client costs are reasonable as between solicitor and client, but whether the quantum represents an amount that the losing party in the

litigation should reasonably be expected to pay to the winning party…. As ***McAllister*** notes, this involves a detailed analysis of all the factors that go into assessing solicitor's fees: see R.10.2 and R. 10.33." ***Barkwell*** at para 59, as illustrated at para 60:

> If the winning party seeks a costs award based on a percentage of solicitor and client fees, that request must be justified by a consideration of the factors in R. 10.2 that are relevant to the reasonableness of a fee. That includes the importance of the issues, the circumstances of the client, the manner in which the services were provided, the skill and responsibility involved, and other relevant considerations. Many of those same issues are also listed in R. 10.33, which in addition to the amount in issue, refers to the complexity of the action and the conduct of the parties. Also relevant are things like the hourly rates being charged (including paralegal or administrative time), whether those rates were appropriate given the seniority and experience of counsel, whether the work was being done by lawyers of appropriate seniority, the number of counsel involved, whether the duration and intensity of pre-trial questioning was appropriate or excessive or disproportionate, whether unnecessary interlocutory proceedings were launched and the outcome of those proceedings, and whether the ultimate fee was proportionate to the issues.

[69] The Court of Appeal reiterates in ***V.L.M. v Dominey Estate*** that "The primary purpose of a costs award is to partly indemnify the successful party for the legal expenses it incurred in the proceedings." See para 4.

[70] Schedule C assumes the relationship between the costs generated by Schedule C and the solicitor and client costs that should have been incurred for similar pieces of litigation as representative of an appropriate level of indemnification. See para 6.

[71] With respect to a costs award based on a percentage of solicitor and client fees: "The issue is not whether the fee charged to the client is fair to the client, but what amount the unsuccessful party can fairly be expected to contribute". There must be proportionality; "success is not a justification for disproportionate litigation." See paras 8 and 9.

[72] I have also reviewed the decision of Justice Graesser in ***Grimes v Governors of the University of Lethbridge***, 2023 ABKB 432 wherein he states at paragraph 10 "I confess to being somewhat uncertain as to the state of the law on "party party" costs as a result of the Court of Appeal's decision in ***McAllister***." The ***Grimes*** decision contains a fulsome review of the caselaw on costs. Graesser J, references several pre-***McAllister*** cases to illustrate this uncertainty.

[73] At ***Grimes*** paragraph 30, Graesser J says:

> I also have difficulty reconciling ***McAllister*** and the ***Barkwell*** decisions with the Court of Appeal's 1997 decision in ***Sidorsky v CFCN Communications Limited***, 1997 ABCA 280, to the extent they are being interpreted as creating a new cost regime. In that case, the Court of Appeal stated at para 28:
>
> > [28] Costs are discretionary and as a general rule a departure from party and party costs should only occur in rare and exceptional circumstances…

[74] At paragraph 34, Graesser J notes: "Indeed, ***RVB Managements Limited v Rocky Mountain House (Town)***, 2015 ABCA 304 describes Schedule C costs as "presumptive":…"

[75] At paragraph 36, Graesser J refers to ***Hill v Hill***, 2013 ABCA 313 and concludes: "However, in that case the issue on costs was whether to apply a multiplier to the normal tariff items, not whether there should be a departure from Schedule C entirely or even at all."

[76] At paragraphs 37 and 39, Graesser J observes:

> In ***Caterpillar Tractor Co v Ed Miller Sales & Rentals***, 1998 ABCA 118, Caterpillar sought a multiplier of the usual tariff as well as an inflationary adjustment. Like the circumstances in ***McAllister*** where Schedule C had not been updated for 12 years, in 1998 when ***Caterpillar*** was decided, Schedule C had not been updated since 1984 and had been significantly eroded by inflation.…
>
> ***Caterpillar*** appears to have had no effect on subsequent use of Schedule C by Queen's Bench judges or by the Court of Appeal since then, other than to recognize that multipliers and inflationary adjustments were appropriate exercises of judicial discretion in some individual circumstances.

[77] At paragraph 40, Graesser J notes:

> The principles in ***Sidorsky, RVB, Hill*** and ***Caterpillar*** were not expressly considered in ***McAllister*** or either of the ***Barkwell*** decisions. ***Hill*** and ***Caterpillar*** were mentioned in ***McAllister***, but they were only references and there was no discussion of that case itself.

