Court of King's Bench of Alberta

Citation: Serinus Energy PLC v SysGen Solutions Group Ltd, 2024 ABKB 123

Date: 20240305
Docket: 2001-07294
Registry: Calgary

Between:

Serinus Energy PLC

Plaintiff/
Defendant by Counterclaim

- and -

SysGen Solutions Group Ltd.

Defendant/
Plaintiff by Counterclaim

Reasons for Decision
of the
Honourable Justice M.A. Marion

I. Introduction

[1] In ***Serinus Energy PLC v SysGen Solutions Group Ltd***, 2023 ABKB 625, I awarded the Plaintiff, Serinus Energy PLC (**Serinus**) judgment against the Defendant, SysGen Solutions Group Ltd (**SysGen**), in the amount of $97,012.50, and I awarded SysGen judgment in its counterclaim against Serinus in the amount of $53,137.89. After set-off, the net amount owing to Serinus was $43,874.61 plus pre-judgment interest from June 1, 2020 to the date of the judgment (plus post-judgment interest).

[2] At para 330 of ***Serinus***, I noted:

> The parties have had mixed success in this matter, and I suspect both will find their respective victories to be rather pyrrhic given the obvious expense they have incurred to litigate this matter to its conclusion. Accordingly, the parties are strongly encouraged to reach a resolution on costs.

[3] My observations were confirmed. Serinus asserts that it incurred $593,167.44 in legal costs and disbursements. SysGen asserts it incurred $211,182 in legal fees. The legal costs and disbursements exceed the monetary amounts claimed and awarded in the action. The parties have been unable to agree on costs.

[4] This matter engages the determination of costs where there is both a successful claim and a successful counterclaim between two parties.

[5] Capitalized terms in these Reasons have the meaning as set out in ***Serinus*** unless stated otherwise.

II. Positions of the Parties

[6] Serinus' position is that it should be entitled to costs for its claim and SysGen should be entitled to costs of the counterclaim, Schedule C is inappropriate, and that each party should recover a percentage of their fees based on an apportionment of costs incurred in respect of the claim and counterclaim. It argues that 73% of the costs in the action pertained to its claim and 27% pertained to the counterclaim, based on its estimate of the relative time spent on the claim versus the counterclaim in seven categories (pleadings, affidavits, expert reports, layperson questioning, expert questioning, briefs and hearing time) and then averaging those percentages. Serinus argues that it should be entitled to 65% of its actual costs incurred in respect of its claim and SysGen should be entitled to 40% of its actual costs incurred in respect of the counterclaim. In the result, Serinus' position is that it is entitled to 47.45% of its actual costs in the action (65% of 73% of its actual costs), SysGen is entitled to 10.8% of its actual costs in the action (40% of 27% of its actual costs), and Serinus is entitled to the net set-off amount.

[7] SysGen's position is that it proved 85% of the monetary value of its claim, and Serinus proved 55% of the monetary value of its claim. It asserts, therefore, that neither party had substantial success and each party should bear its own costs. It disagrees with Serinus' methodology for apportioning the costs to the claim and counterclaim. It argues that, in any event, Serinus has not proven its actual costs or that they were reasonable. It argues Schedule C is a useful benchmark for reasonable costs that should be used in this case.

III. Record

[8] The parties provided submissions and supporting documents pursuant to the direction I made at paragraph 331 of ***Serinus***. Although both parties provided me the totals of their asserted reasonable costs incurred neither provided any detailed summaries of their accounts (redacted or otherwise).

[9] In its submissions, SysGen included post-***Serinus*** settlement communications related to the settlement of costs. My direction to the parties, at para 330 of ***Serinus***, to provide "any formal offer or other settlement offer they wish considered" only related to offers that pre-dated the court's summary trial decision, not post-decision settlement offers relating to costs of the action which are the subject of the present dispute. Settlement communications about matters in dispute are privileged, settlement privilege can only be waived by both parties, and that it is improper to tender settlement communications to the court without consent of the other party: ***Bellatrix Exploration Ltd v Penn West Petroleum***, 2013 ABCA 10 at para 26; ***Williams v Williams***, 2020 ABCA 15 at

para 22. I have not considered the settlement communications that were provided related to the negotiation of costs in deciding costs of the action.

