Court of King's Bench of Alberta

Citation: Murray v Windsor Brunello Ltd, 2024 ABKB 281

Date: 20240517
Docket: 1501 00629
Registry: Calgary

Between:

Donald Murray and Linda Murray

Plaintiffs

- and -

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

Defendants

- and -

KAPO Fenster und Türen GMBH and Luxus Haus Imports Ltd

Third Parties

Reasons for Decision of the Honourable Justice EJ Sidnell

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I Introduction

[1] Between 2011 and 2014, the plaintiffs, Donald and Linda Murray, engaged the defendant Windsor Brunello Ltd (WBL) to build a large two-storey home initially designed with over 8,800 square feet of development on the first and second floors, not including over 3,400 square feet of finished basement space, plus an attached four-car garage (the Murray Residence), east of Calgary.

[2] The defendant, KAPO Fenster Und Turen GMBH (KAPO) is an Austrian manufacturer of windows and doors. To sell its windows and doors, KAPO used a Canadian importer, the defendant Luxus Haus Imports Ltd (Luxus), and Luxus' sales agent, the defendant Sebastian Bade, operating as a sole proprietorship "CS Eurohaus" (Mr. Bade). KAPO, manufactured and supplied windows and doors for the Murray Residence (the KAPO Windows and Doors).

[3] The Murrays allege that there are significant defects in the structure of the Murray Residence affecting the KAPO Windows and Doors, which was designed, in part, by the defendant, Alberta Engineering Ltd (AEL). The Murrays claim against AEL in negligence.

[4] In addition, the Murrays allege that the KAPO Windows and Doors are defective and claim against KAPO, Luxus and Mr. Bade in negligence.

[5] The Murrays allege that WBL was responsible for coordination of the construction of the Murray Residence, and the work of its subcontractors and suppliers, including KAPO, Luxus and Mr. Bade. The Murrays claim against WBL:

(a) for breach of contract;

(b) in negligence; and

(c) for breach of statutory obligations under the *Sale of Goods Act*, RSA 2000, c S-2.

[6] The Murrays also allege that AEL, WBL, KAPO, Luxus and Mr. Bade failed to warn them that the KAPO Windows and Doors "had inherent issues arising from their size, weight and intended operation such that significant structural issues and defects had to be considered before they were installed".

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

[8] In January 2022, AEL entered into an agreement with the Murrays under which AEL admitted that it was "at least partially liable to the [Murrays] in the tort of negligence" and paid the Murrays $125,000. However, it was left to this Court to adjudicate on the liability of all defendants and third parties. Only the Murrays agreed to not pursue AEL for any further amount beyond the $125,000 settlement. This means there is no restriction on the other defendants to pursue AEL for any further amount under any joint and several liability.

[9] WBL, Luxus and Mr. Bade deny that they are liable to the Murrays.

[10] In the alternative, if they are liable, WBL and Luxus both presented evidence that the cost to perform appropriate repair work is substantially less than the amount claimed by the Murrays.

[11] Although he was aware of the trial, Mr. Bade was not represented by counsel and appeared only on selected dates during the trial.

[12] No one appeared on behalf of KAPO at the trial.

Other pleadings and appearances

[13] There were a number of pleadings filed in this action but on the first day of trial there were several amendments made so that the only remaining claims amongst the defendants and third parties were:

(a) KAPO's Notice of Claim against Co-defendants: WBL, Luxus and Mr. Bade;

(b) Luxus' Notice of Claim against Co-defendants: WBL, KAPO and Mr. Bade;

(c) WBL's Third Party Claim against KAPO and Luxus; and

(d) AEL's Third Party Claim against KAPO.

[14] On November 18, 2021, the principal of AEL, Mr. Ruggieri, PEng, swore a Statutory Declaration in which he confirmed that AEL's debts exceeded its assets. AEL was struck from the corporate registry in July of 2022. Having been struck from the corporate registry, AEL ceased to exist pursuant to s 213(4) of the Alberta *Business Corporations Act, RSA 2000, c B-9*.

[15] By the first day of trial, AEL was not operating, did not legally exist and AEL's lawyer was granted leave to withdraw. On the second day of trial, Mr. Ruggieri made an application to represent AEL at the trial, which was denied. As a result, no one appeared on behalf of AEL at the trial.

[16] Before she withdrew, counsel for AEL submitted that AEL did not intend to pursue the third party claim against KAPO but AEL had not obtained a consent dismissal.

[17] Notwithstanding that AEL had not legally existed since July 2022, WBL served a Notice to Admit Facts on AEL two days before the trial commenced and the lawyer for AEL purported to serve AEL's Reply to Notice to Admit Facts on the eve of trial. I heard the application to admit these documents after having given the lawyer for AEL leave to withdraw. My decision denying admission is reported at 2023 ABKB 375.

[18] Mr. Ruggieri attended at the trial as a witness. In addition, the Murrays relied on read-in evidence from the questioning of Mr. Ruggieri as corporate representative of AEL, among other read-in evidence.

[19] KAPO filed a Statement of Defence and a Notice of Claim against Co-defendants on September 9, 2015. On November 4, 2016, KAPO filed a Statement of Defence to Third Party Claim. However, counsel for KAPO eventually filed a Notice of Ceasing to Act.

Organization of these Reasons

[20] In the ground floor great room of the Murray Residence (the Great Room) there are four large sliding doors (the Great Room Sliding Doors) which are part of a "curtain wall" consisting of the Great Room Sliding Doors and windows above (collectively, the Great Room Windows and Doors).

[21] In the second floor master bedroom of the Murray Residence (the Master Bedroom) there are two sets of two sliding doors (the Master Bedroom Sliding Doors).

[22] The Great Room Windows and Doors and the Master Bedroom Sliding Doors make up the KAPO Windows and Doors.

[23] The Great Room Sliding Doors and the Master Bedroom Sliding Doors do not function as intended because they are "binding".

[24] The binding of the Great Room Sliding Doors and the Master Bedroom Sliding Doors is the symptom, and this case is about what caused the binding, who is responsible for it and how much the repair work will cost.

[25] To determine who is liable for the lack of functionality of the Great Room Sliding Doors and the Master Bedroom Sliding Doors, and the quantum of damages, I have:

(a) provided a detailed description of the KAPO Windows and Doors, and related constituent parts of the Murray Residence, together with defined terms;

(b) commented on the scope of the expert evidence and its admissibility;

(c) provided a sequence of events;

(d) examined the roles of AEL and WBL;

(e) reviewed the ordering, fabrication, and installation of the KAPO Windows and Doors; and

(f) addressed nine issues to answer, among other things: what were the terms of the oral contracts, what was the cause of the lack of functionality; whether either of the contracts were breached; whether any of the parties are liable in negligence, and the quantum of damages.

[26] As I have noted in specific paragraphs, a case such as this would have benefitted from an agreed statement of facts to address the non-contentious issues.

II The Murray Residence

[27] The following are my findings of fact about the configuration of the Murray Residence windows and doors. I have assigned defined terms for ease of reference.

(a) The Great Room incorporates a large section of glazing with a 32-foot-wide clear span.

(b) The Great Room Windows and Doors are more than two stories high and consist of:

(i) the Great Room Sliding Doors, which consist of four 10-foot-high sliding doors opening onto a patio, which recess into pockets to create a 32-foot-wide clear opening, and which travel in an upper guide track affixed in a wood member (collectively, the Guide Track) and a lower guide in the Great Room floor;

(ii) four 2-foot-high fixed-pane transom windows (the Lower Transom) above the Great Room Sliding Doors;

(iii) a structural steel W 21 x 93 I-beam (the Intermediary Beam) installed in a horizontal, or weak, orientation so that the cross-section profile looks like an “H” (the Horizontal Axis), above the Lower Transom, around which there is wood blocking and interior finishing (collectively the Intermediary Bulkhead) and exterior cladding, and which is supported on two W 12 x 35 I-beam steel columns and related structural steel and connections (collectively, the Columns) on either side of the 32-foot opening;

(iv) four 10-foot-high fixed-pane windows (the Upper Windows) above the Intermediary Bulkhead;

(v) four 2-foot-high fixed-pane transom windows (the Upper Transom) above the Upper Windows, which together with the Upper Windows, are, collectively, the Upper Glazing;

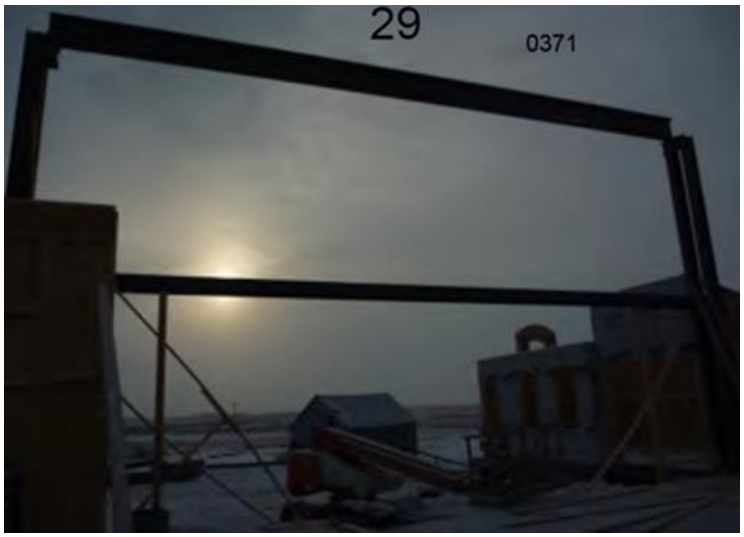
(vi) a structural steel W 21 x 68 I-beam (the Roof Beam) supported on the Columns, and installed, in a vertical, or strong, orientation so that the cross-section profile looks like an “I” (the Vertical Axis), above the Upper Transom, around which there is wood blocking and interior (collectively the Roof Beam Bulkhead) and exterior cladding; and

(vii) an “eyebrow” window above the Roof Beam Bulkhead.

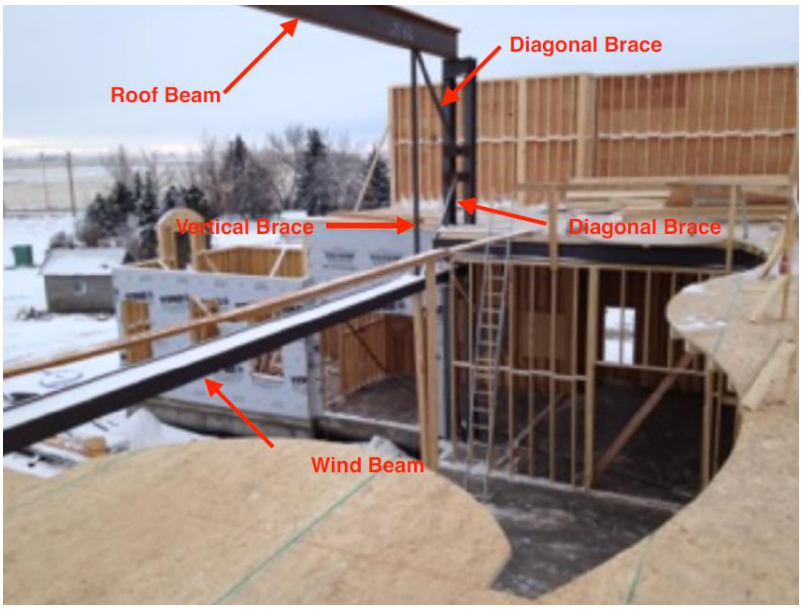
(c) For illustration, the Great Room Windows and Doors can be seen in a photo from Emperor Homes Ltd. (Emperor Homes) production contained in the Joint Exhibits Book:

(d) After the initial installation of the Columns, the Intermediary Beam and the Roof Beam (collectively, the Initial Structural Steel), additional vertical and diagonal 4" x 4" hollow structural steel supports (collectively, the Additional Steel Supports) were added at the second storey level to provide further support for the Initial Structural Steel. Collectively, the Initial Structural Steel and the Additional Steel Supports, are referred to as the "Great Room Structural Steel".

(e) For illustration, the Initial Structural Steel can be seen in a photo from the Murrays' production contained in the Joint Exhibit Book:



(f) One of the experts, Mr. Demitt, included a photograph in one of his expert reports of the Great Room Structural Steel, taken by the Murrays in the late fall of 2012. For illustration, a portion of the Great Room Structural Steel can be seen. Mr. Demitt's notes pointing out the "Diagonal Brace" and the "Vertical Brace" relate to what are defined in these Reasons as the "Additional Steel Supports". Mr. Demitt's note pointing out the "Wind Beam" relates to what is defined in these Reasons as the "Intermediary Beam":



(g) Each set of Master Bedroom Sliding Doors:

(i) is located at a corner of the Master Bedroom;

(ii) consists of two glass sliding doors installed at 90 degrees to each other, so that when opened the doors slide out of the way to open up the corner of the Master Bedroom;

(iii) travels on the track on the floor with an upper track (the Upper Track) to guide them when they travel;

(iv) creates a barrier free connection, without a column, with the adjacent balcony; and

(v) has above it a cantilevered structure (the Cantilevered Beam) designed and supplied by the truss manufacturer, Tech-Wood Building Components Ltd (Tech-Wood).

[28] The configuration of the KAPO Windows and Doors was not contentious and should have been the subject of an agreed statement of facts.

[29] Throughout the trial, the parties referred to most of the dimensions in imperial measurement, and that choice is reflected in these Reasons. However, where some evidence was in metric, I have maintained those references. In some cases, I have included a conversion to the alternate measurement.

[30] Before addressing the issues raised in this case, I will deal with matters relating to the expert evidence.

III Experts

[31] Opinion evidence is generally inadmissible, with expert opinion evidence being the exception. The factors set out in ***R v Mohan***, 1994 CanLII 80 (SCC), as enhanced by Cromwell J's analysis in ***White Burgess Langille Inman v Abbott and Haliburton Co***, 2015 SCC 23, form the basis of the inquiry to be applied when considering the admissibility of expert evidence. For ease of reference, I refer to these enhanced factors as the "*Mohan* Factors".

[32] In this trial, the typical litigation process was followed for the expert evidence. The expert reports were exchanged between the parties before trial. At trial, each expert was the subject of a qualification *voir dire* to determine if the expert's qualifications were appropriate for the scope of expertise for which the expert was proffered. During the qualification *voir dire*, each expert's *curriculum vitae* was marked as an exhibit. Most of the experts were subject to both direct examination and cross-examination on their qualifications but none of the experts were challenged, save for Mr. Roy whose scope of expertise was limited to those matters set out in his expert report. Each expert in this case was qualified for a particular scope of expertise.

[33] When each expert took the stand to testify in the trial proper, each of the expert's reports was introduced and made an exhibit in the trial while the expert was under direct examination. Each expert was then subject to cross-examination and some also subject to re-direct.

[34] Unless an objection is raised by one of the parties in the qualification *voir dire*, this typical expert evidence process provides no opportunity to assess whether the expert evidence meets the *Mohan* Factors until the expert is on the stand, and perhaps not even until the report is reviewed by the Court.

[35] In this case, the concerns regarding the necessity factor were only evident when the reports were reviewed after the conclusion of the evidence and, in some cases, after the trial. However, the parties had the opportunity to address this issue during closing argument.

[36] McLachlin CJ (as she then was) articulated each of the analytical steps to be taken post-***Mohan*** and ***White Burgess*** to ensure admissible expert evidence enhances, rather than distorts, the fact-finding process: see ***R v Bingley***, 2017 SCC 12, at paras 13 to 17. In ***Signalta Resources Limited v Canadian Natural Resources Limited***, 2023 ABKB 108, at para 51, I summarized the two analytical stages for expert evidence, and each of the gatekeeping steps, as follows:

> Stage 1
>
> The party tendering the expert evidence must show that it meets the threshold requirements of admissibility. Added to the four ***Mohan*** factors is the optional fifth factor:
>
> > First factor, relevance: the expert evidence must be logically relevant to a material issue.
> >
> > Second factor, necessity: the expert evidence must be necessary to assist the trier of fact because the expertise is necessary to understand a fact or issue [about] which ordinary people are unlikely to form a correct judgment without the expert's assistance.

> Third factor, exclusionary rule: the expert evidence must not be subject to any exclusionary rule outside of the normal exclusionary rule for opinion evidence.
>
> Fourth factor, qualification: the expert must be properly qualified such that the expert (a) possesses special knowledge and experience beyond that of the trier of fact in relation to the subject of the opinion; and (b) is able and willing to carry out the expert's primary duty to the court to provide evidence that is impartial, independent, and unbiased.
>
> Fifth factor, novelty: where the expert opinion is based on novel science, contested science, or science used for a novel purpose, the underlying science must be reliable for its purpose.
>
> Stage 2
>
> Stage 2 operates if the four or five factors, as applicable, are satisfied and is the gatekeeping stage. This is where the trial judge balances whether the evidence ought to be admitted, considering its potential benefits, such as probative value, and its associated risks, such as prejudice, together with the necessity of, the reliability of, and the absence of bias in, the expert evidence.

[37] In this case, there were no issues regarding the first, third, fourth and fifth *Mohan* Factors. As discussed below, the opinion evidence in this case engaged the application of the second factor – necessity.

[38] I have undertaken an analysis which balances whether the expert evidence ought to be admitted considering its potential benefits, and its associated risks, together with the necessity, or lack thereof, of the expert reports and testimony. In the result, except as addressed below in paragraphs [53] to [86], dealing with the specific experts, the expert reports and testimony are admissible. To the extent that I have indicated that a portion of an expert's report or testimony is inadmissible, I will not consider that portion of the opinion evidence.

Second Factor - Necessity

[39] The necessity factor was discussed in a trademark case: ***Masterpiece Inc v Alavida Lifestyles Inc***, 2011 SCC 27, at paras 75 to 92. At para 92, Rothstein J determined that in trademark cases where goods or services are being marketed to the general public, judges should consider the marks and use their own common sense to determine whether the casual consumer would likely be confused. The Court also identified problems with the survey that the expert undertook. Ultimately, Rothstein J found the expert evidence to be "of little or no use to the issue of confusion": para 103.