[78] And at paragraph 55 to 57, Graesser J concludes:

> Ultimately, I do not see that ***McAllister*** and ***Barkwell*** have any greater authority than the earlier decisions. I do not see that the comment in ***Weatherford*** about the "general rule" being that party party costs should be "between 40 and 50% of actual costs" fundamentally changed the law and made use of Schedule C the exception rather than the general rule. None of these decisions purport to overturn or modify the earlier authorities in any way. The earlier decisions were not even considered other than by way of brief reference for a couple of them, and not by way of any analysis. As such, they all must be read together and rationalized somehow.
>
> I will make some observations:
>
> 1. The appropriateness of a solicitor and own client bill has generally been the bailiwick of the Review Officers, who have considerable expertise in this area, as opposed to judges;
> 2. Cost awards outside the tariffs in Schedule C (solicitor and own client costs, solicitor and client costs, and partial indemnity costs) are very fact driven;
> 3. The basic principles of party party costs in the *Rules of Court* have not changed since 1998. Only the amounts and tariff items have; and

4. Some Court of Appeal decisions, as cited above, treat Schedule C as the starting point for a party party cost award.

From all this I conclude that ***McAllister*** is an example of a case where the strict application of Schedule C was not appropriate. It does not stand for any change in costs principles as previously outlined in earlier Court of Appeal decisions. I do not read either of the ***Barkwell*** decisions or ***Weatherford*** to say anything different.

[79] From a practical perspective, Graesser J comments at paragraph 71:

However, before starting down the path of looking at a party's actual legal costs, in my view there should be a preliminary determination, made summarily, by the judge or applications judge that an award of partial actual indemnity costs is a reasonable possibility in the circumstances of the case. There is no presumption or even an inference as to the inapplicability of Schedule C costs simply because the successful party has incurred more than double in solicitor and own client costs than Schedule C would ordinarily award.

[80] And at paragraph 72 of ***Grimes***, Graesser J writes:

I note with approval that Master Schlosser performed a similar analysis in far less detail than this decision in ***Brosseau Estate v Dubarry Estate***, 2023 ABKB 378. His comments at paras 21 resemble mine here, but in a much pithier way:

> [21] The ***McAllister*** decision seems to be on every successful counsel's lips. However, it would be a misreading of the case to say that it supplants Schedule C with a 40-50% indemnification model. With respect, this case is simply a reminder that there are a wide range of choices on the costs menu, depending on the Court's appetite and the circumstances of any particular case; all of which are contemplated by rules 10.33 (and 10.2) with respect to scale, and r 10.31, with respect to options. It is not a shift from *prix fixe* to *carte blanche*, or nearly so.
>
> [22] Costs remain wholly within the discretion of the Court. Apart from the comprehensive list of principles set out in the ***McAllister*** decision, the case has no direct application to this one. As noted, and unlike ***McAllister***, this case is not a piece of hard-fought protracted litigation involving 'arguably novel' liability. Though it has been protracted, this case is the opposite.

[81] In his assessment of the facts in ***Grimes***, Graesser J was not satisfied that there were any factors to suggest a departure from Schedule C costs was in order; the issues were not particularly complicated or complex; he did not see it as a particularly important decision as no new principles of law were involved and the application was in essence a routine judicial review. See paragraphs 73 to 77.

[82] From this review of the law on costs, I agree with Judge Schlosser that ***McAllister*** "… is simply a reminder that there are a wide range of choices on the costs menu, depending on the

Court's appetite and the circumstances of any particular case; all of which are contemplated by rules 10.33 (and 10.2) with respect to scale, and r 10.31, with respect to options."

[83] The Court of Appeal in ***Barkwell*** reminds us that in determining the amount or scale of costs, the overriding issue is proportionality.

[84] Proportionality is contemplated by rules 10.2 and 10.33 in the list of factors the court may consider in determining the reasonable amount a lawyer is to be paid for services and in making an award for costs payable by one party to another.

[85] By considering those factors, the court may ensure the fees paid or costs awarded are proportionate to the nature and importance of the matter, the complexity and conduct of the action, as well as the amount claimed and recovered.

[86] The Court of Appeal applied the principle of proportionality in its subsequent decision setting the cost award in ***Barkwell v McDonald,*** 2023 ABCA 183 [***Barkwell #2***] at paragraph 74:

> … As indicated in the appeal reasons, an award of party and party costs based on solicitor and client costs must be justified: 2023 ABCA 87 at paras. 52-61. The issue is not simply how much the successful party spent, but how much that party can reasonably expect the other party to pay. The amount actually charged to the client is not definitive. The rates and amount of time invested must be justified. The costs awarded must be proportionate to the amounts in issue.