IV. General Costs Principles

[10] Trial judges have considerable discretion in setting reasonable and proper costs under rules 10.29(1), 10.31, and 10.33, acting judicially on the facts of the case: ***Barkwell v McDonald***, 2023 ABCA 87 at para 53; ***McAllister v Calgary (City)***, 2021 ABCA 25 at para 17; ***British Columbia (Minister of Forests) v Okanagan Indian Band***, 2003 SCC 71 at para 42.

[11] Rule 10.29 of the Alberta *Rules of Court*, Alta Reg 124/2010 (*Rules*) provides that, subject to the discretion of the Court under rule 10.31 (among other matters), a successful party to an action is entitled to a costs award against the unsuccessful party. Rule 10.29 embodies the general rule that the successful party in an action is presumptively (or *prima facie*) entitled to costs: ***JWS v CJS***, 2022 ABCA 63 at para 24; ***McAllister*** at para 21.

[12] 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" a costs award, which can be one or a combination of a party's reasonable and proper costs incurred or any amount the Court considers appropriate in the circumstances, including an indemnity for that party's lawyer's charges or a lump sum instead of or in addition to assessed costs. There is no presumptive level of indemnification in the *Rules*: ***VLM v Dominey Estate***, 2023 ABCA 382 at para 6.

[13] Reasonable and proper costs include the reasonable and proper costs that a party incurred to bring an action (or application), costs incurred in a costs assessment unless the court otherwise orders (but does not include dispute resolution costs (unless a party engages in serious misconduct) or court investigation or court expert costs: rule 10.31(2)). Reasonable and proper costs are often referred to as party-party costs or partial indemnity costs: ***Secure 2013 Group Inc v Tiger Calcium Services Inc***, 2018 ABCA 110 at para 12(a).

[14] A court can deviate from "reasonable and proper costs" and may order such other amount the court feels is appropriate in the circumstances, whether it be reduced costs or enhanced or elevated costs: ***McAllister*** at para 31.

[15] A court may order an enhanced or elevated costs at a higher partial indemnification than would otherwise apply (for example, enhanced Schedule C costs or a higher percentage of assessed solicitor-client costs), or as solicitor-client costs: rules 10.31(3) and 10.33(2)(a), (d) and (f): ***Kantor v Kantor***, 2023 ABCA 329 at para 8; ***Oleynik v University of Calgary***, 2023 ABCA 265 at paras 21-23; ***Schitthelm v Kelemen***, 2022 ABCA 334 at para 18; ***PricewaterhouseCoopers Inc v Perpetual Energy Inc***, 2020 ABCA 273 at para 7; ***SRG Takamiya Co Ltd v 58376 Alberta Ltd***, 2020 ABCA 217 at para 22; ***Condo Corporation No 0410106 v Medicine Hat (City)***, 2020 ABCA 43 at para 5; ***Lotoski v Lotoski***, 2019 ABCA 262 at para 7; ***Louw v Hamelin-Chandler***, 2012 ABQB 52 2012 ABQB 52 at para 18.

[16] Enhanced costs are often based on the conduct of the parties, including litigation misconduct, settlement offers, or unsubstantiated allegations of fraud, although it may (rarely) include pre-litigation conduct in appropriate cases: ***Lotoski*** at para 7; ***Stubicar v Calgary (Subdivision and Development Appeal Board)***, 2023 ABCA 98 at paras 52-53; ***Borgel v***

Paintearth (Subdivision and Development Appeal Board), 2020 ABCA 321 at para 49; ***Breen v Foremost Industries Ltd***, 2024 ABKB 9 at para 24; ***Ewashko v Hugo***, 2022 ABCA 420 at para 6; ***H2S Solutions Ltd v Tourmaline Oil Corp***, 2020 ABCA 201 at para 18; ***Piikani Nation v McMullen***, 2020 ABCA 366 at para 84; ***Pillar Resource Services Inc v PrimeWest Energy Inc***, 2017 ABCA 19 at paras 1-9; ***Brodylo Estate (Re)***, 2023 ABCA 314 at paras 23-24.