[40] In ***Murray v Galuska***, 2002 BCSC 1532 (CanLII), a lawyer was proffered as an expert witness. The lawyer's opinion was that the subject prosecution was not malicious. As noted at para 16, the lawyer based his conclusions on a review of trial transcripts and assumptions based on trial evidence. The lawyer's conclusions about the trial were contrary to those of the trial judge. Where an expert undertakes functions similar to that of the trier of fact, including reviewing the evidence, drawing inferences, making conclusions of law, and offering an opinion on the ultimate issue, the opinion should be excluded: ***Galuska***, para 21. The role of legal expert evidence was also

addressed by Dilts J in ***CNOOC Petroleum North America ULC v 801 Seventh Inc***, 2022 ABQB 284, at para 23.

[41] In ***Marathon Canada Limited v Enron Canada Corp***, 2008 ABQB 408, at paras 41, 42 and 45, upheld on appeal at 2009 ABCA 31, McMahon J commented on necessity:

> Where the court can draw necessary inferences or conclusions from established facts, opinion evidence is not necessary to assist the court. Mere helpfulness is not enough to allow expert evidence - it must be necessary: ***R. v. D.D.*** 2000 SCC 43 (CanLII), [2000] 2 S.C.R. 275 ...
>
> There is seldom a clear line of demarcation between what is necessary and what is not. The closer the opinion comes to an opinion on the ultimate issue, the stricter the need to show necessity. It is generally not the role of an expert to draw legal conclusions or to engage in a legal analysis: ***Hovsepian v. Westfair Foods Ltd.*** ...
>
> . . .
>
> Where there is a standard or common practice in an industry in relation to the performance of contracts that evidence is in some cases admissible. An expert can also opine that a party's conduct was inconsistent with that standard practice. What he cannot do is offer an opinion that a party was therefore at law in breach of its contract.

[42] If an expert opinion touches on the ultimate issue, the opinion need not be excluded but should be considered with a higher degree of scrutiny: see Glenn R Anderson, *Expert Evidence*, 3rd ed (Markham: LexisNexis, 2014), at §5.100 to §5.102. In some cases, the ultimate issue may be whether a standard or duty was breached, and that is a matter typically within the purview of the Court.

[43] The determination as to whether a duty or standard was breached, or whether a party failed to meet its obligations, is based on the Court's findings of fact, among other things. Generally, it is inappropriate for an expert to opine on whether a party has failed its obligations or breached a duty or standard.

[44] More helpful is expert opinion that assists the Court in determining the duty or standard of care to be applied, or the scope of the duty or obligation. The expert may set out clearly identified assumptions. In some cases, it may be appropriate for the expert to opine on whether certain assumed facts would amount to a failure or breach. However, it is a step too far for the expert to usurp the role of the Court by making findings of facts and concluding that those facts constitute a breach or failure. As Hall J said in ***Condominium Corporation No 0321365 v Prairie Communities Corp***, 2017 ABQB 359, at para 12:

> ... where a party's conduct is governed by a statute, the expert may opine as to applicable standards, and as to what the party was required to do, but he cannot offer an opinion that the party was in breach of the statute.

[45] Experts frequently are given assumptions upon which they can base their expert opinion. These assumptions should be clearly stated in their written report. The effect of hypothetical changes to these assumptions can be explored through cross-examination in the event that the evidence is not proven to substantiate the assumptions. This process is used to give the expert a basic factual foundation on which to base the opinion. Typically, counsel provides the assumptions

because counsel is familiar with the anticipated trial evidence. If a party fails to prove the assumptions as fact at trial, the expert opinion will be undermined.

[46] Providing an expert with copies of transcripts of questioning is not the same as providing an expert with assumptions. The majority of the Alberta Court of Appeal commented on this issue in ***Cooperatieve Centrale Raiffeisen-Boerenleenbank BA v Stout & Company LLP***, 2019 ABCA 455, at para 36, where the trial judge's reliance on certain expert evidence was at issue:

> Nor are we able to rely ... on the fact that Mr. Muccilli, unlike Mr. Henry, reviewed the transcripts of the Stout and Elliott questioning. It was said that Mr. Muccilli obtained a broader understanding of the respondents' knowledge base from his review of these transcripts. However, because they were not in evidence and Mr. Muccilli did not refer to specific passages in his testimony, it is not known what precisely he took from these transcripts and whether, or to what extent, the information gleaned was relevant to his risk of fraud assessment. Moreover, it would be incongruous to rely on these transcripts to bolster the trial judge's preference of Mr. Muccilli when the trial judge herself concluded that the essential facts upon which Mr. Muccilli based his opinion were in evidence.

[47] I conclude that having an expert review questioning transcripts is not the same as counsel identifying the assumptions that an expert can rely on, or the expert themselves identifying the assumptions, and the proof of which the Court can determine. Further, questioning transcripts cannot displace the trial evidence. An expert's review or reliance on transcripts for anything other than a contextual basis, or to set out specific factual assumptions that underpin the expert's opinion, weakens rather than strengthens the expert's opinion as it enables reliance on conclusions or assumptions which are not clearly set out in the expert opinion.

[48] While it may make sense in a particular case to have an expert review documentary evidence, such as questioning transcripts, understanding the reason for that review is critical to the effective use of expert opinion evidence. Expert opinion evidence is typically based on the application of the expert's expertise to one or both of the following:

(a) an investigation, study or review conducted by the expert of:

  (i) applicable records (such as documents, raw data, business records, audio, and video), which are anticipated to be proven at trial; and

  (ii) physical things (such as human bodies, bullets, land, soils, products, buildings, vehicles, or materials which have suffered mechanical or chemical failure); and

(b) assumptions of fact, typically provided to the expert in writing by the party relying on the expert opinion, which are anticipated to be proven at trial, and are acknowledged in the expert's written report.

[49] Making a determination as to what a person, or party, did, or did not do, is a finding of fact. It may be appropriate for an expert to make an assumption about what happened and to identify that assumption in the expert's opinion. In some cases, it might be appropriate for an expert to opine on the effect or consequence of an assumed fact.

[50] In this case, having an expert opine on whether an opposing party has failed in its duty of care is not helpful, is not necessary and such opinions are not accepted. It was not appropriate for

any of the experts to make findings of fact and then provide the expert's opinion as to whether those facts met the applicable standard of care. A determination as to whether a standard of care has been met must be made on the evidence proven at trial. An expert's opinion of whether pre-trial disclosure evidence, documentary or questioning, or both, indicates that the standard of care has been met is both unhelpful and unnecessary. In this case, the Court is able to weigh the trial evidence and make a determination as to whether the applicable standard of care has been met, without relying on any expert opinion.

[51] Receiving and reviewing the expert evidence as it is entered at the trial means that a determination on the inadmissible portions of the written expert reports can only occur after the expert has testified. Upon review, several of the expert reports entered as evidence in this trial contain portions which are not necessary and are inadmissible.

[52] Determinations which are the purview of the Court are not necessary, particularly conclusions as to what are the facts of the case. Finding that portions of the expert evidence is inadmissible is not a criticism of the experts. Counsel orients the expert to the areas on which the expert is requested to opine. Counsel should communicate the assumptions which should be made by the experts and those assumptions should be contained in the expert's report. Counsel has the obligation to ensure that the opinion meets all evidentiary rules: see ***Signalta***, at paras 45 to 48.

Expert: Anast Demitt, PEng

[53] Mr. Demitt is a professional engineer and was called by the Murrays, and later qualified, to give opinion evidence as an expert in civil and structural engineering, failure analysis and construction standards.

[54] Mr. Demitt has been a consulting structural and civil engineering expert on many projects and has been accepted as an expert by various courts. During the qualification *voir dire*, Mr. Demitt noted that he had designed and examined the failures of wall assemblies, including windows and doors. He is familiar with residential construction failures having consulted for the Alberta New Home Warranty Program for 24 years. Mr. Demitt has experience in designing glazing frames and cladding and the structural systems for supporting windows, though not for sliding doors.

[55] The Murrays relied on reports and letters prepared by Mr. Demitt dated April 27, 2016, December 7, 2018, November 18, 2021, March 30, 2023, and May 23, 2023 (collectively, the Demitt Reports), together with an explanatory sketch prepared during his direct evidence and cross-examination, all of which were made exhibits at the trial.

[56] Those portions of the Demitt Reports and Mr. Demitt's testimony describing his opinion regarding the standard of care of an engineer primarily working in the residential market, in Calgary, at the relevant time, are helpful and necessary, notwithstanding that AEL admitted that it was "at least partially liable" to the Murrays.

[57] Mr. Demitt's opinion as to the cause of the problems with the Great Room Windows and Doors and the Master Bedroom Sliding Doors is also necessary as it assists the Court in determining the party, or parties, responsible for the problems, and the appropriate remedy which underpins the calculation of damages. To the extent that Mr. Demitt opines on matters within his scope of expertise as a structural engineer, on the regulatory standards and the technical aspects of those regulations, particularly the *Building Code Regulation*, AR 117/2007, better known as the

Alberta Building Code 2006 (the *ABC*), the regulation in force at the time, his opinion is necessary and is admitted: ***CNOOC***, para 37.

[58] However, Mr. Demitt was not qualified as an expert to opine on cost estimation and whether it is possible for a cost estimator to prepare a cost estimate for repair work without attending at site, or the standard of care to be applied to a window manufacturer. Further, the Demitt Reports include unnecessary conclusions based on a long list of pre-trial evidence, including transcripts, and assessments of whether certain defendants lived up to their respective obligations. These opinions are not necessary as the case must be determined on the evidence at trial and it is the purview of the trial judge to measure the actions of the defendants against the applicable standards of care.

Expert: Kevin Graham

[59] Mr. Graham was called by the Murrays, and later qualified, to give opinion evidence as an expert in custom home building and custom home cost estimating. Mr. Graham prepared one report, dated February 11, 2021.

[60] Since 2008, Mr. Graham has been the principal and site superintendent for Stonewater Developments and has been involved in the custom home building industry for over 35 years. He has performed and supervised the budgeting, planning and construction of over 100 custom homes with a market value averaging between $1.5 and $7.5 million.

Expert: Johannes Gouws

[61] Mr. Gouws was called by the Murrays, and later qualified, to give opinion evidence as an expert in construction cost consulting and construction defect correction estimation. Mr. Gouws prepared two reports: October 31, 2022, and April 4, 2023 (collectively, the Gouws Reports).

[62] Mr. Gouws has a background in construction. He completed a bachelor of science degree in construction management while concurrently working as a project manager for a custom home builder in South Africa. After obtaining his degree, Mr. Gouws was a residential housing project manager and quantity surveyor responsible for the planning and management of all construction phases of several large multi-phased residential projects. Mr. Gouws then took on roles as a project quantity surveyor, and construction manager. Mr. Gouws is a member of the Association of South African Quantity Surveyors. Mr. Gouws joined MKA Canada Inc in 2017.

[63] In his October 31, 2022 report, Mr. Gouws prepared a cost estimate of $1,650,409.53 to repair the Great Room Windows and Doors and the Master Bedroom Sliding Doors.

Expert: Yannick Roy, PEng

[64] Mr. Roy is a professional engineer and was called by Luxus, and later qualified, to give opinion evidence in (1) structural forensic engineering; and (2) material failures and restoration.

[65] Mr. Roy has experience working in structural engineered wood manufacturing, including trusses, and engineering design and construction. After taking a break to work on software unrelated to engineering, Mr. Roy returned to engineering, focusing on forensic analysis through the assessment of the root cause of collapses and construction defects.

[66] Mr. Roy prepared one expert report, dated June 10, 2019. Mr. Roy noted that one of his colleagues attended at the Murray Residence on August 22, 2016; however, he never visited the site.

[67] Mr. Roy reviewed the questioning transcripts of Mr. Ruggieri and Sudeepta (Sid) Chakrabarti's, PEng, and then set out the points that he said were revealed by his review. These points were helpful as they made clear the information Mr. Roy took from the transcripts, and therefore the assumptions made, and then relied upon.

[68] Mr. Roy set out six conclusions in his report:

(a) the first set out his opinion, based on his review of pre-trial evidence, as to whether certain defendants lived up to their respective communication obligations; this conclusion is neither helpful nor necessary and is inadmissible;

(b) the second was his conclusion that the Great Room Sliding Doors were likely binding due to excessive Intermediary Beam deflection but, since he did not know that the method of construction had changed, his opinion was based on unproven facts and cannot be accepted;

(c) the third set out his opinion of what KAPO was responsible for, which is beyond the scope of his expertise and is neither helpful nor necessary and is inadmissible;

(d) the fourth relates to the design of the Guide Track which is helpful and necessary;

(e) the fifth states his opinion about AEL's failures to comply with its initial design but as he was unaware that the design had changed, this conclusion is neither helpful nor necessary and is inadmissible; and

(f) the sixth conclusion was that he had insufficient information to assess the cause of the binding of the Master Bedroom Sliding Doors.

[69] It is not the role of experts to opine on whether certain parties lived up to their respective obligations. It is the evidence at trial which forms the record, and upon which facts are to be found by the trial judge. To the extend that certain parties are subject to a standard of care (whether regulatory, or by trade or convention), or there is an expectation of a customary practice or procedure, experts can provide valuable opinions about the nature of applicable standards, customs, practices and procedures. This is particularly so when those standards, customs, practices and procedures are outside of the general knowledge of the trial judge. However, the application of facts proven at trial to those standards, customs, practices and procedures, and the determination of whether certain parties met their obligations, is the role of the trial judge. It is the purview of the trial judge to measure the actions of the parties, as proven at trial, against the applicable contract or standard of care.

[70] In addition to his conclusions which I have described above, Mr. Roy opined on the Great Room Structural Steel, the structure surrounding the Master Bedroom Sliding Doors and the *ABC*. Mr. Roy was qualified to provide these opinions and they are admissible.

Expert: John Carswell, PEng

[71] Mr. Carswell is a professional engineer and was called by WBL, and later qualified, to give opinion evidence on the repair scope for the Great Room Sliding Doors. Mr. Carswell prepared one report dated February 2, 2021 (the Carswell Report).

Expert: Cameron Kraychy

[72] Mr. Kraychy was called by WBL, and later qualified, to give opinion evidence as an expert in the standard of care applicable to custom homebuilders. Mr. Kraychy prepared one report dated February 10, 2023 (the Kraychy Report).

[73] After obtaining a degree in finance, an MBA and then working in banking, Mr. Kraychy worked for a large-scale subdivision home builder in Arizona where he had been at university. He then moved to Calgary and worked for a custom home builder.

[74] Mr. Kraychy is the president of Rocky Point Custom Homes Ltd, a high-end custom home builder in the Calgary area which constructs two or three $2 to $7 million custom homes a year ranging from 3,000 to 12,000 square feet. Mr. Kraychy's experience is extensive from initial marketing and sales through estimating, design, construction, invoicing, accounting, and warranty work. Mr. Kraychy has experience in installing large glazing systems, similar, but not as large as the Great Room Windows and Doors in the Murray Residence.

[75] While WBL characterized itself as a custom homebuilder generally, and in closing took the position that it was acting as a custom homebuilder in connection with the Murray Residence, WBL disclaimed any responsibility for KAPO, Luxus or Mr. Bade. Notwithstanding this qualification, Mr. Kraychy stated in his report that he was retained to:

> ... offer an opinion of whether Windsor Brunello acted as a reasonable custom home builder in the circumstances. I was also retained to review other experts' reports and to provide an opinion relating to the aspects of their reports relating to Windsor Brunello. ...

[76] It was never made clear what Mr. Kraychy meant when he used the term "custom home builder" and whether he considered that role to be similar to a general contractor or a project manager, which roles are dissimilar.

[77] Responding to Mr. Demitt's conclusion that WBL failed to obtain information and coordinate the work, Mr. Kraychy reviewed a transcript of the questioning of Mr. Chakrabarti and concluded that it contradicted Mr. Demitt's conclusions. In his report, Mr. Kraychy said:

> ... After reviewing all of the correspondence between Mr. Chakrabarti, Kapo and Alberta Engineering, I feel that Windsor Brunello made all parties aware of the concern of the weight of the [Upper Glazing] and how they may cause deflection in the beam below if they were not hung or suspended. In my experience, these type [*sic*] of details would not be the homebuilder's responsibility – more so the Architects.

[78] Although WBL engaged an architect to provide revised drawings for the purpose of truss coordination, there was no coordinating architect for the Murray Residence.

[79] Mr. Kraychy also opined on matters which are the purview of the trial judge after assessment of the evidence proven at trial, which is inadmissible:

(a) that WBL followed accepted industry practice that is expected for a custom homebuilder engaged to build a home like the Murray Residence;

(b) that WBL acted reasonably in working with and retaining various trades and professionals involved in the design of the Murray Residence and the KAPO Windows and Doors;

(c) that WBL is not responsible for the problems with the operation of the KAPO Windows and Doors; and

(d) responding to Mr. Demitt's opinions on the failure of certain defendants, which opinions I have already found inadmissible (see paragraph [58]).

[80] As noted above, it is not for experts to offer an opinion as to whether a party, based on pre-trial evidence reviewed, has lived up to its obligations. Such an opinion is unnecessary. The only evidence relevant to this decision is the trial evidence, and it is the purview of the trial judge to make determinations as to whether a party has acted reasonably, or in accordance with a contract or the applicable standard of care.

[81] In addition, Mr. Kraychy was not qualified to provide an opinion on whether the KAPO Windows and Doors complied with the *ABC*.

Expert: Rajiv Shrivastava, PQS

[82] Mr. Shrivastava is a professional quantity surveyor and was called by WBL and Luxus, and later qualified, to give opinion evidence on quantity surveying and construction costing. Mr. Shrivastava prepared two reports: September 6, 2021 and February 10, 2023 (collectively, the Shrivastava Reports).

[83] Mr. Shrivastava obtained a master's degree in mechanical engineering in 1998 and began his career as an operations engineer in the oil and gas sector. In 2010, he obtained an MBA Finance degree. In 2002, he started working as a cost estimator and quantity surveyor and became a professional quantity surveyor in 2019.

[84] In his September 6, 2021 report, Mr. Shrivastava prepared a cost estimate of $91,598.47, based on the Carswell Report, which related only to the Great Room Sliding Doors. As discussed at paragraph [461], I do not accept the Carswell Report as setting out a possible scope of repair.

[85] In his February 10, 2023 report, Mr. Shrivastava prepared a cost estimate of $458,150.57, based on a report prepared by Latera Engineering, because it provided a more detailed scope of work than set out in the Carswell Report. The Latera Engineering report purportedly set out a repair scope for the Great Room Windows and Doors and the Master Bedroom Sliding Doors but was never entered into evidence.