[87] Ultimately, the Court placed the dispute within column 4 of Schedule C of the *Rules of Court*. A second counsel fee was justified and the amount for trial preparation was doubled given the complexity.

[88] At paragraph 75 in ***Barkwell #2***, the Court found: "… Simply put, the amount of litigation was disproportionate to the issues, and both parties incurred excessive solicitor and client costs. This is not an appropriate file in which one party should be entitled to recover from the other party assessable costs based on a percentage of solicitor and client costs."

Analysis

[89] The costs claimed by Clark Builders appear at first look to be an example of disproportionate litigation. The Bill of Costs of the plaintiffs for fees claimed on a Solicitor and Client (Full Indemnity) basis shows fees of $415,741.50 to December 22, 2022 plus disbursements and GST for a total of $462,917.03.

[90] The Bill of Costs prepared by the plaintiff's for fees claimed under column 3 of Schedule C shows fees of $22,125.00, plus disbursements and GST for a total of $49,792.57. The amount claimed for solicitor and own client full indemnity fees by Clark Builders is almost 19 times the amount the Redleaf defendants might be required to pay under Schedule C.

[91] Clark Builders submits that the circumstances of this litigation give rise to an elevated costs award. The Owner breached the Construction Management Contract by failing to pay the outstanding debt forcing Clark Builders to register the liens, pursue the court action and incur

significant legal costs to obtain that which it was entitled to under the contract, being payment of the outstanding debt by the Owner. Had the Owner complied with its obligations under the contract, Clark Builders would not have incurred these significant legal costs.

[92] Clark Builders points out that the outstanding debt relates to invoices issued between August 2009 and June 2011 and owing for over 12 years. I note that Clark Builders has calculated contractual interest on those invoices to the date of judgment in the amount of $459,240.90 as set out in the affidavit filed in support of the application to set costs.

[93] Clark Builders argues that the Redleaf defendants failed to provide sufficient detail of facts and records to show a genuine issue requiring a trial on the s 53 *BLA* application, let alone prove the allegations set out in Redleaf's statement of defence.

[94] The Redleaf defendants acknowledge that Clark Builders was successful on the s 53 *BLA* application which would entitle them to costs for the action and the contested special chambers application, however, such costs should be awarded in accordance with column 3 of Schedule C. They submit that Clark Builders is not entitled to costs on a solicitor and own client full indemnity basis and the elevated indemnity basis of 80% of solicitor client costs is excessive.

[95] The Redleaf defendants further point out that no matter what scale costs are assessed at, Clark Builders should not be entitled to costs for any steps necessitated by their failure to provide a full and complete affidavit of records, the summary judgment application that was dismissed, and the abandoned application for summary dismissal of the Redleaf counterclaim. I note that the draft Bill of Costs prepared by Clark Builders under Schedule C does account for some of these steps.

[96] If Clark Builders is to be awarded costs on a solicitor and client basis, Redleaf requests copies of the actual accounts rendered for which it seeks compensation as well as the time records to support those billings. I expect that should the matter of solicitor and client costs be referred to the assessment officer, those detailed records will be provided.

[97] I will refer the assessment of the quantum of the costs award to the assessment officer. However, I am required to provide direction as to whether the costs are to be assessed under Schedule C or as a percentage of solicitor and client costs.

[98] I am able to contrast the two draft Bill of Costs submitted by Clark Builders by comparing the dates that fees were advanced up to with the items identified on Schedule C and the corresponding events set out on the Summary of Court Action. I looked the at the pleadings and the s 53 *BLA* special chambers application as examples.

[99] According to the Summary of Court Action, Clark Builders registered the liens on March 22, 2011. The first account sent by the lawyers to Clark Builders was dated May 17, 2011 for fees advanced up to May 16, 2011 in the amount of $1,295.00. There is of course no corresponding Schedule C item. There is no doubt the registration of the liens was crucial in advancing the litigation.

[100] According to the Summary of Court Action, Clark Builders filed its statement of claim on September 7, 2011, Redleaf filed its statement of defence and counterclaim on November 2,

2011 and Clark Builders filed its statement of defence to counterclaim on March 26, 2012. The next five accounts sent by the lawyers to Clark Builders advanced between May 17, 2011 and April 30, 2012 cover the timeframe for the pleadings and total $7,252.00. The amount allowed under column 3 of Schedule C for pleadings is $2,700.00. This would provide Clark Builders with about 37% indemnity.