[17] Enhanced costs may also be awarded based on the amount involved, complexity or duration of the litigation: ***Indutech Canada Limited v Gibbs Pipe Distributors Ltd***, 2013 ABCA 111 at para 105; ***Stewart Estate v TAQA North Ltd***, 2016 ABCA 144 at paras 25-26; ***RVB Managements Ltd v Rocky Mountain House (Town)***, 2015 ABCA 304 at paras 12-13; ***Weatherford Canada Partnership v Artemis Kautschuk und Kunstoff-Technik GmbH***, 2019 ABCA 92 at para 7.

[18] Solicitor-client costs (costs that a reasonable client might be required to pay for the services rendered) are rare and exceptional: ***Luft v Taylor***, 2017 ABCA 228 at paras 77-78; ***Secure 2013 Group*** at para 15. They are typically awarded only where there has been reprehensible, scandalous or outrageous conduct by a party: ***Goldstick Estates (Re)***, 2019 ABCA 508 at para 24; ***Secure 2013 Group*** at para 15; ***Young v Young***, 1993 CanLII 34 (SCC); ***Pillar Resource*** at para 85.

[19] Solicitor-own-client or full indemnity costs (costs that counsel can charge as a matter of contract, which may include "frills or extras" authorized by the client) is "virtually unheard of" except where provided for by contract, and will rarely be appropriate: ***Barkwell*** at para 56; ***Goldstick Estates*** at para 25; ***Luft*** at paras 77-78.

[20] Lump sum costs are fixed at a set amount: ***Secure 2013 Group*** at para 12(b). Whenever a party seeks a lump sum 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.

[21] Rule 10.33 provides:

> 10.33(1) In making a costs award, the Court may consider all or any of the following:
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> (a) the result of the action and the degree of success of each party;
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> (b) the amount claimed and the amount recovered;
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> (c) the importance of the issues;
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> (d) the complexity of the action;
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> (e) the apportionment of liability;
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> (f) the conduct of a party that tended to shorten the action;
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> (g) any other matter related to the question of reasonable and proper costs that the Court considers appropriate.

(2) In deciding whether to impose, deny or vary an amount in a costs award, the Court may consider all or any of the following:

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

(b) a party's denial of or refusal to admit anything that should have been admitted;

(c) whether a party started separate actions for claims that should have been filed in one action or whether a party unnecessarily separated that party's defence from that

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

(e) an irregularity in a commencement document, pleading, affidavit, notice, prescribed form or document;

(f) a contravention of or non-compliance with these rules or an order;

(g) whether a party has engaged in misconduct;

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

[22] In making a cost award, the court may order a party to pay all or part of the reasonable and proper costs with or without reference to Schedule C, using multipliers, proportions or fractions of columns in Schedule C, based on the reasonable and proper costs with respect to a particular issue, application or proceeding or part of an action, or a percentage of assessed costs: rule 10.31(3): ***McAllister*** at para 54; ***Barkwell*** at para 53. The court may adjust the amount by deduction or set-off against the other party's costs entitlement: rule 10.31(4).

[23] The rules aim to balance the indemnity of the winner without unreasonably discouraging access to the court, or unduly penalizing the losing party: ***McAllister*** at para 45; ***Barkwell*** at para 57.

[24] Costs awards are designed to partially, but not fully, indemnify the successful party: ***McAllister*** at para 37; ***Barkwell*** at para 58.

[25] Schedule C is a useful tool, option and rough measure but not a mandated or default method for quantifying costs: ***Barkwell*** at para 53; ***McAllister*** at paras 23-30; ***VLM*** at paras 6-7.

[26] A rule of thumb of 40 to 50% recovery of a party's solicitor-client costs must consider both the payor's and the recipient's perspective - the quantum should reflect: (1) the costs that the cost-entitled recipient, as a reasonable client, might be required to pay for the services rendered (as informed by a detailed analysis of all the factors that go into assessing solicitor's fees under rules 10.2 and 10.33); and (2) whether that quantum represents an amount that the losing party in the

litigation should reasonably be expected to pay to the winning party (as informed by appropriate costs using Schedule C as a rough measure of how much should have been incurred): ***McAllister*** at paras 41-43; 46, 48; ***Barkwell*** at paras 57-60; ***Barkwell v McDonald***, 2023 ABCA 183 at para 74; ***Sutherland v Sutherland***, 2023 ABCA 185 at para 4; ***Sunridge Nissan Inc v McRuer***, at para 57; ***Petropoulos v Petropoulos***, 2023 ABCA 193 at para 18. Parties should always provide a draft bill of costs based on Schedule C regardless of the costs claimed: ***Barkwell*** at para 58.