[86] However, Mr. Shrivastava also provided comments on the cost of items claimed by the Murrays and commented on the costs which Mr. Gouws opined would be incurred to repair the Great Room Windows and Doors and the Master Bedroom Sliding Doors.

IV Sequence of events

[87] The following is a description of some of my findings of fact relating to the sequence of events relevant to this action. Again, many of these facts could have been included in an agreed statement of facts because most were not contentious:

(a) The Murrays initially engaged an architectural firm, Phase One Design, which prepared several sets of drawings. The drawing set produced at trial was prepared

on November 16, 2011, and states that the design is for 4,610 square feet on the main floor, plus 4,202 square feet on the second floor, plus a 3,423 square foot basement and a 1,517 square foot garage.

(b) The Murrays engaged a homebuilder, Wolf Custom Homes Ltd (Wolf). Wolf obtained a building permit from the County of Wheatland (the County) for the Murray Residence. Wolf engaged AEL to engineer the foundation and an exterior tall wall.

(c) During the design and construction of the Murray Residence:

(i) Mr. Ruggieri was the principal of AEL and, through a corporation, the sole shareholder and directing mind of AEL;

(ii) AEL had a permit to practice issued by the Association of Professional Engineers and Geoscientists of Alberta;

(iii) Mr. Ruggieri and Mr. Chakrabarti were both professional engineers providing services through AEL, together with a number of technologists; and

(iv) Mr. Chakrabarti worked for both AEL and WBL.

(d) In May 2012, the Murrays parted ways with Wolf and, in June 2012, the Murrays engaged WBL to construct the Murray Residence. WBL engaged AEL to continue providing engineering services for the Murray Residence.

(e) By 2012, the shareholders of WBL were Mr. Ruggieri, Mr. Chakrabarti, and Kent Halluk. None of these individuals speak German.

(f) In July 2012, Mr. Halluk contacted Luxus in its capacity as a distributor for an Austrian window manufacturer, Gaulhofer, to enquire about supplying windows and doors for the Murray Residence. Later that month, Luxus contacted Mr. Bade to assist in the pricing the windows and doors for the Murray Residence.

(g) The KAPO Windows and Doors are the ones relevant to this action. The other windows and doors in the Murray Residence were manufactured by Gaulhofer (the Gaulhofer Windows and Doors) and are not in issue in this action.

(h) On September 12, 2012, Mr. Bade sent an email to Mr. Chakrabarti and Mr. Halluk providing an update on the quote for the KAPO Windows and Doors and the Gaulhofer Windows and Doors.

(i) On October 10, 2012, Mr. Chakrabarti, in his capacity as an engineer at AEL, prepared a sketch of the Initial Structural Steel design, which was provided to Mr. Bade on that same date.

(j) In October 2012, a steel erection contractor, who was selected by the Murrays, installed the Initial Structural Steel. The Additional Steel Supports were added later.

(k) October 31, 2012, AEL issued its invoice to WBL for its engineering services for the Murray Residence.

(l) WBL had another architectural firm, neoteric architecture inc, update the Phase One Design drawings for the Murray Residence. A set of plans were issued by neoteric architecture "for Truss Coordination" on November 9, 2012.

(m) In late November to early December 2012, Mr. Chakrabarti and Mr. Halluk, together with Bernd Grosse, the principal of Luxus, and Mr. Bade, travelled to Austria (the Austria Trip). Mr. Grosse and Mr. Bade are both fluent in German.

(n) KAPO prepared a set of shop drawings for the KAPO Windows and Doors, some of which were dated December 17, and others December 18, 2012 (collectively, the Initial KAPO Shop Drawings).

(o) On December 18, 2012, Mr. Grosse forwarded an email, written in German, from Stefan Hirschhofer, with KAPO, to Mr. Bade. In that email, Mr. Hirschhofer notes that a stable, covered steel beam would be necessary for the proper function of the Great Room Sliding Doors due to the enormous span of almost 10 m.

(p) On December 20, 2012, Mr. Halluk sent Emperor Homes a copy of the Initial KAPO Shop Drawings.

(q) On January 15, 2013, Mr. Chakrabarti approved the Initial KAPO Shop Drawings and in doing so added some commentary (the Initial KAPO Shop Drawings with Mr. Chakrabarti's commentary are collectively referred to as the Approved KAPO Shop Drawings).

(r) On or about April 1, 2013, the KAPO Windows and Doors were delivered to the Murray Residence and later installed by Emperor Homes.

(s) By October 2013, it became apparent that the Great Room Sliding Doors and the Master Bedroom Sliding Doors were binding and had become difficult to open.

(t) In September 2014, the Murrays moved into the Murray Residence.

(u) On August 22, 2016, a site visit was held to inspect the KAPO Windows and Doors and representatives of KAPO and some of the experts attended.

[88] Mr. Demitt opined that, when functioning normally, the weight of the Great Room Sliding Doors and the Master Bedroom Sliding Doors is transferred to the bottom track on the floor and the Guide Track is used to simply guide the sliding doors along the path of intended travel. Mr. Demitt also opined that if there is any downward movement on the Guide Track it will impart a load on top of the sliding door roller mechanisms and, if the load becomes too great, the sliding doors will not move freely, which is what he called "binding", and functionality will be impacted. This evidence was not contradicted, and I accept Mr. Demitt's opinion on this point.

[89] None of the parties disputed that the Great Room Sliding Doors and Master Bedroom Sliding Doors are binding, and their functionality is impacted.

V *Alberta Building Code 2006* (*ABC*)

[90] Mr. Demitt opined that the design and construction of the Great Room Structural Steel was

not governed by Part 9[1] of the *ABC*, entitled "Housing and Small Buildings", and that Part 4[2] of the *ABC*, entitled "Structural Design", applied to it. I accept Mr. Demitt's opinion on the applicability of Part 4 of the *ABC* to the Great Room Structural Steel.

[91] The *ABC* italicizes defined terms and when quoting from the *ABC* I have incorporated that italicization.

[92] Mr. Chakrabarti acknowledged that the design of the Great Room Structural Steel was covered by Part 4 of the *ABC*, and that the Great Room Structural Steel specifications were required to comply with s 4.1.1.3.(1) which states:

> *Buildings* and their structural members and connections ... shall be designed to have sufficient structural capacity and structural integrity to safely and effectively resist all loads, effects of loads and influences that may reasonably be expected, having regard to the expected service life of *buildings*, and shall in any case satisfy the requirements of this Section ...

[93] Section 4.1.1.4 requires all structural drawings and related documents to conform to the appropriate requirements of s 2.2. Mr. Chakrabarti acknowledged s 2.2.4.2.(1) and 2.2.4.3.(1) of the *ABC*, but they do not apply to any of the defendants as none of them made an application for a building permit.

[94] Section 2.2.4.5. of the *ABC* requires calculations and analysis made in the design of the structural members of a building to be available for inspection upon request. Mr. Chakrabarti acknowledged this requirement but was unresponsive as to whether it applied stating that he did not administer AEL's paperwork.

[95] There was no evidence as to the applicable portions of the *ABC* relative to the Master Bedroom Sliding Doors.

[96] Mr. Chakrabarti admitted that all of AEL's work as consulting engineer and WBL's work as project manager was required to comply with the *ABC*.

VI Roles of AEL and WBL

[97] Mr. Murray said he thought that no building permit was required for the construction of the Murray Residence because it was being built on farmland. At over 12,000 square feet of developed area, plus an attached four-car garage, the Murray Residence is a substantial construction project and a significant financial undertaking. Mr. Murray recognized that it was a large residence and that a professional engineer would be required. Because he wanted somebody to be on-site at all times during construction, Mr. Murray installed a shack with a telephone for a site supervisor.

[98] Notwithstanding Mr. Murray's misunderstanding of the permitting process, a building permit was obtained by Wolf for the Murray Residence. When the Murray Residence was

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[1] Article 1.3.3.3.1(a) of the *ABC* states "Part 9 of Division B applies to all *buildings* described in Article 1.1.1.1. [including the design and construction of a *new building*] of 3 *storeys* or less in *building height*, having a *building area* not exceeding 600 m^2 [6458 ft^2], and used for *major occupancies* classified as a) Group C, *residential occupancies* ..."

[2] Article 1.3.3.2.1(c)(i) of the *ABC* states "1) Parts 3, 4, 5, and 6 of Division B apply to all *buildings* described in Article 1.1.1.1. and … exceeding 600 m^2 [6458 ft^2] in *building area* or exceeding 3 *storeys* in *building height* used for *major occupancies* classified as i) Group C, *residential occupancies* …"

completed, AEL provided the required documentation for the County's agent to close the building permit.

[99] Neither of the architects, firstly, Phase One Design, and, secondly, neoteric architecture, played any role in the construction of the Murray Residence. Mr. Chakrabarti said that WBL knew neoteric architecture from previous projects and, as a result of the Phase One Design drawings containing dimensional errors, and construction being on hold until corrections were made, the Murrays agreed to WBL's proposal to engage neoteric architecture to correct the errors and issue a revised set of drawings.

[100] Mr. Chakrabarti said that once the drawings for the Murray Residence had been updated to reflect the dimensional changes and "the structure was right", there was no need to pay for an "issued for construction" set of drawings when there were no further changes to be made. This decision highlights that the role of coordinator and field inspector for the Murray Residence would not be undertaken by the architect, as the architect's engagement came to an end once the drawings were complete.

[101] At the material time, AEL provided engineering consulting services, mainly for residential projects, and WBL was a custom homebuilder. The roles of these entities are important to distinguish between their respective responsibilities and liabilities.

AEL

[102] Mr. Ruggieri and Mr. Chakrabarti both said that Wolf hired AEL. Mr. Chakrabarti described the engagement as beginning with pre-permit engineering requirements. Starting in February 2012, and based on the Phase One Design drawings, AEL performed foundation design, a tall wall design and participated in some initial correspondence regarding the Murray Residence. AEL was also engaged to conduct foundation and other inspections not related to the issues in this case. It was Mr. Chakrabarti who undertook all site visits to the Murray Residence on behalf of AEL.

[103] After the foundation was built, the design of the exterior wall in the Great Room, where the Great Room Windows and Doors were to be installed, was reconfigured from a curved wall to a straight wall due to cost issues. This design change is not material to the issues in this case. The foundation was re-built by Wolf to accommodate a straight wall. A short time after that reconfiguration, around May 2012, the Murrays parted ways with Wolf.

[104] Mr. Ruggieri testified that AEL had been alerted to Wolf's imminent departure from the Murray Residence because AEL was asked to complete its invoices. He also testified that he contacted Mr. Murray regarding the availability of WBL to replace Wolf.

[105] Mr. Murray's evidence was that he was unaware that AEL had been engaged by Wolf to provide engineering services for the Murray Residence. Mr. Murray also said that shortly after the termination of Wolf, Mr. Ruggieri contacted him to propose the continued engineering services of AEL and the home building services of WBL. I accept that Mr. Ruggieri made the initial contact with Mr. Murray.

[106] In his direct testimony, Mr. Ruggieri said he did not recall any other structural engineers being involved and described AEL's role on the Murray Residence as "... the design of the structural components. ... and then ... also to review all the material". It is not clear what material Mr. Ruggieri reviewed; however, I find that, to the extent he reviewed any materials, that review

only related to the structural components. There was no evidence that AEL was involved in any review of any of the drawings or specifications for the KAPO Windows and Doors.

[107] Mr. Halluk testified he believed that AEL's scope of work was engineering services because WBL had "zero involvement with the engineering".

[108] AEL billed WBL for its engineering work on the Great Room Structural Steel on October 31, 2012. There were no other AEL invoices after this date which were entered into evidence.

WBL

[109] Mr. Chakrabarti said that before being engaged on the Murray Residence, WBL had worked on a range of residential projects from small renovation work to new custom-built homes up to a cost of approximately $1,500,000. Mr. Ruggieri testified that Mr. Chakrabarti and Mr. Halluk managed the operation of WBL.

[110] Mr. Chakrabarti said that when Wolf was still on the project, Wolf conferred with him on constructability issues. He also said that when the Murrays and Wolf parted ways, Mr. Murray contacted Mr. Ruggieri about keeping AEL on the project and then called Mr. Chakrabarti to discuss his background in construction. I find that this is not what occurred and that it was Mr. Ruggieri who initially contacted Mr. Murray.

Initial discussions

[111] Mr. Murray met with Mr. Chakrabarti at the offices of WBL to discuss whether WBL would be interested in completing the Murray Residence. Mr. Chakrabarti said he understood that Mr. Murray thought the construction of the Murray Residence would be best served by the appointment of a project manager, rather than a custom home builder.

[112] Mr. Murray said he met with three representatives of WBL: Mr. Ruggieri, Mr. Chakrabarti and Mr. Halluk. Mr. Ruggieri denied being involved.

[113] Mr. Murray described the meeting as one where WBL was selling, and he was buying. Mr. Murray testified that WBL said it could undertake the engineering and that it had two engineers at the company: Mr. Ruggieri and Mr. Chakrabarti. He also said that WBL agreed to have a supervisor on site. I do not accept Mr. Murray's testimony on this point and find that WBL did not agree to provide any engineering services directly; however, I accept that WBL's sales pitch included a reference to Mr. Chakrabarti being a professional engineer.

[114] I find that the Murrays and WBL agreed that WBL's role on the Murray Residence was to proceed in a similar manner as it had with Wolf, except that:

(a) WBL would be a project manager and construction manager;

(b) WBL would receive a fee on a monthly basis regardless of the construction cost;

(c) the Murrays or WBL could terminate the arrangement at any time;

(d) WBL would provide fulltime supervision for the construction of the Murray Residence; and

(e) WBL would rely on the services of AEL as the engineering consultant providing the structural design, and other professional consultants, as required.

Oral agreement

[115] Mr. Murray testified that based on his previous experience he thought an oral agreement to construct the Murray Residence would be the most appropriate. Mr. Murray has been in business for over 40 years undertaking coring in the oil sands and for coal development projects.

[116] When Mr. Murray had a discussion with WBL regarding its possible engagement, the only portion of the Murray Residence that had been constructed was the poured concrete foundation. Mr. Chakrabarti said he understood that Mr. Murray was not looking for a contractor or a homebuilder but rather "a little bit of help" to get the Murray Residence completed. Mr. Chakrabarti also said that he understood that while the Murrays were no strangers to construction, they had never built anything like the Murray Residence, with high-end finishing. Mr. Chakrabarti described the arrangement with the Murrays as a handshake deal, where WBL was engaged to help the Murrays complete the project.

[117] Mr. Halluk said that Mr. Murray made it clear that he did not want a builder; rather, he wanted a project manager. Mr. Halluk formed the view that Mr. Murray liked the idea that WBL was able to provide a team at a cost similar to Mr. Murray engaging a retired project manager who he knew.

[118] Under the oral agreement, Mr. Murray understood that he would pay WBL a fee of approximately $500,000 for the construction of the Murray Residence, however he testified that he was not sure of the exact amount. Ms. Murray said that the fee which they agreed to pay WBL was $550,000 and that fee was for WBL to provide all of the construction services and engineering required. Mr. Halluk said that he could not recall the compensation that WBL was to be paid but that it was a flat monthly fee unrelated to construction cost. In that respect, Mr. Halluk said that WBL was offering a service.

[119] Mr. Chakrabarti said that WBL's initial understanding was that Mr. Murray was looking for a construction manager and so WBL forwarded a contract on that basis. However, Mr. Murray did not want to sign a contract. Mr. Chakrabarti understood Mr. Murray wanted an oral agreement to achieve his goal of either party being able to terminate the relationship at any time.

Project manager and construction manager

[120] The terms project manager and construction manager were used interchangeably at trial even though those roles are not the same. To add to the imprecision of these terms, they can be used for both individuals and organizations.

[121] The tasks undertaken by a project manager are typically related more to the project as a whole, as compared to the tasks of a construction manager, which are concentrated on construction. However, they both focus on the management and coordination of the work rather than performing the work itself.

[122] Broadly speaking, the role of a construction manager is distinguishable from the role of a contractor. A construction manager typically takes on the responsibility of managing the construction performed by others as opposed to a contractor who typically takes on the obligation of constructing, which may be undertaken by its subcontractors. The spectrum of the risks and responsibilities that may be undertaken is incredibly broad. At one end, a construction manager might be paid by the hour and only have responsibility for oversight. At the other end, a contractor may agree to a stipulated price, for a defined scope of work, to be completed by a specified date.

There are an infinite number of ways that the commercial relationship could be structured, and the project risks could be allocated.

[123] It is not uncommon for some construction managers to perform work themselves, though such work is typically of a narrow scope or related to general site services. In relation to the Murray Residence, there was no evidence that any of the construction work was performed directly by WBL, though, as discussed below, some work was performed by WBL's subcontractors.

[124] Mr. Murray said that once WBL was hired, he did not see Mr. Ruggieri anymore and Mr. Chakrabarti attended at the site. On behalf of WBL, Mr. Chakrabarti said that he was primarily responsible for the Murray Residence but that he and Mr. Halluk both took on the role of project manager. Terrence Belcher was WBL's on-site representative and construction manager for the Murray Residence.

[125] Mr. Chakrabarti said he was an employee of AEL until July 2012 when WBL was increasingly busy due to the Murray Residence, which had suddenly introduced a much larger scope of work, and which took his attention. Mr. Chakrabarti said that after July 2012 he continued to undertake "bits and pieces" of work for AEL where his involvement was required. Mr. Chakrabarti was imprecise about when his employment with AEL concluded but said it was between July and December 2013.

[126] The Great Room Windows and Doors were delivered at the beginning of April 2013. Mr. Robert Belcher, a principal of Emperor Homes and Mr. Terrence Belcher's brother, appeared as a witness at the trial. Mr. Robert Belcher was asked about the role that he observed Mr. Chakrabarti take during the installation of the Great Room Windows and Doors and said that Mr. Chakrabarti helped Emperor Homes with the location and method of placement, together with the fastening method.

Selection of suppliers and trades

[127] Mr. Chakrabarti said that Mr. Murray had some trades lined up for some scopes of work but that for other scopes of work he had no ideas and needed WBL to assist. Mr. Halluk confirmed that the Murrays had some trades that they wanted to work with and that WBL had an extensive pool of trades that they could call on.

[128] Mr. Halluk testified that the process often started with a discussion with the Murrays about what was required. WBL would go to different suppliers to get quotes and then discuss them with the Murrays. Mr. Chakrabarti testified that he was responsible for looking into the subtrades to determine "who you want to be on the project with you" and that he and Mr. Halluk were "heavily involved in terms of sourcing trades, sourcing materials, looking into things".