[101] The Summary of Court Action shows that both Clark Builders and Redleaf filed applications for the other to provide affidavits of records between January 2014 and March 2016. There were further and other applications related to records and disclosure obligations throughout 2016 and 2017 and an appeal to a Justice. Clark Builders provided a third supplemental affidavit of records on February 26, 2018. There are many accounts rendered by the lawyers to Clark Builders during this timeframe at significant legal cost. Schedule C allows one item for disclosure of records and one for review of opposite party documents for total column 3 fees of $2,700.00. The Schedule C tariff items for these successful and unsuccessful applications are added. A detailed analysis of the time records and the circumstances of each application would be necessary if the solicitor and client fees were to be used to assess the portion of reasonable and proper costs for which the Redleaf defendants should indemnify Clark Builders for record exchange.

[102] Intermingled with the activities to compel record disclosure, Clark Builders brought a summary judgment special chambers application heard on May 2, 2016 and dismissed on July 15, 2016. A detailed analysis of the time records would be necessary if the solicitor and client fees were to be used to assess the portion of reasonable and proper costs for which the Redleaf defendants are entitled for this unsuccessful special chambers application.

[103] Redleaf conducted questioning for discovery on July 16, 2016. The corresponding Schedule C item is $1,350.00. There is an account for July 2016 in the amount of $8,755.00 but it may include other activity going on at the same time. A detailed analysis of the time records would be required to assess costs as a percentage of solicitor and client costs.

[104] There was a case management conference on October 22, 2018 with billing on November 27, 2018 for $13,062.00. There is no corresponding item on the Schedule C Bill of Costs.

[105] The Summary of Court Action lists events after the case management conference related to the s 53 *BLA* special chambers application. These include Clark Builders filing an Affidavit Proving Lien on December 6, 2018; filing the s 53 *BLA* application on November 20, 2020; obtaining procedural orders; exchanging affidavits of the experts and questioning on their reports; providing answers to undertakings and questioning on undertakings. Clark Builders and Redleaf filed their Briefs in July 2021. I heard the s 53 *BLA* application in special chambers on March 23, 2022 and rendered my decision on April 14, 2023.

[106] The statements of account rendered by the lawyers to Clark Builders for fees advanced from November 16, 2018 through to March 31, 2022, being the time period covering the Affidavit Proving Lien to and including the s 53 *BLA* Special Chambers Hearing, total $257,796.50.

[107] The corresponding tariff items under column 3 Schedule C total $8,775.00. The costs for questioning of the experts on their affidavits and undertakings of $6,750.00. The tariff item for a contested application requiring briefs is $2,025.00 for a total of $8,775.00. The solicitor and own client legal fees appear to be 29 times the tariff fees. Although competing experts were involved, even indemnity at 40% to 50% of solicitor and own client fees between $103,000 and $129,000 would seem to be disproportionate for the special chambers application.

[108] With this limited analysis and considering the applicable rules and case law, I find the most appropriate option for costs is a lump sum in addition to Schedule C costs to be assessed under column 4. The reasons for this conclusion are set out below.

Conclusion

[109] This lengthy litigation arises from a construction contract and payment dispute. The claim by Clark Builders for payment has been resolved by a successful special chambers application pursuant to s 53 *BLA* for a judgment declaring it's liens valid in the amount of its outstanding invoices.

[110] Pursuant to rule 10.29, Clark Builders as a successful party to this application is entitled to a costs award against the unsuccessful Redleaf defendants. As the special chambers application resolved the claim, Clark Builders is also entitled to costs of the action.

[111] Although the application for summary dismissal of the Redleaf counterclaim was not pursued, Clark Builders argues that the Redleaf defendants failed to provide sufficient detail of facts and records to show a genuine issue requiring a trial on the s 53 *BLA* application or to prove the allegations set out in Redleaf's statement of defence.

[112] The Redleaf defendants acknowledge that Clark Builders was successful on the s 53 *BLA* application which would entitle them to costs for that application and the action. However, they point out that Clark Builders should not be entitled to costs for any steps necessitated by their failure to provide a full and complete affidavit of records, the summary judgment application that was dismissed, and the abandoned application for summary dismissal of the Redleaf counterclaim.

[113] As I have noted, the draft Bill of Costs prepared by Clark Builders under Schedule C does account for some of these steps.

[114] I have already found that Clark Builders is not entitled to solicitor and own client full indemnity contractual costs as discussed above.

[115] Rule 10.29(1)(a) provides that the successful parties costs award against the unsuccessful party is subject to the court's general discretion under rule 10.31.