[27] An overriding consideration is proportionality between the amount of the costs claimed and the issues and amounts involved in the litigation: ***Kantor*** at para 13; ***Barkwell*** at para 57; ***Sutherland*** at para 4; ***Petropoulos*** at para 18.

V. Issue

[28] The issue is an appropriate costs award.

VI. Analysis

A. Costs Principles When Divided Success on Claim and Counterclaim

[29] The Court of Appeal has consistently held that costs on appeal generally follow the ultimate result rather than apportioning costs by issue, claim or damages. Recently, in ***Johannson v Haaranen***, 2019 ABCA 197 (emphasis added), the Court stated at para 4:

> [4] Costs on appeal generally follow the ultimate result and will not be apportioned on an issue-by-issue basis, as this court has noted on numerous occasions. See for example, *Hogarth v Rocky Mountain Slate Inc*, 2013 ABCA 116 at para 12, 87 Alta LR (5th) 108, and *Mahe v Boulianne*, 2010 ABCA 74 at para 6, 21 Alta LR (5th) 277, where the court stated:
>
> > [6] The general rule is that the successful party on appeal is entitled to costs of the appeal. It is rare for any successful party on appeal to be successful on each and every argument that is made. Where several forms of relief are requested on appeal, it is also relatively rare for the successful party to succeed on each item of relief. Further, the parties often make arguments on points that the court does not have to deal with, because of the way the decision unfolds. **The general rule contemplates that the party who achieves substantial success on the appeal will receive costs, even if that party is not totally successful, nor successful on every issue or argument. Generally the costs follow the ultimate result, and costs are not usually apportioned on an issue-by-issue basis, a claim-by-claim basis or on a head-of -damages basis, although there is a discretion to do that in proper cases**: *Wilde v. Archean Energy Ltd.*, 2008 ABCA 132, 88 Alta. L.R. (4th) 54, 429 A.R. 41 at para. 9; *Sutherland v. Canada (Attorney General)*, 2008 BCCA 27 at para. 7; *British Columbia v. Worthington (Canada) Inc.*, 1988 CanLII 175 (BC CA), [1989] 1 W.W.R. 1, 29 B.C.L.R. (2d) 145, 32 C.P.C. (2d) 166 (B.C.C.A.); *Portugal Cove-St. Phillips (Town) v.*

> *Willcott* (1997), 1997 CanLII 14702 (NL CA), 150 Nfld. & P.E.I.R. 183, 20 C.P.C. (4th) 237 (Nfld. C.A.) at paras. 13-19. In this case the appellant was substantially successful by reducing the amount of the damage award by a significant amount, and he is entitled to costs of the appeal: *Alberta Wheat Pool v. Northwest Pile Driving Ltd.*, 2000 BCCA 641, 146 B.C.A.C. 119, 2 C.P.C. (5th) 12 at paras. 18-9.

[30] A similar "substantial success" approach has been endorsed by the Court of Appeal with respect to trial costs: ***Goska J Nowak Professional Corporation v Robinson***, 2016 ABCA 240 at para 34. This Court has, on numerous occasions, noted that where success is mixed to the extent that it cannot be said that one party was "substantially successful", no order should generally be made and the parties will bear their own costs: ***Rysdyk v Slaney***, 2023 ABKB 5 at para 14; ***Clarke v Syncrude Canada Ltd***, 2014 ABQB 430 at para 12; ***Concrete Equities Inc (Re)***, 2022 ABQB 304 at para 4; ***Hotchkiss v Budding Gardens Inc***, 2021 ABQB 333 at para 26.