[129] In describing the scope of WBL's role and what it was being paid to perform, Mr. Chakrabarti said that WBL was "essentially assisting the Murrays in managing the project completion and that we were acting somewhat as a project manager/construction manager but working alongside the Murrays because they too had their people for sourcing the materials and some the trades that they wanted to use".

[130] Mr. Murray said he did not have oversight of the trades and they were looked after by WBL, except if there was a problem with one of the trades and then he would get involved. Mr. Murray admitted that there were some exceptions to WBL looking after the trades:

(a) he had some particular trades that he wanted to hire, including, a master electrician, who was a neighbour, and his nephew who ran a welding business; and

(b) the Murrays selected some materials and suppliers, including, the American clay used as a plaster finish, countertop materials and the tile for the bathrooms.

[131] In addition, all of the steel for the Murray Residence was purchased from a supplier with whom Mr. Murray's company had a relationship. However, Mr. Murray said that he did not have anything to do with the calculations for the supply of the structural steel and that Mr. Chakrabarti made those calculations, advised Mr. Murray's company, and his company sent the order to the steel supplier.

[132] Neither of the Murrays or WBL had a window or door supplier selected for the Murray Residence when WBL commenced work. The Murrays had independently looked at window and door suppliers but were not satisfied with what they found. Mr. Murray said that Gaulhofer windows and doors were recommended by WBL. He also said that he had never heard of either Gaulhofer or KAPO before the construction of the Murray Residence.

[133] The Murrays and WBL met with one window manufacturer in British Columbia. Mr. Chakrabarti said that WBL also looked at some other manufacturers, but they were not producing a wood window. Mr. Chakrabarti testified that WBL had made inquiries with window suppliers in Germany and one name that kept coming up for wood windows was Gaulhofer. In July 2012, Mr. Halluk contacted Luxus because he had done business with Luxus (under a previous name) through a previous employer. Mr. Grosse told Mr. Bade about the Murray Residence and Mr. Bade contacted WBL. In August or September 2012, Mr. Bade made arrangements for Ms. Murray and Mr. Chakrabarti to visit a home in Canmore where Gaulhofer windows had been installed.

[134] Once the windows were selected, Mr. Murray said he wanted some assurance that the windows he was buying were appropriate. To that end, he said he paid for Mr. Chakrabarti and Mr. Halluk to travel to Austria to examine the Gaulhofer manufacturing facility and meet with company representatives; however, Mr. Grosse said he paid for the actual costs of the Austria Trip. Mr. Murray testified that he trusted Mr. Chakrabarti and Mr. Halluk to ask the right questions, including those related to design, given that Mr. Chakrabarti was an engineer.

Budget and payment of trades and supplies

[135] There was little evidence about who managed the Murray Residence budget, however there were discussions between WBL and the Murrays regarding the cost of certain items, with the Murrays making the final decision.

[136] The evidence was that most of the invoices from suppliers and trades were paid for by WBL, billed to the Murrays, who then paid WBL. The Murrays paid all of WBL's invoices, in full. In addition, there were some trades who were paid directly by the Murrays.

Project schedule

[137] There was no evidence about the scheduling of the construction, except that both the Murrays and WBL anticipated that construction would take approximately two years to complete.

[138] The Murrays had a hands-off role for most of the construction other than the finishing. WBL organized the suppliers and trades and ensured that each supplied materials to, or attended at, the Murray Residence in the appropriate sequence.

VII KAPO Windows and Doors

[139] Both of the Murrays testified that they understood that all of the windows and doors in the Murray Residence were to be manufactured by Gaulhofer until the problems arose with the KAPO Windows and Doors, when they found out that some windows had been manufactured by KAPO.

[140] The communication for the supply of the Great Room Windows and Doors was initially between Luxus and Gaulhofer. On August 26, 2012, Mr. Bade provided a sketch of all of the windows for the Murray Residence to Luxus, including the dimensions for the Great Room Windows and Doors.

[141] In September 2012, as Luxus was trying to finalize the quotation for the Great Room Windows and Doors, Mr. Chakrabarti was asking for a drawing of those windows to be prepared by the window manufacturer. By email dated September 21, 2012, Gaulhofer advised Mr. Bade that KAPO would prepare a drawing but that it required detailed installation requirements and exact dimensions. When Mr. Bade was cross-examined on this point, he referred to his sketch with dimensions on it sent on August 26, 2012.

[142] Mr. Murray said he never saw the drawings for the Great Room Windows and Doors or the Master Bedroom Sliding Doors before they were installed and had not asked to see them because it was not his expertise and he had trusted WBL to deal with it.

[143] Ms. Murray testified that she did not know what the Great Room Windows and Doors would look like before they were ordered. However, she acknowledged that she had been told the glass could not be more than 10 feet high and that is why there was a two-foot transom window above the 10-foot-high sliding doors, which design was repeated in the Upper Glazing.

[144] In cross-examination, Mr. Bade confirmed that he had provided a warranty on the KAPO Windows and Doors to WBL.

Great Room Structural Steel design

[145] Mr. Ruggieri testified that, in October 2012, AEL designed the Great Room Structural Steel into which the Great Room Windows and Doors would be installed. Mr. Ruggieri said AEL requested WBL to provide the weight of the Great Room Windows and Doors, AEL then checked that information against its assumptions and then used an estimated weight for its calculations.

[146] In relation to the design of the Great Room Structural Steel, Mr. Ruggieri testified as follows:

> A ... [AEL] considered two options and ... the installation method as well. ... When we look at that upper glazing, there's basically two options. You're either going to have the [Intermediary Beam] support that glazing, or you are going to have the roof beam support that glazing. What [AEL] did is that we considered both options.
>
> Then how this was going to be assembled, we got specific with that as well. What ... [AEL] wanted was ... the glazing system to go on first.
>
> Q Do you mean the upper glazing, sir?
>
> A The upper glazing ... first. And the reason for that is that [AEL] wanted to materialize the deflection in that [Intermediary Beam]. ...

> What was very important with this design that the loads above the [Great Room Sliding Doors] were not going to impact the [Great Room Sliding Doors]. So that's why we got specific on the installation procedure. So when the upper glazing got installed on top of that [Intermediary Beam], what happened was we allowed that beam to deflect.

[147] Mr. Ruggieri further testified that:

> ... because [AEL] considered two options, it was very important for [AEL] to communicate that information to [WBL] to ensure -- so there was three criteria we needed to meet. We wanted [WBL] to let the window manufacturer be aware that as an option, we wanted the upper glazing to be supported by the roof beam. That's number 1.
>
> Number 2 is we wanted to make sure that the window manufacturer didn't have an issue with that, that we wouldn't impact that upper glazing.
>
> And number 3 is that if they had any specific requirements, we wanted the window manufacturer to provide that information, those details, in order for us to be able to use that option.
>
> Q And as far as you are aware, ... do you know whether that information was ever communicated to the manufacturer?
>
> A It was.
>
> Q And how do you know that?
>
> A [Mr. Chakrabarti] basically wrote a note on the manufacturer's drawing for them to understand that as an option, we wanted to be able to have the roof beam hold the upper glazing.

[148] Other than Mr. Ruggieri's hearsay evidence about why Mr. Chakrabarti wrote his note on the Initial Shop Drawings, there was no evidence that there were any other options for carrying the deadload of the Upper Glazing, until Emperor Homes raised a concern about the installation.

[149] Later in his direct examination, Mr. Ruggieri took a different tact and testified:

> A Well, as part of the design, we considered two options. So we wanted to make sure that let's call it the second -- the first option was that the [Intermediary Beam] would be taking the load of the upper glazing, and the second option would be that the roof beam would be supporting the ... load. So we wanted to make sure that they took that into consideration and we would be able to use that option if needed be.
>
> Q Who's they?
>
> A [WBL].
>
> Q You wanted [WBL] to take that into account?
>
> A No, to use the option. So we wanted to ensure that the window manufacturer considered option 1 and 2 but mostly 2 because it affected them. ... We wanted to make sure that the manufacturer considered our option number 2.
>
> Q Right. So you're saying you passed that on to [WBL] to --

A Yes.

Q -- pass on and communicate to the manufacturer?

A Correct.

[150] In relation to why the Intermediary Beam was designed to be installed on its Horizontal Axis, Mr. Ruggieri testified that:

A ... the roof beam is placed in an 'I' position because it's taking roof load which is a vertical load. The [Intermediary Beam] has been positioned as an 'H' because its major force that it's taking is in the horizontal ... the wind load.

Q And so when you ran the calculations that you described earlier, was that with these axes in mind?

A Absolutely. ... when I say that the [Intermediary Beam] was placed in the 'H' position and it's taking the wind load, we also considered the vertical load on that beam as well.

[151] The AEL structural drawings produced at trial which depict the Great Room Structural Steel (the AEL Structural Drawings) consisted of:

(a) Section, dated October 10, 2012, and drawn by Mr. Chakrabarti (the Initial Cross-Section), which does not contain any information about the exterior cladding, loading, specifications, or installation and is not sealed by a professional engineer;

(b) S1 Elevation, no revision noted, drawn by Mr. Chakrabarti, dated February 1, 2013, and sealed by Mr. Ruggieri as a professional engineer on February 4, 2013 (the AEL Elevation); and

(c) S2 Section, marked revision 1, drawn by Mr. Chakrabarti, dated February 1, 2013, and sealed by Mr. Ruggieri as a professional engineer on February 4, 2013 (the AEL Cross-Section).

[152] Mr. Chakrabarti testified that he believed that there was an earlier version of the AEL Elevation but was not aware of its whereabouts, though in giving this evidence he was obtuse.

[153] The Initial Cross-Section was prepared on October 10, 2012, and the Great Room Structural Steel was installed in October 2012. The AEL Elevation and AEL Cross-Section are dated more than three months after the installation of the Great Room Structural Steel.

[154] The AEL Cross-Section included:

(a) a list of “DESIGN LOADING OF WINDOW WALL STRUCTURE” representing the live and dead loads considered by AEL;

(b) specifications for structural steel and concrete; and

(c) an “INSTALLATION SEQUENCE” in four steps (the Installation Sequence).

[155] The dead loads identified on the AEL Cross-Section consisted of the roof and the “Glazing Load”. There is no reference to the exterior stone cladding which was installed on the Murray Residence (the Stone Cladding) or its dead load. Mr. Chakrabarti asserted that, even though it was not specifically identified, the Stone Cladding was taken into account because it is noted on the

cross-section; however, it is not listed under the "DESIGN LOADING OF WINDOW WALL STRUCTURE".

[156] The AEL Elevation was marked as "S1 / 2" and the AEL Cross-Section was marked "S2 / 2" and I find these marks demonstrate that there were two sheets in the set. On the other hand, the Initial Cross-Section is marked "1 /1" and I find that mark demonstrates that there was one sheet in the set. I find that no previous version of the AEL Elevation was ever prepared, contrary to the suggestion of Mr. Chakrabarti, and that the AEL Cross-Section was marked as revision 1 because it revised the Initial Cross-Section.

[157] Mr. Ruggieri also testified about the AEL Cross-Section:

> Q ... why did you seal this particular drawing on this date?
>
> A Because this is the design that we would move forward with.
>
> . . .
>
> A So during the whole design process, designs are done more than once. New information comes in, things change, right? We take that into consideration. So at the very end once we have all the information, then we are able to basically issue the final design.

[158] During their testimony, both Mr. Ruggieri and Mr. Chakrabarti were, at times, inconsistent and obtuse. Much of their evidence is not credible because they were trying to provide excuses or explanations for steps not taken or suggesting that multiple options for the Great Room Window and Door installation were considered when there was no evidence to support that. Indeed, the evidence shows that there was only one method of installation considered (hanging the Upper Glazing from the Roof Beam) until Emperor Homes advised that it was not a workable solution, and the Upper Glazing dead load was instead transferred to the Intermediary Beam. By that time, the Great Room Structural Steel had been installed for months.

[159] Both Mr. Ruggieri and Mr. Chakrabarti went so far as to suggest that certain design documents not produced at trial, including drawings and calculations, existed. However, there was no evidence to support this assertion and the evidence of Mr. Ruggieri and Mr. Chakrabarti was vague. I find that the documents relating to the Great Room Structural Steel, which Mr. Ruggieri and Mr. Chakrabarti asserted existed but were not produced by AEL, do not exist because they were never prepared by AEL.

[160] I find that the Great Room Structural Steel was installed when only the Initial Cross-Section existed, and that no identification of the deadloads was undertaken, and no calculations were performed. I further find that when the dead load and live load calculations were performed by AEL in February 2013, as indicated on the AEL Cross-Section, before the installation of the Great Room Windows and Doors, AEL did not consider, or account for, the dead load of the Stone Cladding.

[161] The AEL Elevation shows the Additional Structural Steel but there was no evidence indicating that any engineering design or calculation was ever performed for the Additional Structural Steel.

Great Room Structural Steel installation

[162] The Great Room Structural Steel was installed in October 2012. Mr. Robert Belcher was clear that when the Intermediary Beam was installed it sagged "over 2 inches". As a result, the

Additional Steel Supports were installed in an effort to lift the Intermediary Beam. However, WBL had the Intermediary Bulkhead installed around the deflected Intermediary Beam such that it was sagging inside of the Intermediary Bulkhead.

[163] Mr. Murray said that he observed the Intermediary Beam after installation and noted it was orientated in an “H” shape, rather than an “I” shape. Mr. Murray said this orientation concerned him and said that he also observed that the Intermediary Beam was bowing like a banana before any load had been placed on it.

[164] Mr. Murray said when he raised his concerns about the Intermediary Beam with Mr. Chakrabarti, he was assured that the calculations had been done, and that the Intermediary Beam had been installed in the correct orientation so it could carry wind loads.

[165] Mr. Chakrabarti’s read-in evidence was that he explained to Mr. Murray that he was more concerned about wind loads than the dead load from the Upper Glazing. After that conversation, the Additional Steel Supports were added.

[166] Mr. Robert Belcher testified that the opening for the Great Room Sliding Doors and Lower Transom was tight because Emperor Homes had to frame around the Intermediary Beam. Mr. Belcher said that, after a discussion with Mr. Chakrabarti, Emperor Homes lifted the Intermediary Beam with a forklift, and while it was lifted, the Additional Structural Supports were welded in place on either side of the opening, and on top, so that some of the load was carried by the Roof Beam. Mr. Belcher also testified that Mr. Chakrabarti directed the installation of the Additional Structural Steel and that even after it was installed the Intermediary Beam was still sagging by about one-and-a-half inches.

Austria Trip

[167] Mr. Halluk testified that in late 2012, WBL was being pressured to provide another deposit to Luxus for the KAPO Windows and Doors. The Great Room Windows were already in production by that time and deposits had been made. Mr. Halluk said that he understood Mr. Murray was not comfortable providing a further deposit as they had no relationship with Gaulhofer which led to Mr. Chakrabarti and Mr. Halluk travelling to Austria with Mr. Grosse and Mr. Bade. Mr. Halluk testified that Mr. Chakrabarti led the discussions with Mr. Bade regarding the Great Room Windows and Doors and that he participated in the Austria Trip to assist Mr. Chakrabarti and because he was involved with the windows.

[168] Mr. Chakrabarti, Mr. Halluk, Mr. Grosse and Mr. Bade participated in the Austria Trip, which Mr. Bade said took place in December 2012. Mr. Murray said he paid for Mr. Chakrabarti’s and Mr. Halluk’s participation but there were no records or particulars of what he paid for, and it is not clear from the evidence if Mr. Murray meant that he just paid for their time to participate in the Austria Trip. The evidence of Mr. Grosse was that Luxus arranged for and paid the expenses for the Austria Trip, and I accept that evidence.

[169] The four met with Gaulhofer and then the manufacturer for the Great Room Windows and Doors, who WBL initially thought was Gaulhofer but found out during the Austria Trip that it was KAPO.

[170] Mr. Bade said that he and Mr. Grosse translated the discussions between Mr. Chakrabarti and the KAPO factory representatives. He testified that Mr. Chakrabarti and one of the KAPO technicians, Mr. Gruber, discussed that the Upper Glazing was very heavy and that it should be

hung from above and not impart any load whatsoever on the Intermediary Beam. Mr. Bade's evidence was that the Upper Glazing weighed approximately 4,000 pounds.

[171] Mr. Chakrabarti testified that during the Austria Trip the discussions with KAPO were that the Upper Glazing would be hung from the Roof Beam so that the weight would not bear on the Intermediary Beam.

[172] Mr. Halluk testified that the KAPO representatives noted that there were limitations on the size of the Great Room Sliding Doors and the deflection to which they could be subjected. Mr. Halluk said that he and Mr. Chakrabarti were told that the Great Room Sliding Doors and the Guide Track could not support any weight, in other words no load could be placed on them. Mr. Bade also testified to this effect. I find as a fact that WBL, through its representatives, Mr. Chakrabarti and Mr. Halluk, was advised by KAPO that the Great Room Sliding Doors and the Guide Track could not support any weight and no weight could be placed on them and that WBL understood this requirement. I further find that Luxus' representative, Mr. Grosse, and Mr. Bade were in attendance when this advice was given to WBL.

[173] Mr. Halluk also said that it was around the time of the Austria Trip that WBL first saw shop drawings from KAPO.

[174] Mr. Chakrabarti and Mr. Halluk provided a very positive review of their trip to Austria to Mr. Murray. In addition, Mr. Murray said that he was able to view a 2-foot by 2-foot window manufactured by Gaulhofer that was provided by WBL. Mr. Murray said that he considered it to have been well made. Ms. Murray also viewed a home built in Canmore which WBL said contained Gaulhofer windows.

[175] Mr. Ruggieri, who had not attended the Austria Trip, testified that AEL received further information about the weight of the KAPO Windows and Doors after Mr. Chakrabarti returned from the Austria Trip. However, Mr. Ruggieri said that no changes were made because AEL had already accounted for the weight of the Upper Glazing.

[176] None of the witnesses testified as to the exact dates of the Austria Trip; however, a deposit for the KAPO Windows and Doors was received by Mr. Bade on November 26, 2012.