[116] Rule 10.31 provides that, after considering the matters described in rule 10.33, the court may order one party to pay to another party, as a costs award, the reasonable and proper costs that a party incurred or any amount that the court considers to be appropriate in the circumstances. I find that payment by the Redleaf defendants to Clark Builders of a lump sum in addition to Schedule C costs assessed under column 4 will provide an appropriate level of indemnification in the circumstances of this litigation.

[117] Actions to enforce builders' liens are meant to proceed summarily, expeditiously, and at the least expense. The time and steps taken in this action, and therefore the solicitor and own client fees incurred, are disproportionate to the costs that should reasonably be incurred given the issues, amount, and nature of the builders' liens claimed. This should not have been the complex litigation it turned out to be. Further complication through an assessment of 10 years of solicitor and own client accounts to consider the rule 10.2 and 10.33 factors is not appropriate. See the illustration in paragraph 60 of ***Barkwell***.

[118] Given that the Clark Builders claim was resolved through a summary judgment application following the exchange of pleadings, records and affidavit evidence, a costs award on a percentage of an assessment of solicitor and client costs is not justified. As succinctly stated in ***Barkwell #2***: "The issue is not simply how much the successful party spent, but how much that party can reasonably expect the other party to pay." There must be proportionality.

[119] An award of costs under the appropriate column of Schedule C with some consideration for the apparent cost and actual success of the s 53 *BLA* special chambers application will provide proportionality. The concerns of the Redleaf defendants that they do not pay for steps necessitated by Clark Builders' failure to provide a full and complete affidavit of records, the summary judgment application that was dismissed, and the abandoned application for summary dismissal of the Redleaf counterclaim will be addressed through a review of a Bill of Costs under Schedule C.

[120] I found the Clark Builders liens valid in the amount of the outstanding invoices, being $475,350.80 plus GST in the amount of $23,767.54 for a total amount of $499,118.34. The interest pursuant to the Construction Management Contract from the date that such payments became due has been calculated at $459,240.90. The total amount to be recovered through the successful s 53 *BLA* application falls under column 4 of Schedule C.

[121] Reviewing my analysis above, the item for pleadings under column 4 is $3,375.00, closer to the 40% to 50% indemnity contemplated by Schedule C of the $7,252.00 in legal fees billed for pleadings.

[122] The same cannot be said when comparing the solicitor and client accounts to the corresponding tariff items for the disproportionate amount of time spent on obtaining disclosure and the other events in the litigation. As recognized in the case law, there are steps in the litigation which will not be covered by Schedule C, such as the filing of the builders' liens and the case management conference which I have noted. However, the total solicitor and own client costs in excess of $415,000 billed for a claim of $499,000 are disproportionate to an appropriate award of costs for this litigation.

[123] The Schedule C tariff items for the successful special chambers application under column 4 would include 5 one half days of questioning on affidavit and a contested application with briefs for a total of $10,785.00. The time which appears to have been spent preparing for and arguing this application resulted in solicitor and own client fees of $257,796.50.

[124] The s 53 *BLA* application also involved expert reports providing cost in place estimates for each of the parties. The Redleaf defendants obtained the Altus report first. I find it reasonable for Clark Builders to have obtained their own LCVM Report in response. I found the reports helpful but not necessary to determine the outcome of the application. However, I expect the

involvement of the experts contributed to the solicitor and own client fees charged to Clark Builders.

[125] Pursuant to rule 10.31(2)(d), I order that the consulting fees for LCVM Consultants Inc and the disbursement for the expert report to be included in the taxable disbursements to be paid by the Redleaf defendants to Clark Builders.

[126] I direct that a Bill of Costs be prepared and assessed by the assessment officer under column 4 of Schedule C.

[127] To acknowledge the extra time spent and the successful outcome of the s 53 *BLA* special chambers application in resolving Clark Builders' claim, I also order a lump-sum cost award in the amount of $20,000.00 to be paid by the Redleaf defendants to Clark Builders in addition to the assessed costs.

[128] Clark Builders claimed full indemnity costs; the Redleaf defendants successfully opposed that application. The Redleaf defendants argued for column 3 Schedule C costs. I have ordered costs be awarded under column 4 of Schedule C and an additional lump sum of $20,000.00. In these circumstances, each party shall bear their own costs of this application and the assessment.

[129] I am grateful to both counsel for the thorough arguments advanced and comprehensive materials submitted for my review in preparing this costs endorsement.

Heard on the 30th November, 2023
Written submissions on the 15th and 29th of January, 2024
Dated at the City of Edmonton, Alberta this 28th day of March, 2024.

L.R. Birkett
A.J.C.K.B.A.

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