[31] Substantial success means greater success, determined objectively: ***Boelman v Boelman***, 2024 ABKB 30 at para 14; ***Mitrovic v Mitrovic***, 2007 ABQB 107 at para 8; ***PricewaterhouseCoopers Inc v Perpetual Energy Inc***, 2022 ABQB 592 at para 25; ***1384334 Alberta Ltd v Buster's Pizza Donair & Pasta Enterprises Ltd***, 2020 ABQB 533 at para 7; ***AT v TE***, 2017 ABQB 674 at para 6; ***Clarke*** at para 23; ***Herman v Delong***, 1999 ABQB 745 at para 16. Success is determined globally having regard to the outcome, the degree of quantitative and qualitative success, and success on the issues or claims (although it does not require success on every issue or argument raised): ***Abt Estate v Cold Lake Industrial Park GP Ltd***, 2019 ABCA 145 at para 2; ***PricewaterhouseCoopers*** at para 25; ***Kon Construction Ltd v Terranova Developments Ltd***, 2014 ABQB 665 at para 13; ***Mahe v Boulianne***, 2010 ABCA 74 at para 6; ***Johannson*** at para 4. Ultimately, a balanced assessment of the outcome and the nature of the final judgment is sufficient: ***Mahe*** at para 6; ***Kon Construction*** at para 13; ***Kent v Kent (Ellis)***, 2011 ABQB 611 at para 7.

[32] In my view, the concept of substantial success in cases involving a claim and counterclaim should recognized that a counterclaim is an "independent action" under rule 3.58, the presumptive rule under rule 10.29 applies to a party that is successful in an "action", and, therefore, that a successful party can include a successful counterclaimant as well as a plaintiff: ***Manson Insulation Products Ltd v Crossroads C & I Distributors***, 2019 ABQB 684 at para 543. In the exercise of discretion, unique considerations may arise in determining whether to award costs to a substantially successful counterclaimant where both parties have had substantial success in their independent actions.

[33] I have considered cases where both plaintiffs and counterclaimants have had success at trial or on appeals /cross-appeals. These cases unsurprisingly illustrate a range of approaches, including:

(a) treating the proceedings as one proceeding and only awarded costs to that successful party: ***Luft*** at para 8; ***Evans v The Sports Corporation***, 2011 ABQB 616 at paras 20-30; ***Terra Power Tractor Co Limited v Pusztai***, 1982 ABCA 107 at para 9; ***Suri Holdings Inc v Jung***, 2022 ABKB 714 at para 63. This approach is

more common where the issues overlap or originate from a single relationship, where one party is the substantially successful party of the proceeding as a whole (based on the party winning the "most important" issue or having a net positive financial recovery or success), or where one of the successful claims is nominal or minimal compared to the other one: ***Evans*** at para 29; ***Suri Holdings*** at para 63; ***Mikkelsen v Truman Development Corporation***, 2016 ABQB 255 at para, 30 aff'd 2017 ABCA 99 at para 40, leave to appeal dismissed 2017 CanLII 76782; ***Lloyd Gardens Inc v Chohan***, 2020 ABQB 343 at para 10; ***Jones v Gerosa***, 2016 ABQB 614 at paras 41-49; ***Dewberry Financial Limited v Weishaar***, 2009 ABQB 692 at para 108; ***Alberta Wheat Pool v Fieldberg***, 2001 ABQB 669 at paras 11-23; ***PTI Group Inc v BOT Quebec Ltee (1995)***, 1995 CanLII 18097 (AB KB) at paras 167 and 174; ***Thorn v RGO Office Products Ltd***, 1993 CanLII 7244 (ABKB) at para 93; ***Labadie v Copithorne***, 1978 CanLII 3204 (ABKB); ***G & J Parking Lot Maintenance Ltd v Oland Construction Co***, 1978 CanLII 3276 (AB KB) at para 32;

(b) awarding each party costs of their independent proceeding with set-off of the two amounts: ***Schitthelm*** at para 16; ***Bergman v Bergman***, 2004 ABCA 194 at para 13; ***Field Aviation Company Limited v Vanir Construction Services Ltd***, 1992 ABCA 307 at para 1; ***Suri Holdings*** at para 53; ***Evans*** at para 28; ***Adams v Adams Estate***, 2001 ABQB 173 at para 31; ***Modern Livestock Ltd v Elgersma***, 1990 CanLII 5545 (ABKB); ***Suderman Developments Ltd v Smith***,1987 CanLII 3484 (ABKB) at paras 158-159; ***Shewczuk v Breeko***, 1918 CanLII 645 (ABCA) In some cases, there is no adjustment for the amount of time pertaining to the claim and counterclaim portion of the proceedings, which effectively assumes the time associated with the two proceedings were similar. In other cases, courts have allocated or apportioned each party's cost entitlement based on the proportionate time associated with each proceeding or issue, either by allocating a percentage to each proceeding, awarding enhanced costs for one but not the other, or using Schedule C multipliers: ***IFP Technologies (Canada) Inc v EnCana Midstream and Marketing***, 2022 ABKB 807 at para 268; ***Manson Insulation***; ***Whitaker (Plaintiff) Appellant v Rumble (Defendant) Respondent***, 1919 CanLII 785 (ABCA); ***Yeast v Knight & Watson***, 1919 CanLII 651 (AB KB); and