KAPO Shop Drawings

[177] The Initial KAPO Shop Drawings were prepared in metric measurement and included notes that were entirely in German. The Approved KAPO Shop Drawings include Mr. Chakrabarti's signature, and the date he approved them: January 15, 2013, on many but not all pages. In addition, Mr. Chakrabarti added commentary in red or black handwriting on selected drawings:

(a) On an elevation of the Great Room Windows and Doors:

  (i) in red, arrows together with notations of "ROOF BEAM" and the "INTERMEDIARY BEAM";

  (ii) in red, a notation beside the Upper Glazing: "UPPER GLAZING SHOULD HANG FROM ROOF BEAM AND NOT ADD LOAD TO INTERMEDIARY BEAM": and

  (iii) in black, a notation below the elevation: "O.K. FOR BASIC DIMENSIONS", together with a signature and the date of January 15, 2013.

(b) On a cross-section showing the base of the Upper Windows, the Intermediary Beam, the Lower Transom, the Guide Track and the Great Room Sliding Doors in the most interior two tracks, and the track in the floor under the Great Room Sliding Doors:

(i) in red, a cloud is drawn around "110 ??", which represents a dimension for flashing over the Intermediary Bulkhead, and "216 mm" is added with a line to the cloud;

(ii) in red, beside the base of the Upper Windows, and over a line with an arrow pointing up: "WINDOWS ABOVE SHOULD BE HUNG";

(iii) in red, below the above note and line, and with an arrow to the Intermediary Beam: "FROM ROOF STRUCTURE SO AS TO NOT ADD DEAD LOAD TO INTERMEDIARY BEAM";

(iv) in black, a notation below the notations in red: "O.K. FOR BASIC DIMENSIONS", together with a signature and the date of January 15, 2013.

(c) On a cross-section very similar to (b), showing the base of the Upper Windows, the Intermediary Beam, the Lower Transom, the Guide Track and the Great Room Sliding Doors in only the most interior of the tracks, and the track in the floor under the Great Room Sliding Doors:

(i) in red, beside the base of the Upper Windows, and over a line with an arrow pointing up: "WINDOWS ABOVE SHOULD BE HUNG FROM ROOF BEAM"; and

(ii) in red, below the above note and line, and with an arrow to the Intermediary Beam: "AND NOT ADD DEAD LOAD TO INTERMEDIARY BEAM".

(iii) in black, a notation below the notations in red: "O.K. FOR BASIC DIMENSIONS", together with a signature and the date of January 15, 2013.

(d) On a cross-section showing the Upper Transom, the Upper Windows, the Intermediary Beam and the top of the Lower Transom:

(i) in red, with an arrow to a hand drawn I-beam: "ROOF BEAM";

(ii) in red, beside the Upper Transom and Upper Windows: "UPPER GLAZING SYSTEM SHOULD BE HUNG FROM ROOF BEAM SO AS NOT TO ADD DEAD LOAD TO INTERMEDIARY BEAM"; and

(iii) in red, with an arrow to the Intermediary Beam: "INTERMEDIARY BEAM".

(iv) in black, a notation at the top of the cross-section: "O.K. FOR BASIC DIMENSIONS", together with a signature and the date of January 15, 2013.

[178] Mr. Chakrabarti said in direct examination that his comments in red were on behalf of AEL and his comments in black were on behalf of WBL because they dealt with "overall dimensions". However, some of the notations in red handwriting on the cross-section, referred to in the paragraph, above, at (b), had particular dimensional notations made in red handwriting. Further, this was contradicted by Mr. Chakrabarti's own evidence under cross-examination:

Q ... You -- you put it on your -- on these KAPO drawings, and you raised it with the people at KAPO. You were concerned that the [Upper Glazing] not add any load to the intermediary beam at that time.

A That's not why that note is there. That note is there to tell KAPO that the intention is to start the installation by hanging the window, so if they have to design their frame accordingly, I'm letting them know. That's the reason that that note is there. As a contractor, I need them to know that.

Q So you were concerned about that.

A Well, it's a concern that they should know in case they have to do something accordingly.

Q You were the managing partner of [WBL] at the time.

A Which -- which is precisely why I put that note there.

. . .

Q As the managing partner of [WBL] and the project manager on the Murray residence, that was a concern of yours at this time, that the [Upper Glazing] not add any load to the intermediary beam. Are you denying that?

A I'm not denying that. What I'm explaining to you is why that note is there. You're misinterpreting that note. I'm simply correcting you.

[179] Some of the evidence of Mr. Chakrabarti was entered as read-ins from questioning as against both AEL and WBL, without objection. Mr. Chakrabarti also appeared as a witness at the trial. The read-ins included the following exchange regarding Mr. Chakrabarti's notes on the Approved KAPO Shop Drawings:

Q I'm just trying to get an understanding of the process. So here, where you said (as read) "Upper glazing should hang from roof beam and not add dead load to intermediary beam." What did you mean by that?

A When the structure here was designed, the structure was designed so that the [Upper Glazing] hung from the roof structure and didn't put any weight on that intermediary beam that you see labelled.

[180] Mr. Bade testified that Mr. Chakrabarti's commentary on the Approved KAPO Shop Drawings was consistent with the discussions with KAPO during the Austria Trip. Mr. Chakrabarti also testified that hanging the Upper Glazing was discussed during the Austria Trip.

[181] In questioning, Mr. Chakrabarti said that in the initial design the Upper Glazing was to be hung from the Roof Beam, and he admitted that the window frames would have to be reinforced and that the connections between the window frames and the Roof Beam would have to be designed by a professional engineer. However, no details were prepared explaining how the Upper Glazing was to be hung, how the window frames would be reinforced, and no calculations were made for, and no design prepared for, the connections. Mr. Chakrabarti's explanation at trial was that AEL was never given any connection details to review.

[182] Under cross-examination, Mr. Chakrabarti confirmed that his notes on the Approved KAPO Shop Drawings were intended to convey to KAPO the intention to install the Upper

Glazing in a manner so as to not add any dead load to the Intermediary Beam. However, Mr. Chakrabarti attempted to step back from that position when he said:

> A When you're -- when you're dealing with something that's heavy -- these are quite heavy these windows, you know, our -- our curiosity was that if we were to hang it and by hanging I mean the beginning of the installation and that no window is truly hung. A window is attached on all four sides but when you start the installation if we start by hanging it from the top are there specific points that KAPO wants us to attach to and that is part of what we discussed in Austria and as it turned out, no. There isn't.

[183] And in a response to a follow-up question on the same point and then continuing, Mr. Chakrabarti testified:

> A We wanted the manufacturer to be aware that our plan was to start the installation of those windows by supporting them from the top.
>
> Q Okay. ... in addition to the installation you've explained something further there have you not?
>
> A Oh, I simply said yeah. We are hanging this from the top so as to try not to add any dead load to the intermediary beam.
>
> Q I don't think it says -- does it say try?
>
> A Well, it says -- no. It says not add dead load to intermediary beam.
>
> Q Okay. And so is that what you were conveying to the manufacturer that intention to --
>
> A Yes.
>
> Q -- install in that manner and not place any -- not add any dead load to the intermediary beam?
>
> A Yes. In case it had any relevance to them.
>
> Q And why did you think it might have any relevance to them?
>
> A In the event that they -- that they would tell us that we need to support those sections at specific points.

[184] Mr. Chakrabarti also said that KAPO's depiction of the Intermediary Beam on its Vertical Axis was simply to show a steel beam was in that location.

[185] I find that Mr. Chakrabarti's evidence on the KAPO Shop Drawings was inconsistent and, at times, evasive and at odds with compelling evidence to the contrary.

Upper Glazing

[186] In his December 8, 2018 expert report, Mr. Demitt opined that it would be possible to suspend the Upper Glazing from the Roof Beam, and that in designing such an installation four engineering issues must be considered:

> (a) Firstly, the [Roof Beam] must be capable of supporting the weight of the [Upper Glazing] and the roof loads without deflecting excessively so that the [Upper Glazing] or adjacent drywall finishes do not become damaged.

(b) Furthermore, the connections which fasten the window frames to the [Roof Beam] must be designed and detailed by a Professional Engineer to ensure that the contractor erecting the frames has clear instructions on how to fasten the window frames to the steel structure above.

(c) The window frames must be specially designed and suitably reinforced to support the weight of the glazing system as they will be hung from the steel structure above.

(d) Finally, the engineer who designed the connections would need to review the window frame installation to ensure that the details specified in the connection design have been properly incorporated into the final construction.

[187] Mr. Chakrabarti denied that there is any requirement for window installation to be undertaken by an engineer and confirmed he had not made calculations for hanging the Upper Glazing from the Roof Beam. Mr. Chakrabarti testified that he expected copies of KAPO installation instructions to accompany the delivery of the KAPO Windows and Doors, but none arrived. I do not accept Mr. Chakrabarti's testimony on this point.

[188] Based on his experience and qualification as an expert, I prefer the evidence of Mr. Demitt and accept that to hang the Upper Glazing (weighing approximately 4,000 lbs) from the Roof Beam would have required fasteners designed by an engineer. The evidence is clear that this was never done. Design of fasteners would have to have been undertaken by a professional engineer but coordinated by the project manager overseeing all of the aspects of the project coming together.

[189] In addition, there was no evidence that a method of hanging the windows was discussed with KAPO during the Austria Trip or that any details of the Great Room Structural Steel were provided to KAPO. Further, it is not reasonable for an engineer working on a residential project in Canada to expect that a foreign window manufacturer would provide structural engineering details for a project in Canada, certainly not without being expressly engaged to undertake such a task.

[190] Regarding Mr. Chakrabarti's assertion that installation instructions were anticipated with the delivery of the KAPO Windows and Doors, there was no evidence that anyone at, or on behalf of, WBL made any follow-up inquiry of any of Mr. Bade, Luxus or KAPO. Indeed, when it came time to install the Great Room Windows and Doors, Mr. Robert Belcher testified that there was still an installation issue with the handling of the Upper Glazing and that is when the installation method changed to have the Upper Glazing rest on the Intermediary Beam.

Great Room Windows and Doors delivery and installation

[191] Mr. Bade was on site shortly after the KAPO Windows and Doors were delivered and provided assistance to WBL in unloading and assembly as the instructions were in German.

[192] Mr. Halluk said he was not sure what installation instructions WBL provided to Emperor Homes other than the KAPO Shop Drawings. Mr. Halluk said he was aware that Emperor Homes was on site and was given an instruction that revised the installation of the Lower Transom Windows. However, Mr. Halluk said that he had no involvement in providing instructions to Emperor Homes for the installation of the Great Room Windows and Doors or the Master Bedroom Sliding Doors as that was undertaken by Mr. Chakrabarti.

[193] The AEL Cross-Section, dated February 1, 2013, contained the Installation Sequence for the Great Room Windows and Doors after they were delivered in April 2013. In direct examination, Mr. Chakrabarti said:

> Q And with respect to your involvement in providing [Mr. Robert Belcher] with instruction with respect to installation of the [Great Room Sliding Doors], the instruction [on the AEL Cross-Section], are those the same instructions that you provided him with?
>
> A Yes.
>
> Q And those instructions came from [AEL] and were conveyed to [Mr. Robert Belcher] by you on behalf of [WBL]?
>
> A That is correct.

[194] On cross-examination, Mr. Chakrabarti denied that he had instructed Emperor Homes to install the Upper Glazing on the Intermediary Beam insisting that it had been Emperor Homes who had come to WBL to propose that method of instruction for safety reasons. However, after confirming that he gave general instructions to Emperor Homes and that Emperor Homes was WBL's subcontractor, Mr. Chakrabarti testified that he had relayed Emperor Home's proposal to Mr. Ruggieri and that he had agreed to this method of installation after having "checked on [his] end whether it would work".

[195] At trial, Mr. Chakrabarti tended to tailor his evidence depending on whether questions were asked by WBL's counsel or counsel for an opposing party. This occurred in relation to the installation of the Upper Glazing. In direct, Mr. Chakrabarti indicated that he provided instructions to Emperor Homes on the Upper Glazing installation. On cross-examination, he denied giving instructions and then finally agreed that he relayed the Installation Sequence to Emperor Homes. On re-direct, Mr. Chakrabarti revised his testimony again and testified that he and Mr. Robert Belcher "worked together on how best to do the attachments".

[196] Mr. Robert Belcher testified that Emperor Homes was not provided with the AEL Elevation and AEL Cross-Section, on which the Installation Sequence appeared. He said he was sure he had not seen those drawings because he observed that they showed the position of the Upper Transom and the Upper Windows being reversed (so that the 10-foot segment was on top of the two-foot segment) as compared with the actual installation. I accept Mr. Robert Belcher's evidence that Emperor Homes installed the Upper Glazing but was not provided with the AEL Elevation and AEL Cross-Section, which included the Installation Sequence.

[197] When it came to installation, the Upper Glazing was not hung from the Roof Beam but rather rested on the Intermediary Beam. This demonstrates that when the Great Room Structural Steel was designed, the design contemplated that the Upper Glazing would be hung from the Roof Beam and would not impart any load on the Intermediary Beam. The Intermediary Beam sagged under its own weight on installation. The Additional Structural Steel was added but there was no design for it provided at trial and the Intermediary Beam still sagged. There was no design of fasteners or connectors undertaken for the hanging of the Upper Glazing. Mr. Chakrabarti confirmed on the Approved KAPO Shop Drawings that the Upper Glazing would impart no dead load on the Intermediary Beam. The installation method changed after the KAPO Windows and Doors were delivered to the site in April 2013 and Emperor Homes raised safety concerns about

hanging them from the Roof Beam. I find that contrary to his evidence, Mr. Chakrabarti did not show Mr. Robert Belcher the AEL Cross-Section with the Installation Sequence.

[198] Mr. Halluk was also involved in the installation of the Upper Glazing. I accept the evidence of Mr. Robert Belcher that he discussed the installation of the Upper Glazing with Mr. Chakrabarti and Mr. Halluk. Mr. Robert Belcher said that it was Mr. Halluk who suggested that once the Upper Glazing was screwed into place that most of the weight would transfer to the Columns and I accept Mr. Belcher's evidence on that point.

[199] Although Mr. Bade assisted in assembly of the KAPO Windows and Doors when the shipping container arrived on site, there was no evidence that any of Mr. Bade, Luxus, KAPO or AEL were involved in the on-site installation of the Great Room Windows and Doors.

Master Bedroom Sliding Doors

[200] There was no evidence as to the applicable portions of the *ABC* relative to the Master Bedroom Sliding Doors. Indeed, there was little evidence about the Master Bedroom Sliding Doors whatsoever.

[201] The Tech-Wood drawings for the Murray Residence dated November 8, 2012, indicate that "customer" is WBL. An email from Tech-Wood dated November 9, 2012, sought approval of WBL as to the interior vaults, exterior roof lines and dimensions because Tech-Wood's Design Technician said that there was a lack of information.

[202] Mr. Chakrabarti testified that he had a discussion with Tech-Wood about providing stronger Cantilevered Beams. When asked if he provided load calculations, Mr. Chakrabarti testified:

> A I gave them the loading that they needed to use in the deflection criteria. Or sorry. Let me rephrase that. I gave them what finishes were and what type of roofing system so that they knew what loads to use, and then I gave them the additional deflection criteria because of the tight tolerance doors that were being installed.

[203] Mr. Chakrabarti confirmed that Tech-Wood undertook the deflection calculations for the Cantilevered Beams, which I find they did based on the applicable live loads and dead loads based on the finishes communicated by Mr. Chakrabarti. AEL did not design the Cantilevered Beams as that was Tech-Wood's mandate. I find that, when communicating with Tech-Wood, Mr. Chakrabarti was doing so in his role as WBL project manager.

[204] There was no evidence that WBL ever asked for, or received, any drawings from Tech-Wood that were stamped by an engineer, even though the trusses and beams supplied by Tech-Wood were significant structural elements in the Murray Residence.

[205] In his site review, Mr. Kraychy said that he observed large decorative timbers, approximately 8 inches x 8 inches, mounted above all of the Master Bedroom Sliding Doors. It was unclear how these were mounted but Mr. Kraychy said that they did not appear to be cantilevered into the wall. There was no evidence as to the weight of those decorative timbers or that the dead load associated with them was conveyed to Tech-Wood or was factored into the design of the Cantilevered Beams.

[206] The evidence demonstrated that the Master Bedroom Sliding Doors bind, are difficult to operate and do not fully seal. In addition, Mr. Graham said that on one of his three visits to the Murray Residence he observed the Master Bedroom Sliding Doors "leaking/dripping water".

[207] There was no evidence that any of Mr. Bade, Luxus, KAPO or AEL were involved in the on-site installation of the Master Bedroom Sliding Doors.

VIII Issues

Issue 1: What was the agreement between the Murrays and WBL?

[208] When Mr. Murray testified, he struggled to remember what occurred ten, or more, years ago. He said that during construction he was busy running his own business and relied on WBL to ensure that the Murray Residence was built correctly. Mr. Murray had no particular recollection of any dates on which specific events occurred. In addition, when emails were put to him on cross-examination, Mr. Murray had no recollection of receiving most of them. I make this observation about the reliability of Mr. Murray's evidence while discussing the agreement between the parties, but it applies to all aspects of Mr. Murray's testimony.

[209] Mr. Murray said that he knew an engineer would be required for the Murray Residence but neither of the Murrays were involved in the selection of, or direction to, any of the engineers who provided services for the construction of the Murray Residence. The invoice issued by AEL for the design of the Great Room Structural Steel, dated October 31, 2012, was issued to, and approved for payment by, WBL. I find that when engineering services were required for the Murray Residence, WBL contacted an engineer to obtain those services.

[210] I find that AEL provided engineering consulting services directly to Wolf and then directly to WBL. I further find that Mr. Chakrabarti was AEL's primary point of contact with the Murrays during the engagement of Wolf and then later when WBL was engaged.

[211] I also find that the Murrays engaged WBL to take on the roles of project manager and construction manager. This arrangement included Mr. Chakrabarti taking on the role of lead project manager. In that role, Mr. Chakrabarti looked after pre-construction tasks, although, a building permit had already been issued by the County and the foundations had been poured.

[212] WBL engaged neoteric architecture to re-draw the Murray Residence and correct dimensional errors. AEL was already on the project, and, in his dual roles, Mr. Chakrabarti was both WBL's lead project manager for the Murray Residence and the key contact at AEL for engineering services supplied to WBL for the Murray Residence.

[213] Mr. Chakrabarti was involved in the oversight of the entire project and was the primary liaison with the Murrays. Mr. Chakrabarti was also involved in addressing post-turnover and warranty issues, including contacting Luxus about the issues with the KAPO Windows and Doors and warranty claims.