(c) ordering that each party bears their own costs, even where one has achieved a net recovery: ***Perth Construction Ltd v Mears Canada Corp***, 2018 ABCA 349 at paras 10-14; ***Selkirk Petroleum Ltd v Drummond Oil & Gas Ltd***, 1986 CanLII 1698 (ABKB) at para 39; ***Bevan v Anderson***, 1957 CanLII 257 (ABKB); ***Schaller v O'Bray***, 1950 CanLII 198 (AB KB) at para 6. This is more likely the result where it is difficult to say that one party was substantially successful, or where the parties were "equally" successful or both at least partially successful; or where it is difficult or impossible to allocate the time spent to the claim or counterclaim: ***Pechiney Metal Service v Suncor Inc.*** (1997), 1997 CanLII 24650 (ABKB) at para 14; ***Murphy Oil Canada Ltd v Predator Corporation Ltd***, 2005 ABQB 134 at para 17; ***956126 Alberta Ltd v JMS Alberta Co Ltd***, 2021 ABQB 121 at para 5.

[34] Whether one or both or neither of the parties should be entitled to costs cannot be decided in isolation. I consider the most pertinent rule 10.33 factors and other considerations below.

B. Rule 10.33 and Other Considerations

1. Result of the Action, Degree of Success and Amounts Claimed and Recovered

[35] Both parties were successful in the action to a degree. Serinus successfully established liability for breach of the FMSA, the tort of conversion and punitive damages, all stemming from the Administrator Lockdown. It was unsuccessful in its fiduciary duty claim and its intrusion upon seclusion tort claim (these would not have added to the claimed damages in any event). Serinus achieved a judgment of $97,012.50, when it had claimed at least $186,295.39. It recovered $5,000 out of $8,311.35 claimed for its personal costs, 100% of the amounts it paid to ION in response to the Administrator Lockdown, none of its claimed $45,323.84 in general damages, and $50,000 out of $90,647 claimed for punitive damages.

[36] On the other hand, SysGen was successful in its counterclaim. It obtained judgment in the amount of $53,137.89 out of a claimed amount of $62,347.44, which was recovery for most of the services provided under the FMSA and various other services.

[37] Serinus achieved a higher quantum of recovery, after set-off. However, SysGen achieved a greater recovery of the amounts it claimed, and largely defeated Serinus' defence to SysGen's counterclaim. Further, if one were to look at all financial aspects, including avoided claimed liability, it presents another angle. Serinus achieved $97,012.50 and avoided claimed liability in the amount of $9,209.55, for a total theoretical benefit of $106,222.05 and SysGen achieved $53,137.89 and avoided claimed liability in the amount of $89,282.89, for a total of $142,420.78.

[38] While comparing relative financial success is important, it is not the only factor.

2. Importance of the Issues

[39] While the issues immediately following the Administrator Lockdown were highly important to Serinus for security and operational purposes, the urgency and importance of the issues was diminished by the time the action was commenced. By then, it was effectively a relatively small commercial billing dispute with an associated punitive damages claim.

3. The Complexity of the Issues

[40] As I noted at paragraph 73 of ***Serinus***, the matter was reasonably complex but not overly so.

4. Apportionment of Liability

[41] As noted, each party was partially successful on their claim, but Serinus achieved a net positive judgment after set-off.

5. Conduct of a Party that Tended to Shorten the Action

[42] Both parties took reasonable and commendable steps to shorten the trial in this matter, through the use of the summary trial process and the creation of the Compendium. As I noted in ***Serinus***, at para 17, the parties condensed what would likely have been a two-week trial into two days of argument. I recognize that, to do so, considerable pre-trial work had to be done in the action.

6. Misconduct or Unnecessary Conduct that Lengthened or Delayed the Action

[43] In his concurring reasons in ***Pillar Resource***, at para 123, Justice Wakeling described that blameworthy litigation conduct is that which, viewed as a whole, demonstrates blatant disregard for the litigant's obligations under the *Rules* and court orders, and the rights of other parties, or undermines the integrity of the trial process. He gave examples of blameworthy litigation conduct, at para 124 (footnotes omitted), as being where a litigant:

> (a) alleges fraud, without any reasonable basis,
>
> (b) fails to observe time lines imposed by the [*Rules*] and court orders,
>
> (c) seeks adjournments for no valid reason and otherwise unreasonably delays the litigation process,
>
> (d) files material just before hearings in order to deny an adversary the right to cross-examine the affiant or otherwise properly respond to other documents,
>
> (e) misleads the court – consistently misrepresents the facts or law,
>
> (f) conceals, destroys or fabricates evidence or otherwise thwarts the purpose of the discovery process,
>
> (g) maintains positions or brings applications that are patently indefensible – the likelihood they will succeed is very low,
>
> (h) presents dishonest witnesses,
>
> (i) behaves in an uncivil manner; or
>
> (j) engages in other misconduct that undermines the integrity of the trial process.

[44] As noted earlier, the court may consider litigation conduct and pre-litigation conduct. In some cases, pre-litigation conduct may be considered as part of costs, even where punitive damages have been awarded: ***Breen*** at paras 12-21; ***Indutech*** at para 103.

[45] Serinus argues that SysGen's central defence was that there was an urgent security threat justifying the Administrator Lockdown, and that this position unnecessarily lengthened the proceedings. I agree and accept that submission, however, I do so with a caveat. The same could be said for Serinus' position that it was not obligated to pay for SysGen's services, both prior to and after the Administrator Lockdown. While SysGen bears more responsibility for the time spent on this matter, both parties bear some responsibility for taking and maintaining unsuccessful and unreasonable positions that caused this matter to require an expensive process culminating in the summary trial.

7. Overlap Between the Claim and Counterclaim

[46] Serinus' costs position is founded upon its argument that its claim was the most important and complex issue litigated. As I noted, at para 1 of ***Serinus***, the core and most important issue in this case was the legal effect of the Administrator Lockdown. That issue permeated Serinus' claims and Serinus was successful in establishing SysGen's conduct was unlawful. Serinus' claim also engaged the court's public interest jurisdiction to effect retribution, deterrence and denunciation of SysGen's conduct, which enhances the importance of the legal effect of the Administrator Lockdown and ***Serinus****'* claim.

[47] However, the legal effect of the Administrator Lockdown was not only relevant to Serinus' claim, contrary to Serinus' submissions. It was also a key component of Serinus' defence to SysGen's counterclaim, because Serinus argued that the Administrator Lockdown constituted a repudiation of the contractual arrangements underpinning SysGen's counterclaim. SysGen's counterclaim could not be resolved without resolving the issues surrounding the Administrator Lockdown. And SysGen was largely successful in defeating Serinus' defences based on the Administrator Lockdown.

[48] The claim and the counterclaim arose out of the same contractual relationship, its related billing dispute and Administrator. The claim and counterclaim were closely and inextricably connected, such that a significant portion of the extensive time and cost associated with proving the Administrator Lockdown, its purpose and its legal effect, was required for both the claim and the defence. As a result, Serinus' methodology and estimation of the time spent respecting the claim versus the counterclaim was flawed and unpersuasive. It overestimated the time spent on the claim and underestimated the time associated with the counterclaim.

8. Public Policy Considerations

[49] As just noted, this case, to a degree, engaged public policy because punitive damages are not compensatory and involve a court's jurisdiction to effect retribution, denunciation and deterrence of conduct that is a marked departure from ordinary standards of decent behaviour.

[50] However, as it relates to compensating Serinus, Serinus' claim did not involve *Charter* or constitutional issues, issues vital to Serinus' survival, significant financial matters, or any human or property well-being, safety or security. Further, there is no indication Serinus could not or would not have advanced the claim without expected significant costs compensation.

[51] Finally, while SysGen's Billing Dispute strategy was the Administrator Lockdown, I find that the punitive damages claim was part of Serinus' private litigation strategy surrounding the

very same Billing Dispute. I am not being critical of Serinus – it was fully entitled to make the claim it did and was successful in obtaining punitive damages. However, this is not a case where public policy considerations are significant as a costs consideration – they are sufficiently addressed by the punitive damages award.