[214] I find that WBL also took on the role of construction manager for the Murray Residence, overseeing the construction of the project, including day-to-day site operations and supervision of the construction. WBL arranged for most of the trades and suppliers through their network of subcontractor and supplier contacts. WBL also undertook all of the construction administration, including the receipt of invoices for most of the construction work, payment of those invoices and

billing the Murrays for reimbursement of construction costs. There were only a handful of trades and suppliers which were selected and paid directly by the Murrays. WBL also managed the scheduling and sequencing of the construction of the Murray Residence.

[215] I find that WBL took on many of the duties that would be expected of a project manager and the coordination duties that would be expected of an architect, in addition to all of the typical duties of a construction manager; however, its scope as project manager did not include any pre-construction duties.

[216] There was no evidence regarding the expectations of the Murrays and WBL as to WBL's responsibility for the work of the trades and suppliers. In Beverley M McLachlin and Arthur M Grant, *The Canadian Law of Architecture and Engineering*, 3rd ed (Toronto: Lexis Nexis Canada, 2020), at page 85, footnotes omitted, the authors note the balance between the certainty of terms of a contract and agreements undertaken:

> ... reasonable certainty does not require terms so clear that there can be no doubt about the meaning. Courts are loath to hold that commercial contracts are not binding, particularly if the parties have partially performed their obligations. If it is clear that the parties intended to make a contract, and if from the provisions of the agreement and the surrounding circumstances the court can determine what the parties reasonably intended, the courts will imply missing terms or clarify unclear provisions and enforce the contract accordingly.
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> . . .
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> The fact that both parties have accepted and acted upon the agreement for a number of years is an important element in the court's determination of whether the agreement is sufficiently certain to constitute a valid contract. The court will strive to uphold an agreement which the parties themselves have treated as binding.

[217] There was no evidence that the Murrays and WBL addressed their minds specifically to whether WBL would be responsible for the work performed by trades and materials supplied by suppliers. However, the oral agreement arose in the context of a project and construction management context, and I have considered the evidence of the parties.

[218] I find that Mr. Murray chose not to have a written contract because he believed that would give him greater flexibility to terminate WBL if he was not pleased with how the work was being supervised. Mr. Murray made it clear that he did not want to hire a contractor. Mr. Murray and WBL agreed that WBL would be both project and construction manager. There was no discussion of WBL taking on the role of a contractor having its own subcontractors or taking on responsibility for selected trades, though the parties recognized that WBL had some existing relationships with some trades.

[219] Throughout the project, WBL treated the trades and suppliers with whom it had a prior relationship as subcontractors for whom WBL took responsibility. However, there are no allegations against any of those trades and suppliers.

[220] I find that Mr. Murray wanted to engage someone to manage the Murray Residence construction project in a manner that permitted the Murrays to part ways at anytime and not be bound to a custom homebuilder. I also find that WBL accepted the engagement to manage both the project and construction aspects of the Murray Residence. WBL provided the Murrays with a

contract that WBL used as a custom homebuilder and both parties agreed to depart from WBL's standard contractual documentation.

[221] Even though not all of the terms of the oral agreement between the Murrays and WBL were expressly discussed, I find that the Murrays and WBL reached an agreement, WBL performed the services and the Murrays paid WBL in full. It falls to the Court in such a situation to look at the surrounding circumstances to determine the scope of the contract. In Thomas G Heintzman, Bryan G West and Immanuel Goldsmith, *Heintzman, West and Goldsmith on Canadian Building Contracts*, loose-leaf (2022-Rel 1), 5th ed, vol 1 (Toronto: Carswell, 2022), at §1:34, footnotes omitted, the authors discuss oral agreements:

> ... if the court finds there was an agreement between the parties, it will be more flexible in determining what the terms of the contract were, recognizing that oral contracts must be construed without the interpretive tools used to understand written contracts, namely, the words of the agreement on the page.

[222] There are three grounds upon which an implied term in a contract may be found, which are discussed in *Heintzman*, at § 4:39, footnotes omitted:

> Those grounds were identified by the Supreme Court of Canada in *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, and then confirmed and refined by that court in four subsequent decisions. First, a term may be implied if the contract is of a class or kind of contract in which an implied term of that nature has historically been found to exist in prior judicial decisions. Building and sale of goods contracts are contracts of this class or kind. Second, a term may be implied if it arises from the customs or usage in the trade or business in which the contract is used. In this case, it is presumed that the parties did not need to expressly include that term in their contract since it was well understood by the business context in which the contract was made. Third, a term may be implied into the contract based upon the presumed intention of the parties. This third ground is based in turn on two objectives. By implying a term the court seeks to preserve the business efficacy of the contract, and to carry out the objective intention of the parties. The parties' objective intention is determined by what an "officious bystander" would understand from the parties' dealings.

[223] In ***Vermilion & District Housing Foundation v Binder Construction Limited***, 2017 ABQB 365, at para 122, Nielsen J, as he then was, said:

> Unless the contract or the circumstances indicate otherwise, the contract will contain an implied term that the work will be done in a good and workmanlike manner, the workmen employed on the work will possess the ordinary skill of those exercising the particular trade, and the materials will be of good quality and reasonably fit for the purpose for which they are used ...

[224] I agree with the comments in ***Vermilion*** and that those attributes ought to be implied in the oral contract between WBL and the Murrays. I would add an additional implied term that the construction would be in accordance with the *ABC*: see ***G Ford Homes v Draft Masonry (York) Co Ltd***, 1983 CanLII 1719 ONCA, at page 8. Though not an issue in this case, given the strides taken by government and industry to improve safety in construction, I find that safe construction

methods and safety legislation compliance are now expected by all participants, required by legislation and may, in appropriate circumstances, be an implied term in a construction contract.

[225] All three grounds for implying a term of the agreement between the Murrays and WBL are applicable. I find that applying these grounds to this construction case, it can be said that:

(a) building contracts, including construction management and project management, are types of contracts in respect of which implied terms have been applied historically;

(b) there are customs and usage in the building trade that are typically understood by the parties and can be implied as terms of an agreement, unless excluded, which include:

  (i) work will be undertaken in compliance with, and the completed project will comply with, all applicable building codes and related codes, such as safety, plumbing and electrical codes;

  (ii) the work will be performed in a good and workmanlike manner, with safe construction methods and compliance with safety legislation;

  (iii) the workers engaged to undertake the work will possess the ordinary skill of those exercising the particular trade; and

  (iv) the materials supplied and installed will be of good quality, installed in accordance with instructions or custom and will be reasonably fit for the purpose for which they are used.

(c) terms may be implied based upon the intention of the parties to:

  (i) preserve the business efficacy of the contract; and

  (ii) to carry out the objectively reasonable intention of the parties.

[226] I find that the relationship between the Murrays and WBL was one where the Murrays were hands-off owners providing input when Mr. Murray visited the site or when WBL sought out Ms. Murray's input into design and finishing. WBL, on the other hand, did not take on a traditional custom homebuilder or contractor role and instead was both the project manager and the construction manager for the Murray Residence.

[227] On WBL's recommendation, neoteric architecture was engaged to correct dimensional errors and issued a revised set of drawings. Similar to what Dickson J, as he then was, found in his dissenting reasons in ***Brunswick Construction Ltée v Nowlan***, 1974 CanLII 181 (SCC), at pages 536 and 537, there was nothing arising in relation to the Murray Residence which would impose a duty on WBL to detect faults in the drawings prepared by the architect or to inform the Murrays of any faults. Indeed, there was no issue raised about, or fault observed in, the work performed by neoteric architecture, and there was no suggestion that WBL should be responsible for its architectural design services.

[228] However, WBL managed the relationship with the architect and determined the scope of the architectural services and neoteric architecture's services concluded with the issued "for Truss Coordination" drawings, dated November 9, 2012. Seeing no need for a set of "issued for construction" drawings, or the services of an architect once the truss coordination drawings were complete, WBL then had no architect to coordinate the work and undertake field inspections. By

not engaging, or recommending the engagement of, an architect for the construction of the Murray Residence, I find that WBL determined that it would take on the role of coordination and field inspection.

[229] WBL was responsible for ensuring that the necessary engineers were engaged to design the structural elements of the Murray Residence, that such engineering was performed and, when required, revised, if plans or installation methods changed. However, WBL did not take on any responsibility for those engineering services.

[230] As construction manager, WBL was responsible for ensuring the installation method for the KAPO Windows and Doors was communicated to all of the necessary trades. In addition, WBL was responsible for inspecting the installation of the KAPO Windows and Doors to ensure that it was performed in accordance with the engineering design, including the Installation Sequence. However, WBL did not take on any responsibility for the design and manufacture of the KAPO Windows and Doors.

[231] There are some similarities between this case and ***Sunnyside Nursing Home v Builders Contract Management Ltd***, 1989 CanLII 4719 (SKCA). In ***Sunnyside***, the building design and the building construction were found to have been defective for different reasons. The Court of Appeal found that the contractor, who had provided input into construction methods during the design phase, was not responsible for defective design and said, at paras 55 and 59:

> Obviously, factual distinctions are going to arise, such as in *Brunswick Construction Ltee v. Nowlan* (supra) but in general, where plans are provided by the owner and the contractor is instructed to build in accordance with the plans, the builder is not expected to be a guarantor of the suitability of the plans and specifications provided by the architect and engineer to the owner.
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> . . .
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> ... I accept there may be more provisions in the contract referring to design input from the contractor than might normally be the case. If that is so, it is explained by the rather unusual nature of this building contract. In this concept, [the Contractor] had played a role in determining the type of structure it could build in the most cost effective fashion. It therefore had an interest in seeing the design was not changed unnecessarily, for that would have an impact on the cost of the structure. However, to suggest that it had taken responsibility from the architects and its engineers for structural integrity does not follow. It would take very clear and strong language, which is not present here, to indicate a change in the traditional roles played by these different kinds of experts.

[232] Similar to this case, WBL took on an unusual role for a residential construction project as it was not in the typical role of a custom homebuilder but, rather, a project and construction manager. However, there is nothing to suggest that it was taking responsibility from, or with, KAPO for the design or construction of the KAPO Windows and Doors, or AEL for structural integrity of any aspect of the Murray Residence.

[233] In summary, I find that at the request of Mr. Murray and with the agreement of WBL, WBL took on the dual roles of project manager and construction manager in exchange for WBL receiving a monthly fee. This was an oral agreement. WBL states in its closing brief that it "does not dispute that it had a verbal agreement with [the Murrays] and that it owed [the Murrays] a duty

of care. However, [the Murrays] are trying to expand the scope of the agreement and duty contrary, to the facts".

[234] Neither the Murrays nor WBL raised any issue of the oral agreement being for a period of over a year and engaging a requirement to be in writing under s 4 of the *Statute of Frauds* (1677), 29 Charles II, c 3. Neither party raises any issue that part performance would eliminate any requirement for a written agreement given that WBL completed its scope of work and the Murrays fully paid WBL: ***Haan v Haan***, 2015 ABCA 395, paras 9 and 10. I accept that the oral agreement is valid in this case.

[235] Having reviewed the discussions between the Murrays and WBL, the roles of the parties, the actions of the parties during construction, I find that the oral agreement between the Murrays and WBL included the following express and implied terms:

(a) WBL was engaged to be the project manager and to manage the Murray Residence, recognizing that Wolf had already obtained a building permit and engaged AEL and other consultants, which project management included:

  (i) ensuring that the necessary project professionals, including an architect and consulting engineers were engaged when and as necessary;

  (ii) being the point of contact between the Murrays and the project professionals;

  (iii) ensuring that the site services (i.e. applicable safety equipment, access roads, waste removal, portable toilets, etc.) were provided and maintained during construction;

  (iv) to provide project coordination and field inspection;

(b) WBL was engaged to be the construction manager, which included:

  (i) managing the construction;

  (ii) attending the Austria Trip as the Murrays' representative to ensure that it was appropriate to proceed with the manufacture of the KAPO Windows and Doors;

  (iii) overseeing the scheduling of the construction by the trades and suppliers;

  (iv) coordinating the project professionals, trades and suppliers to ensure:

    (A) their respective work was performed at the correct time; and

    (B) that all information necessary to be shared between them was adequately communicated; and

(c) in relation to the trades and suppliers:

  (i) with whom WBL had prior relationship, WBL took on a traditional contractor-subcontractor role, and this included Emperor Homes;

  (ii) which were selected by the Murrays, WBL took no responsibility for them as a contractor, but managed and coordinated them and undertook field inspections; and

(iii) which were selected while WBL was engaged as the project and construction manager, WBL took no responsibility for them as a contractor, but managed and coordinated them and undertook field inspections; and

(d) in relation to the coordination of the trades and suppliers:

(i) selecting (except where the Murrays selected), contracting with (on the basis described in paragraph (c)), and managing and coordinating the trades and suppliers;

(ii) providing construction-related direction and oversight;

(iii) undertaking field inspections to review the work of trades and suppliers to determine if such work, generally:

(A) was performed in a good and workmanlike manner,

(B) was performed by workers possessing the ordinary skill of those exercising the particular trade;

(C) incorporated materials that were of good quality and reasonably fit for the purpose for which they were used; and

(D) met the requirements of the *ABC*;

(iv) if WBL observed during a field inspection that the work of trades or suppliers was not in accordance with (d)(iii), following up with directions or warranty claims, and reporting to the Murrays about such issues;

(v) making payment to the majority of the trades and suppliers and billing the Murrays for those costs;

(e) in relation to the professional consultants:

(i) WBL would engage the necessary professionals and coordinate their consulting services; and

(ii) WBL took on no responsibility for the performance of the professional services, except those that the architect was not engaged to provide and by implication WBL took on itself;

(f) being the communication contact between the Murrays and all of the other parties involved in the construction of the Murray Residence; and

(g) the Murrays would pay WBL a flat monthly fee of between $28,000 and $30,000/month, for a total of approximately $550,000.

[236] I find that the oral agreement between the Murrays and WBL did not have any express or implied condition that the Murray Residence, or the KAPO Windows and Doors, would be of merchantable quality, fit for their purpose or free of defects.

Issue 2: What was the agreement between the Murrays and AEL?

[237] AEL worked for someone: was it the Murrays or WBL?

[238] The lines between the roles of WBL and AEL are difficult to distinguish due to:

(a) Mr. Chakrabarti's dual roles, as WBL's lead project manager and as a consulting engineering for AEL;

(b) the lack of effort on the part of WBL, AEL, Mr. Chakrabarti and Mr. Ruggieri to clearly distinguish between the roles of AEL and WBL, particularly as to on-site inspections;

(c) the failure of AEL to maintain complete records; and

(d) the lack of an agreement between Wolf and AEL, or WBL and AEL, setting out the terms of the relationship between them.

[239] AEL's invoice for the Great Room Structural Steel was addressed to WBL but this in an of itself does not make AEL a subconsultant to WBL.

[240] The analysis here is similar to that applied in relation to the architectural services. While WBL managed the communication with, and coordinated the services provided by, AEL, there was no evidence that WBL took on AEL as its subconsultant such that it was responsible for its services. There is no evidence that WBL, or the Murrays, intended WBL as a project and construction manager, to take responsibility for engineering services provided by the consulting engineer, AEL. Without clear and strong evidence that WBL took responsibility for AEL, of which there is none here, there is nothing to indicate that AEL was WBL's subconsultant for whom it was responsible.

[241] In *Heintzman*, at § 13:3, footnotes omitted, the authors discuss the implied terms in a contract with a professional consultant:

> Like all contracts between a professional person and the client, a contract between the owner and a professional consultant contains an implied term that the consultant possesses a reasonable level of professional skill and that the consultant will use reasonable care and diligence in carrying out its work. Accordingly, if the consultant has undertaken to supervise the building project, then the consultant has the implied duty to reasonably ensure that the contractor's work is properly done before the work is certified, and to reasonably ensure that the building is properly constructed by carrying out inspections during the course of construction. The duties of the consultant under its professional statutes and regulations, and under the applicable building codes, may also be a guide to the extent and nature of those responsibilities. Included within the consultant's supervisory duties is the obligation to reasonably ensure that the building is accommodated to the exigencies of the site. In sum, and as was said in one decision, by taking on the supervisory role, the consultant "assumed an attendant obligation to perform the function of inspection and certification of the work in progress to the limit of the care and skill that are proper to his calling and the contractual relationship."

[242] There was no invoice, inspection notes or other documentation entered into evidence for inspections undertaken by AEL after WBL took over the project management of the Murray Residence, but it is clear that AEL undertook inspections. Mr. Ruggieri said that he did not undertake any site inspections as they were performed by Mr. Chakrabarti and the AEL technologists at the time.

[243] Mr. Chakrabarti, in a letter on AEL letterhead dated February 19, 2015, addressed to the County's agent, said:

> [this letter] confirm[s] that the [Murray Residence] was visually inspected by [AEL] several times starting in April of 2012 to conduct foundation reinforcing steel inspections; and later throughout the balance of the year 2012 through early 2013 to inspect the framing system installation of the HAMBRO main floor and the wood joist 2nd floor and wood roof truss system as designed by TECH WOOD Building Components.
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> Throughout the visual inspections the works were found to correspond with the intended design of [AEL] for the foundation works; as well as HAMBRO & TECH WOOD Building Components for the floor and roof systems.

[244] I find that the Murrays, through WBL, had an oral agreement with AEL to provide consulting engineering services for the Murray Residence. I find that the implied terms of the oral agreement between the Murrays and AEL, after WBL became project and construction manager, included the following:

(a) AEL was to provide engineering services for the Murray Residence on an as-requested basis, which would be communicated through WBL;

(b) the engineering services would be:

  (i) in compliance with the *ABC*;

  (ii) performed with a level of skill of a reasonably competent professional engineer in Alberta, who is engaged as a consultant engineer for large and complex residential projects, between 2011 and 2013;

  (iii) performed using reasonable care and diligence;

(c) the professionals and the technical staff engaged to undertake the engineering services, including design and inspection, would possess the necessary skills to undertake those engineering services;

(d) where engineering design was part of the engineering services being provided, a professional engineer would supervise the design and, when complete, stamp the design documents;

(e) inspections would be carried out on an as-required basis by appropriate professionals or technicians; and

(f) when carrying out inspections, the professional or technician would undertake a reasonable review of the work it was inspecting to determine if it was correctly performed in accordance with any relevant design.

Issue 3: What is the cause of the binding?

[245] All parties acknowledge that the Great Room Sliding Doors and Master Bedroom Sliding Doors bind and that their functionality is negatively affected. However, the cause of the binding and who is responsible for it is contentious. To determine who is responsible, I must first determine the cause of the binding.

3.1 Expert evidence on the cause of the problems

[246] The Murrays relied on the expert opinion of Mr. Demitt as to the cause of the problems with the Great Room Sliding Doors and Master Bedroom Sliding Doors. Luxus relied on the expert opinion of Mr. Roy. WBL called no expert evidence on the cause of the problems with the Master Bedroom Sliding Doors and the Great Room Sliding Doors; however, WBL submitted that neither Mr. Demitt's expert opinion nor Mr. Roy's expert opinion could be relied upon.

[247] Further, WBL submits that the only expert to provide evidence on the standard of care of custom homebuilders was Mr. Kraychy; however, the evidence is that WBL undertook project management and construction management for the Murrays and did not take on the role of a custom homebuilder.

3.2 Binding of the Great Room Sliding Doors

[248] Mr. Murray said that, approximately one week after the Great Room Sliding Doors were installed, he found them difficult to push open or closed, but that they were operable. Mr. Murray also testified that the operation of the Great Room Sliding Doors changed over time and eventually it required two people to push them open.

[249] Mr. Halluk testified that when the Great Room Sliding Doors were installed, they were operating well. He said that Mr. Belcher told him that he had noticed some "stickiness" in the operation of the Great Room Sliding Doors in October 2013, several months after they had been installed. Mr. Halluk said that he and Mr. Belcher inspected the Great Room Sliding Doors at that time.

[250] Mr. Halluk said that he believed that the Guide Track was sagging and that "you couldn't budge" the Great Room Sliding Doors, then "it was just hard to" budge the doors. He also said that the "doors were sticking" at this time. Mr. Halluk said that he and Mr. Belcher propped up the Guide Track at its mid-point with a "little stick" and were able to operate the Great Room Sliding Doors as they had been initially installed.

[251] Approximately six months later, on April 10, 2014, Mr. Chakrabarti sent an email to Mr. Grosse requesting warranty service for, among other things, the Great Room Sliding Doors because Mr. Chakrabarti said the Guide Track was twisting causing the Great Room Sliding Doors to be very difficult to open. Mr. Chakrabarti said that if the Guide Track was pushed up the Great Room Sliding Doors "become easy to open and close". Mr. Chakrabarti identified the issue as inadequate design and asked to hear from KAPO regarding a solution.

[252] Given that Mr. Murray could not remember many details and was not on-site consistently during construction, I find Mr. Halluk's evidence as to the timing of the discovery of the functionality issues more reliable and accept it.

[253] Mr. Murray testified that the Great Room Sliding Doors were not airtight, and that snow would blow through them into the interior of the Murray Residence. On cold days, the frost which accumulated on the inside of the Great Room Sliding Doors would melt and pool on the Great Room floor.

[254] Mr. Halluk said that at a subsequent site meeting with the Murrays, Mr. Chakrabarti and Mr. Belcher, he demonstrated to Ms. Murray how pushing up the Guide Track improved the operation of the Great Room Sliding Doors.

[255] Ms. Murray testified about how difficult it was to close the Great Room Sliding Doors and was surprised because Mr. Chakrabarti had told her that she would be able to close them with a finger. Given how difficult the Great Room Sliding Doors were to move, and before a problem was identified, Ms. Murray asked Mr. Chakrabarti to install an electric motor to operate the Great Room Sliding Doors.

[256] Both Mr. Murray and Ms. Murray testified that the Great Room Sliding Doors did not operate as intended and by October 2013, were binding and had become difficult to open. The Murrays reported that snow had been able to blow through the connections between the Great Room Sliding Doors.

[257] Ms. Murray said that she was only aware of cracking on the top side of the drywall/clay surface surrounding the Intermediary Beam but had not seen the wall close enough to confirm whether there were other cracks.

[258] Mr. Demitt observed both the Great Room Sliding Doors to be very difficult to open and appeared to be binding when moved. Mr. Kraychy said that he observed that the Great Room Sliding Doors were "unreasonably difficult to slide".

Video showing movement in Intermediary Bulkhead and attempts to repair

[259] Mr. Demitt noted in his Expert Reports that he had reviewed a video which he described as:

> A video taken by the home owner [*sic*] was provided showing the movement in the [Guide Track] when pushed vertically with a short pole. The degree of flexibility in the [Intermediary Bulkhead] and the [Guide Track] was very evident. Significant vertical displacements were evident in the video under light to moderate force on the pole. The lack of vertical stiffness in the [Guide Track] was confirmed by the laser level survey.

[260] Mr. Murray said he took no videos but recalled Mr. Halluk pushing up the Guide Track with a 2" x 4" or broom. Mr. Murray also said that when the Guide Track was pushed up, it helped the Great Room Sliding Doors to open, but they still did not open easily.

[261] Mr. Bade observed Mr. Halluk push up on the Guide Track with a broom and said that he observed the Great Room Sliding Doors move easily at that time.

[262] Ms. Murray testified she witnessed Mr. Halluk push up on the "transom, which is, like, offset from the door" with a broom. In cross-examination, Ms. Murray altered her testimony and said that she did not know where Mr. Halluk pushed up, but it was wherever he could reach with a 2" x 4". Ms. Murray said that when she tried to operate the Great Room Sliding Doors while Mr. Halluk was pushing up, it was a little bit easier to open them.

[263] I find that Mr. Halluk pushed up on the Guide Track.

[264] Mr. Roy acknowledged that if the Intermediary Beam was deflecting onto the Lower Transom Windows it would not be possible to push it up with a 2" x 4" or a broom but there was no evidence that this was ever attempted. Mr. Roy's evidence was that if the drywall moved it would indicate that there is a space between the laminated veneer lumber, known as "LVL", and the drywall portions of the Intermediary Bulkhead.

[265] Ms. Murray also said that, as a result of Mr. Halluk pushing up on the Guide Track, Mr. Murray suggested trying an adjustable rod between the Intermediary Bulkhead and the Guide

Track (referred to as a "Turnbuckle") to see if some weight could be taken off the top of the Great Room Sliding Doors to have them operate more easily. Mr. Halluk testified that the Turnbuckles were WBL's recommended solution.

[266] Four Turnbuckles were eventually installed to pull up the edge of the Guide Track. Mr. Murray said the Turnbuckles temporarily improved the situation, but the difficulty in opening and closing the Great Room Sliding Doors continued to worsen to the point where they were no longer functional, and this evidence was not contradicted. For illustration, the installed Turnbuckles can be seen in a photo from the Murrays' production contained in the Joint Exhibit Book:

[267] WBL submits that I should make an adverse inference against the Murrays for their failure to produce the video. WBL has not satisfied me it would be appropriate to draw an adverse inference against the Murrays in relation to the video for the following reasons:

(a) WBL provided no evidence of who took the video and relies solely on Mr. Demitt's reference to it in the Expert Reports, which I find does not prove who took the video, when it was taken and how it would have been of value at the trial.

(b) Mr. Halluk, who was apparently seen in the video was called as a witness at the trial by WBL and asked about when he pushed on the Guide Track with a broom.

(c) The Murrays were both witnesses at the trial. Mr. Murray said that he did not take a video and Ms. Murray was not asked about it, which she should have been to address the rule in ***Browne v Dunn***, 1893 CanLII 65 (FOREP) (HL).

(d) Typically, a party in a civil suit who takes the position that undisclosed records are relevant and material, and should have been disclosed by the opposing party, brings an application under Rule 5.11 to obtain a ruling on the contested disclosure before the commencement of trial: see ***Watson v Schlumberger Canada Limited***, 2022 ABKB 646, at para 51. WBL did not do so.

Mr. Demitt's expert opinion on the Great Room Sliding Doors

[268] Mr. Demitt attended at the Murray Residence and took level measurements using a rotating laser level and a survey rod on the underside of the Intermediary Bulkhead and the underside of the Guide Track, with both the doors closed and open.

[269] In his December 7, 2018 report, Mr. Demitt included the results of a frame analysis he conducted on the Great Room Structural Steel using the AEL Structural Drawings (the Demitt Frame Analysis). The Demitt Frame Analysis involved imputing the framing member sizes into a computerized structural design model to calculate deflections for three conditions:

(a) Intermediary Beam steel member self weight, which computed the deflection above the mid-point of the Great Room Sliding Doors to be 8 mm;

(b) Dead load, which included the weights imparted on the Intermediary Beam by the Great Room Structural Steel, the second-floor trusses, the Stone Cladding, the Intermediary Bulkhead, the Upper Glazing, which computed the deflection above the mid-point of the Great Room Sliding Doors to be 31 mm; and

(c) Live and dead load, which included the dead load referred to above, plus the live load related to assumed snow accumulation on the roof, which computed the deflection above the mid-point of the Great Room Sliding Doors to be 37 mm.

[270] Mr. Ruggieri acknowledged that he expected the actual deflection of the Intermediary Beam to be less than 1½ inches (38.1 mm).

[271] Mr. Demitt opined on the cause of the Great Room Sliding Doors functionality issues in his December 7, 2018. Firstly, he opined that there was excessive deflection in the Intermediary Beam:

> It is evident that the [Great Room Sliding Doors] operational issues are associated with deflections observed in the [Great Room Structural Steel] above the [Great Room Sliding Doors]. The installation of the [Intermediate Beam] with the beam's strong axis in the horizontal direction has resulted in excessive vertical deflection as the [Intermediate Beam] has not [been] designed or reinforced to resist the anticipated vertical live and dead load forces.

[272] Secondly, he addressed the *ABC* requirements for deflection:

> Calculations performed using the frame analysis software found total load deflections of 37 mm to be expected. Permissible deflection in structural members is governed by building codes. While a total load deflection of 37 mm may be within prescribed limits, it is the responsibility of the structural engineer to ensure that the total anticipated deflection in the structural member does not impair or affect the non-structural components adjacent to the member being analysed.

[273] Thirdly, he opined that the Great Room Structural Steel engineer would need to confirm the design deflection of the Intermediary Beam with the window supplier:

> As such, it would be incumbent on the designer of the [Intermediate Beam] to confirm what deflection in the [Great Room Structural Steel] is acceptable to the window supplier so as not to impair the performance of the [Great Room Sliding Doors] below the [Intermediary Beam]. ...

[274] Fourthly, he addressed the Guide Track, including the video of the Intermediary Bulkhead being pushed, which I have addressed at paragraph [259], and said:

> The top of the [Great Room Sliding Doors] is guided by [the Guide Track] within an assembly or bulkhead that is offset horizontally from the [Lower Transom]

> above. The [Guide Track] located at the head of the [Great Room Sliding Doors] is far less stiff (resistance to deflection) than the [Intermediary Beam] in the vertical direction and can be expected to deflect under its self weight. The door frame is not directly fastened to the [Intermediary Beam] but is offset [from] the [Lower Transom] by approximately 300 mm horizontally. This offset results in the potential for differential vertical movement between the [Intermediary Bulkhead] and the [Guide Track] creating a binding effect on the [Great Room Sliding Doors] guides.

[275] Then Mr. Demitt summarized his opinion on the issue with the Great Room Sliding Doors as follows:

> In view of the foregoing, it is our opinion that the [Great Room Sliding Doors] are being impacted by the vertical deflections in the [Intermediary Beam] and the [Guide Track] immediately above the [Great Room Sliding Doors]. The vertical movement in these assemblies is placing a vertical load on the top of the [Great Room Sliding Doors] resulting in the binding of the [Great Room Sliding Doors] within the door frame. It should be noted that the resistance and binding observed in the [Great Room Sliding Doors] reduces as the [each of the Great Room Sliding Doors] nears the storage location [within the Great Room wall]. This would be anticipated as the overall deflection in these assemblies reduces as you approach the end supports.

[276] Mr. Demitt set out his overall opinion as follows:

> In our opinion, the beams and the track assemblies supporting and guiding all of the doors in question should have been designed to provide greater stiffness or resistance to vertical deflection. This lack of stiffness has directly resulted in the operational problems observed at [the Murray Residence]. The complexity of the [Great Room Structural Steel] and the [Master Bedroom Sliding Doors] would have required specific engineering input into the design of the curtain wall and the adjacent structure. ...

[277] Mr. Demitt was also asked on cross-examination about the flexibility he observed in the Intermediary Bulkhead when it had been pushed and it had moved by several millimetres. However, he was unsure whether there was flexibility in the drywall or the Intermediary Bulkhead. When he was asked if he had been pushing up on the Intermediary Beam, Mr. Demitt was clear that it was not the Intermediary Beam that was moving.

Mr. Roy's expert opinion on the Great Room Sliding Doors

[278] Mr. Roy did not visit the Murray Residence but relied on information from his colleague who attended a site meeting on August 16, 2016, with others, including representatives from KAPO, Mr. Demitt and the Murrays.

[279] Mr. Roy's opinion was that there was excessive deflection of both the Intermediary Beam and the Guide Track. However, Mr. Roy said that he made the assumption that the Upper Glazing had been suspended, or hung, as indicated by the Approved KAPO Shop Drawings. However, as I have found, the Upper Glazing was not suspended from the Roof Beam.

[280] In his expert report, Mr. Roy said:

- the [Great Room Structural Steel] was adequate to support the loads for which it was designed,
- the [Intermediary Beam] was not designed to support dead loads from the [Upper Glazing],
- structural details for supporting the [Upper Glazing] from the [Roof Beam] were not provided,
- although stamped [the AEL Structural Drawings] showed the [Intermediary Beam] with its strong axis horizontal, no revised [Initial KAPO Shop Drawings] were provided for review showing the [Intermediary Beam] in the same orientation, and
- from pictures of the [Stone Cladding] on the exterior face of the [Roof Beam] and [Intermediary Beam], it appears that natural stone was used instead of the ¾" stone veneer specified on [AEL Structural Drawings].

From the above, the [Great Room Structural Steel] was adequate to support the loads for which it was designed. Structural details for hanging the [Upper Glazing] from the [Roof Beam] were not provided. Wood screws ... were used to support the [Upper Glazing] from the [Roof Beam]. However, no calculations were performed to verify the adequacy of this connection in preventing some or all of the weight from the [Upper Glazing] resting on the [Intermediate Beam] in the [Great Room Structural Steel].

[281] Mr. Roy's conclusion about wood screws being used to support the Upper Glazing from the Roof Beam was based on his review of pre-trial information and that was not the evidence at trial. His opinion on this point is not accepted.

[282] Mr. Roy opined that the structural design requires checking if a structural member meets the requirements of the applicable building code and also determining if it is suitable for the particular application. In the case of the Intermediary Beam, Mr. Roy was of the opinion that it needed to be stiffer and to have less deflection. He also said that due to the possibility of creep and ongoing deflection, over time, the Intermediary Beam was not adequate for the application.

[283] Mr. Roy also opined that a steel beam installed on its Horizontal Axis, as the Intermediary Beam was, loses 95% of its stiffness, in other words, its ability to resist deflection was 5% of what it would have been if installed on its Vertical Axis.

[284] Mr. Roy also opined that when a steel beam is installed on its Horizontal Axis, creep is more likely. Mr. Demitt opined that there is no creep in steel beams, except where exposed to very high temperatures, and there should be none in the Intermediary Beam. However, for the reasons that follow, I find that the functionality of the Great Room Sliding Doors was not affected by any creep in the Intermediary Beam and that the functionality of the Master Bedroom Sliding Doors was not affected by any creep in the Cantilevered Beams.

[285] Mr. Roy opined that as constructed, the Great Room Structural Steel and the structure around the Master Bedroom Sliding Doors does not comply with s 4.1.1.3.(1) of the *ABC*.

[286] Mr. Roy said on cross-examination that the Guide Header would sag and twist under its own weight given its unsupported length.

Challenges to Mr. Demitt's expert opinion

[287] In its closing brief, WBL submitted that:

> Evidence at trial from Mr. Ruggieri showed that calculations were made to account for the [Great Room Sliding Doors] being installed after the weight from the [Upper Glazing] was placed onto the [Intermediary Beam]. The [Murrays'] experts did not consider this method of installation. As such, this Court cannot rely on these opinions and must give them little weight.

[288] Firstly, Mr. Ruggieri's evidence did not show that calculations were made to account for all of the dead loads on the Intermediary Beam. At paragraph [160], I have found that no load calculations were undertaken when the Initial Cross-Section was prepared in October 2012 and that the weight of the Stone Cladding was not considered as a dead load in the calculations undertaken when the AEL Cross-Section was prepared in February 2013.

[289] Secondly, as discussed above, Mr. Demitt's calculations were premised on the Upper Glazing being installed on the Intermediary Beam. WBL incorrectly characterizes the Demitt Reports, including the Demitt Frame Analysis, as a theory upon which this Court should make all kinds of conjecture. Both Mr. Demitt and Mr. Roy found that the Intermediary Beam was not designed to be loaded by the Upper Glazing. Further, Mr. Demitt and Mr. Roy opined that the design did not meet the requirements of the *ABC*. In addition, Mr. Demitt opined that the anticipated deflection should have been discussed with the window manufacturer, KAPO, before being finalized. I find that this last element was particularly important in this case where Mr. Chakrabarti, on behalf of WBL, had discussed with KAPO, and then confirmed by way of the Approved KAPO Shop Drawings, that there would be no weight imparted on the Lower Transom and Great Room Sliding Doors as the Upper Glazing would be hung from the Roof Beam.

[290] What the evidence demonstrates, and I have found, is that the dead load from the Stone Cladding was not considered in the Installation Sequence. Further, the Stone Cladding was installed months after the Great Room Sliding Doors were installed and was coincident with the functionality issues.

[291] Further, I find that the Intermediary Beam was not designed in accordance with the *ABC*. The Demitt Frame Analysis demonstrated that the maximum deflection was 37 mm and Mr. Demitt's opinion was that the *ABC* permitted a maximum deflection of 37 mm. However, Mr. Demitt opined that the contravention of the *ABC* occurred due to the Intermediary Beam deflection impacting other elements. During closing argument, WBL also asserted that because the only indicator of non-compliance with the *ABC* was the non-functionality of the Great Room Sliding Doors that Mr. Demitt did not provide an explanation as to why the Great Room Structural Steel was the reason for the functionality issues. This is not correct. It was Mr. Demitt's opinion that the deflection in the Intermediary Beam was causing the binding of the Great Room Sliding Doors.