C. Conclusion re Appropriate Cost Award

[52] After considering all the relevant factors, including the substantial success of each in their respective proceedings, their divided success when considering the action as a whole (but with Serinus being more successful than SysGen on balance), I find that awarding each party costs of their independent proceeding with set-off of the two amounts is appropriate.

[53] Accordingly, I find it is appropriate that Serinus be awarded costs and disbursements incurred (including expert costs) of its claim and SysGen be awarded costs and disbursements (excluding its expert costs) of its counterclaim, with the amounts to be set-off against each other. The issue then is how those costs are to be quantified.

[54] I agree with Serinus that the unique nature of this summary trial, which involved extensive pre-trial work to create the "trial in a box" and save many days of trial time, is not adequately addressed in Schedule C without significant adjustment. Further, both parties took some unreasonable and entrenched positions that required trial to be resolved and increased costs incurred by both sides. The quantum of the actual costs incurred by both parties is significant (although Serinus incurred significantly more costs). While I cannot determine, based on the information provided, whether the actual costs incurred by both parties would be considered reasonable and proper solicitor-client costs, the significant quantum of actual costs supports my conclusion that it is unlikely that Schedule C costs will result in a reasonable partial indemnification to either party or will reflect a reasonable amount the losing party should reasonably be expected to pay. There would have to be significant artificial manipulation of Schedule C.

[55] A percentage indemnity may be appropriate for parties which are sophisticated, similarly situated economically, can be expected to face similar amounts of legal accounts, and are proceeding with full knowledge of what the litigation is costing: ***JBRO Holdings Inc v Dynasty Power Inc***, 2022 ABCA 258 at para 25; ***GO Community Centre v Clark Builders and Stantec Consulting Ltd***, 2020 ABQB 203 at para 150. They may also be appropriate in complex cases or after trial: ***VLM*** at para 7; ***McAllister*** at para 64. These factors support the use of a percentage indemnity in this case notwithstanding that the parties actually incurred significantly different actual costs.

[56] I conclude that a percentage indemnification of legal costs is appropriate in this case. Considering the overlapping issues noted above, and recognizing that some more time was required for the claim than the counterclaim notwithstanding the overlap, based on my knowledge of the matter I find that a reasonable basis to allocate costs between the claim and counterclaim is 60% to the Serinus claim and 40% to the SysGen counterclaim.

[57] As noted, the parties have not provided the Court sufficient detail of their actual costs incurred in the action for me to determine whether they are costs that each party, as a reasonable

client, might be required to pay for the services rendered (as informed by a detailed analysis the factors under rule 10.2 and 10.33), whether they represent an amount that the losing party should reasonably be expected to pay, or whether they are proportional to the issues involved. In the circumstances, I also cannot decide what percentage of costs is appropriate for each party's indemnification (i.e. whether they should be somewhere in the 40-50% "rule of thumb" range of reasonable solicitor-client costs, or somewhere else). All of this is exacerbated by the very significant disparity between the actual costs each side incurred (Serinus' costs being approximately 2.8 times as much as SysGen's costs).

[58] Accordingly, I direct the parties to again attempt to reach resolution of costs having regard to these Reasons, which provides resolution of key issues and guidance to assist the resolution of costs without engaging further court resources. However, if the parties still cannot reach agreement within thirty days of these Reasons, then they are directed, pursuant to rule 10.41, to make an appointment with an assessment officer to have an assessment officer assess their respective solicitor-client costs incurred (1) in the action; (2) in respect of this costs application; (3) and in respect of the assessment before the assessment officer, to determine each of their reasonable and proper solicitor-client costs and disbursements of those matters (other than expert costs which I have decided). The assessment officer may seek my leave if further direction is required, as per rule 10.39.

[59] If, after the assessment officer's assessment, the parties are still unable to agree on an appropriate costs award, they may seek my further direction.

Heard by written submissions dated December 7, 2023, January 5, 2024 and January 8, 2024.
Dated at the City of Calgary, Alberta this 5th day of March 2024.

M.A. Marion
J.C.K.B.A.

Appearances:

Jordan Bierkos and Mark Risebrough
for the Plaintiff/Defendant by Counterclaim

Blake Hafso
for the Defendant/Plaintiff by Counterclaim