[292] WBL's assertion that Mr. Demitt does not know whether the Intermediary Beam is deflecting and transferring load to the Great Room Sliding Doors is based on a submission that the theoretical Demitt Frame Analysis should be rejected in favour of exact measurements. Exact measurements would have been available had the Intermediary Bulkhead been disassembled and the Intermediary Beam exposed. In this simple case, exposure of the element in question may have been an option. In many cases dealing with engineering failures, opening up a space to expose an element to measure is not available, sometimes because of inaccessibility or damage to the

element. In those cases, forensic techniques are used to perform engineering analyses. Mr. Demitt was qualified as an expert in failure analysis and chose to perform a forensic analysis. I accept Mr. Demitt's chosen approach.

[293] WBL also takes issue with Mr. Demitt not knowing the extent to which the Intermediary Beam deflected before and after the Upper Glazing was installed. Mr. Demitt was not on-site when the Upper Glazing was installed. If any engineer had an obligation of inspection that would have been AEL who designed the Great Room Structural Steel, which would have been coordinated by WBL as construction manager. I note that there was no evidence of any inspection being performed by AEL after the installation of the Great Room Structural Steel or any measurements of the deflection in the Intermediary Beam either before or after the Upper Glazing was installed. This is remarkable particularly because the Additional Structural Steel was installed after the Initial Structural Steel was erected and there was no evidence of any design or calculations relating to the Additional Structural Steel.

[294] WBL also raises a concern because Mr. Demitt did not measure the Lower Transom. However, Mr. Demitt's evidence was that the Guide Track was affixed to the Lower Transom and based on the Approved KAPO Shop Drawings, the Lower Transom and the Guide Track were an integral unit. The Lower Transom was affixed to the Intermediary Bulkhead. Mr. Demitt measured the Intermediary Bulkhead using a rotating laser level and survey rod to measure the deflection at the mid-point of the Intermediary Bulkhead relative to the points where the Great Room Sliding Doors enter into their end pockets, a distance of 32 feet. When the Great Room Sliding Doors were:

(a) closed, the deflection at the centre was 8 mm greater than the end pocket points; and

(b) open, the deflection at the centre was 10 mm greater than the end pocket points.

[295] The change in deflection based on whether the Great Room Sliding Doors are open or closed raises another issue. It was demonstrated that there was movement in the Intermediary Bulkhead which could not be associated with movement in the Intermediary Beam. There was no evidence regarding the cause of the movement in the Intermediary Bulkhead. In relation to the Great Room Windows and Doors, the opinion evidence of Mr. Demitt focused on the deflection of the Intermediary Beam.

[296] Mr. Demitt said he was unable to undertake any engineering analysis of the Guide Track:

> The [Guide Track], while not necessarily intended to be load bearing, does support the weight of the [Lower Transom] above. No engineering properties of the [Guide Track] structure [were] provided so calculation of deflections within this component cannot be performed. Visual observations do indicate that [it] is readily moved which would indicate that it is subject to excessive movement.

[297] Mr. Demitt opined that both the Intermediary Beam and Guide Track should have been designed to provide greater stiffness or resistance to vertical deflection and that this lack of stiffness directly resulted in the Great Room Sliding Doors functional problems.

[298] Under cross-examination, Mr. Demitt maintained that the binding was caused by both the deflection in the Intermediary Beam and the Guide Header:

> So there is a chain of components there. So yes, the [Guide Header] does move on its own, but it's also -- it's a cumulative deflection between the [Intermediary Beam] and the deflection in the [Guide Header].

[299] In closing argument, WBL asserted that there were too many unknowns in Mr. Demitt's conclusions to give any weight to his opinion. WBL further submits that Mr. Demitt did not demonstrate that his theory was the actual cause of the functionality issues or even the probably likely cause of the binding. I disagree. Mr. Demitt visited the Murray Residence on numerous occasions, took measurements and performed the Demitt Frame Analysis. On the basis of this investigation, he arrived at his opinions. I find that I can rely on Mr. Demitt's opinion that the reason the Great Room Sliding Doors are binding is that they are subject to excessive deflection from both the Intermediary Beam and the Guide Track.

Conclusion on the Great Room Sliding Door binding

[300] WBL asserts that the Intermediary Beam was pre-loaded in accordance with the Installation Sequence so that it had already deflected when the Great Room Sliding Doors were installed.

[301] The Installation Sequence called for the Lower Transom to be installed first. Then the Upper Glazing was installed by resting it on the Intermediary Beam. With these steps completed, in WBL's submission, the applied dead load allowed the Intermediary Beam to reach its maximum deflection before the installation of the Great Room Sliding Doors.

[302] WBL asserts that this pre-loading and deflection of the Intermediary Beam means that the deflection in the Intermediary Beam is not the cause of the Great Room Sliding Doors functionality issues and that those issues must be caused by the Guide Header. I disagree for the following reasons.

[303] Mr. Demitt testified that the Intermediary Beam could not be fully pre-loaded because all of the live loads (such as snow) are not on the structure all of the time. I accept Mr. Demitt's opinion that the Intermediary Beam could not be fully pre-loaded.

[304] In addition, Mr. Demitt opined that it was not possible to install the Great Room Sliding Doors with clearance in the Guide Header and expect them to function properly because there would be fluctuations in the moisture content of the wood framing and the Intermediary Bulkhead as the Murray Residence was closed-in, affecting their dimensions, and the performance of the Great Room Sliding Doors.

[305] I find that the Great Room Sliding Doors functioned when first installed. I further find that the Great Room Sliding Doors functionality issues arose several months after installation, coincident with the installation of the Stone Cladding. I have already found, at paragraph [160], that the dead load of the Stone Cladding was not considered in the AEL Cross-Section.

[306] In direct examination, Mr. Roy opined that, whether veneer or full stone, the Stone Cladding would have added dead load to the Intermediary Beam and contributed to its deflection. Under cross-examination, Mr. Roy testified that the only dead loads applied to the Intermediary Beam, other than the Upper Glazing, were the dead loads relating to the Stone Cladding on the Intermediary Beam and the interior drywall, and that these additional loads were "minimal". However, Mr. Roy did not mention the dead load from the Lower Glazing and Guide Header in his response and, as noted at paragraph [279], Mr. Roy was not aware of the actual installation method used for the Great Room Windows and Doors. Further, as noted at paragraph [66], Mr. Roy never visited the Murray Residence and relied on observations of a colleague who visited on August 22,

2016, to prepare his June 10, 2019, report. For these reasons, I reject Mr. Roy's opinion about the additional dead loads on the Intermediary Beam being "minimal".

[307] WBL asserts that there was:

> ... no evidence that any added load from the [Stone Cladding] resulted in deflection to the beam such that it impacted the [Great Room Sliding Doors]. These are assumptions the [Murrays] are making and not even their own experts have stated the same. To the contrary, [AEL] has given evidence that it accounted for the loads of the exterior finish to the great room structure.

[308] WBL's assertion cannot be accepted because, at paragraph [160], I found that AEL did not consider the dead load of the Stone Cladding and, Mr. Demitt testified that:

> The photographs -- construction photographs provided to me by Mr. and Mrs. Murray showed the doors installed prior to the drywall, bulkhead being constructed inside, and prior to the stone cladding being placed on the outside of the home. As a consequence, the final dead load is not on the structure when the doors are in place. In that respect, when the comment was made that the doors initially operated freely, it was consistent. You start putting more weight -- permanent weight on the exterior of this home. You are now going to induce additional deflection in that steel beam, whether it's the [Roof Beam] or whether it's the [Intermediary Beam].

[309] I accept Mr. Demitt's opinion on these points.

[310] The AEL Cross-Section does not mention the Stone Cladding in the Installation Sequence but shows that there will be a ¾ inch sandstone veneer on the cross-section. Mr. Murray said he thought that the Stone Cladding was ¾ inch thick though he was not confident in giving this evidence. Other than Mr. Murray's evidence, there was no evidence that the Stone Cladding was anything other than the ¾ inch sandstone veneer noted on the AEL Cross-Section.

[311] Mr. Roy noted in his expert report that from his review of photographs of the Murray Residence it was his assumption that the Stone Cladding was not a veneer but rather full natural stone. He also observed that the Approved KAPO Shop Drawings were revised by Mr. Chakrabarti to increase the flashing to 216 mm [8½"] wide, which he assumed indicated a revision from a veneer to full stone. On cross-examination he admitted that no lintel could be identified in those same photos even though a lintel would be required for full stone cladding. Mr. Roy never inspected the Murray Residence. There was no evidence to verify Mr. Roy's assumption that the Stone Cladding was greater than ¾ inch thick, and in light of Mr. Murray's evidence, I reject Mr. Roy's assumption that the Stone Cladding was full natural stone.

[312] During construction, Mr. Chakrabarti located and sourced the Stone Cladding which was installed over a period of several months. Mr. Chakrabarti testified that the Stone Cladding was installed after the Great Room Sliding Doors were installed probably in the summer of 2013 and that functionality issues with the Great Room Sliding Doors "may have coincided" with that installation.

[313] Mr. Chakrabarti testified that the Installation Sequence "explains how the installation should proceed so that the [Great Room Sliding Doors] are the very last item that gets installed so that all of the dead loads are already in place before those doors go in". The added dead load of the Stone Cladding and interior drywall/clay surface was contrary to the Installation Sequence as these dead loads were added after the installation of the Great Room Sliding Doors.

[314] Regardless of whether the Stone Cladding was veneer or full natural stone, I have found that the AEL Cross-Section dead load calculations and Installation Sequence did not take into account any stone cladding, and, as a result, the Stone Cladding added an additional dead weight to the Intermediary Beam.

[315] I am satisfied that the Murrays have proven that:

(a) the Great Room Sliding Doors:

(i) do not function as they were designed to function;

(ii) were not installed in accordance with the Approved KAPO Shop Drawings and that WBL did not advise KAPO of the change in installation method;

(iii) were installed before all of the dead load was applied to the Intermediary Beam; and

(iv) bind because they are subject to excessive deflection from both the Intermediary Beam and the Guide Header;

(b) the design of the Intermediary Beam installation on its Horizontal Axis contributed to excessive deflection in relation to the tolerances for the Great Room Sliding Doors and as such is not in compliance with the *ABC*;

(c) the Additional Steel Structure was not subject to a structural design approved and stamped by a professional engineer as required by Part 4 of the *ABC*; and

(d) the Guide Track should have been designed to provide greater stiffness or resistance to vertical deflection.

3.3 Binding of the Master Bedroom Sliding Doors

[316] The evidence that the Master Bedroom Sliding Doors are binding and do not function as intended was not contentious.

[317] KAPO supplied the Master Bedroom Sliding Doors but there was no evidence that the design or manufacture of those doors was in anyway deficient or defective.

[318] Mr. Roy opined that the binding issues with the Master Bedroom Sliding Doors were unrelated to the binding issues with the Great Room Sliding Doors; both sets of the Master Bedroom Sliding Doors were affected by binding; and that he had insufficient information to determine the cause of the binding.

[319] Mr. Chakrabarti testified that the Cantilevered Beams supporting the roof above the Master Bedroom Sliding Doors were LVL. Mr. Demitt concluded that the Master Bedroom Sliding Doors were supported on their floor track with alignment provided by the Upper Track.

[320] Mr. Demitt took level measurements using a rotating laser level and a survey rod at the point where the two Master Bedroom Sliding Doors meet at a 90-degree angle and where he anticipated the greatest deflection, with both the doors closed and open. After discussing the Great Room Sliding Doors, see paragraphs [271] to [275], Mr. Demitt said:

> Similar conditions exist with the [Master Bedroom Sliding Doors]. Vertical deflection in the structure supporting the [Upper Track] results in the binding of the door frame. The binding in these two doors is exacerbated by the binding of the leading edge of the door against the track at the top of the door.

[321] Mr. Demitt's analysis of the Master Bedroom Sliding Doors functionality was not the subject of any challenges.

[322] Mr. Chakrabarti testified that Tech-Wood had software that limited LVL beams to a 7-foot cantilever. Given that the design called for the 8-foot Cantilevered Beam, Tech-Wood contacted Mr. Chakrabarti to advise that it might require a third party engineer to stamp the design of the 8-foot Cantilevered Beam, and to inquire if AEL could do that. Mr. Chakrabarti testified that he asked Tech-Wood "typically how do you guys get around it". Mr. Chakrabarti said that they reached a consensus to "beef up the beam to a larger beam just to sort of keep things on the safe side". Mr. Chakrabarti said that Tech-Wood told him that it would let him know if the LVL manufacturer had any issues with that solution. In Mr. Chakrabarti's view, Tech-Wood was able to resolve the issues internally and AEL did not get involved. Mr. Chakrabarti said that during this conversation with Tech-Wood he was acting in his capacity as an engineer with AEL.

[323] Although Mr. Chakrabarti may have discussed the involvement of AEL in his capacity as an engineer with AEL, AEL never became involved in the coordination of the Cantilevered Beams and the trusses. WBL took on the coordination of the Murray Residence and an obligation to ensure that Tech-Wood was advised of the conditions at the Murray Residence, including applicable dead loads, and to engage professional consultants when required.

[324] In its coordination role, WBL had an obligation to communicate the dead loads and tolerances to Tech-Wood so that it would include them in the design of the Cantilevered Beams. There was no evidence that WBL provided Tech-Wood with the dead load associated with the Stone Cladding, or the interior decorative beam, so that such loads could be considered in the calculations for the Cantilevered Beam. Further, there was no evidence that WBL provided Tech-Wood with any information about the Cantilevered Beam tolerance for deflection given that it would be immediately above the Master Bedroom Sliding Doors.

[325] I find that WBL did not engage an engineer to review the Tech-Wood design for the Cantilevered Beam or, alternatively, ensure that the Tech-Wood design was stamped by an engineer.

[326] I am satisfied that the Murrays have proven that:

(a) the Master Bedroom Sliding Doors do not function as they are designed to function; and

(b) the deflection in the Cantilevered Beam has caused the Master Bedroom Sliding Doors to bind.

Issue 4: Did WBL breach its contract with the Murrays?

[327] I have set out the express and implied terms of the oral agreement between WBL and the Murrays at paragraph [235]. I find that WBL breached its contract with the Murrays and that the breaches were direct causes of the binding that is preventing the Great Room Sliding Doors and Master Bedroom Sliding Doors from functioning as intended. Based on the evidence, and my findings of fact already discussed, I find that the particulars of those breaches are as follows:

(a) failing to ensure that the design and construction of the Murray Residence was adequately coordinated, or in the alternative, failing to engage a professional to

ensure the coordination, specifically, to ensure that all necessary engineering designs were obtained from a professional engineer registered in Alberta;

(b) in relation to the Great Room Structural Steel:

(i) failing to provide to AEL all of the dead loads of which it was aware, including the Stone Cladding, when it engaged AEL to prepare the design of the Initial Structural Steel;

(ii) failing to obtain an engineering design for the Great Room Structural Steel prepared by AEL which included all of the dead loads of which it was aware, including the Stone Cladding;

(iii) obtaining from KAPO, and failing to provide to AEL, information regarding the tolerances for the Great Room Sliding Doors when the Installation Sequence was prepared;

(iv) failing to obtain and retain a professional engineer to design the Additional Structural Steel and to maintain a copy of that design;

(c) in relation to the Great Room Windows and Doors:

(i) signing-off on the Approved KAPO Drawings that the Upper Glazing would be hung and that there would be no dead load imparted on the Great Room Sliding Doors when WBL had not obtained or retained any party to prepare such a design;

(ii) failing to provide its subcontractor, Emperor Homes, with any drawing or method of installation for the Upper Glazing, including the Installation Sequence;

(iii) advising on an installation method for the Great Room Windows and Doors that included resting the Upper Glazing on the Intermediary Beam when it had already deflected under its own weight;

(iv) failing to follow the Approved KAPO Shop Drawings when installing the Great Room Windows and Doors;

(v) after having noted to KAPO that there would be no load resting on the Great Room Sliding Doors, changing the method of installation of the Upper Glazing to rest on the Intermediary Beam without coordinating with, or seeking instructions from, KAPO about that new installation method; and

(vi) coordinating the installation of the Stone Cladding after the installation of the Great Room Sliding Doors without ensuring that there would be no impact on the functionality of the Great Room Sliding Doors.

(d) in relation to the Master Bedroom Windows and Doors by:

(i) failing to provide to Tech-Wood all of the dead loads of which it was aware, including the Stone Cladding and the interior decorative beam;

(ii) obtaining from KAPO, and failing to provide Tech-Wood with, information regarding the tolerances required for the Master Bedroom Sliding Doors; and

(iii) failing to obtain an engineer-stamped design for the Cantilevered Beams, which considered all dead loads of which WBL was aware and the tolerances for the Master Bedroom Sliding Doors.

Issue 5: Did WBL breach the *Sale of Goods Act*?

[328] Given my finding that WBL did not take responsibility for the supply of the KAPO Windows and Doors, I find that it cannot be in breach of the *Sale of Goods Act* in respect of the same.

Issue 6: Did AEL breach its contract with the Murrays?

[329] I have found that the Murrays, with WBL acting as their representative or agent, entered into an oral contract with AEL. However, the Murrays did not pursue a claim in contract against AEL.

[330] WBL filed its Statement of Defence on May 29, 2015, and pleaded, in the alternative, that if the Murrays suffered any loss, the co-defendants contributed to that loss. AEL was not a named defendant at that time as it was added when the Amended Statement of Claim was filed on November 5, 2015. WBL did not file an amended Statement of Defence. WBL filed a Third Party Claim against KAPO but not against AEL. WBL has no claim against AEL but pleaded the *Contributory Negligence Act*, RSA 2000, c C-27.

[331] Even though neither the Murrays nor WBL have a direct contractual claim against AEL, an assessment of whether AEL breached its contract with the Murrays is relevant in the context of understanding AEL's role and whether it lived up to that role.

[332] Based on the evidence, and my findings of fact already discussed, I find that AEL breached its contract with the Murrays in the following manner:

(a) the engineering services provided by AEL in relation to the Great Room Structural Steel were not in compliance with the *ABC* because the Great Room Structural Steel design did not adequately consider the impact of:

(i) the Stone Cladding on the deflection of the Intermediary Beam; and

(ii) the deflection of the Intermediary Beam on the Great Room Sliding Doors;

(b) the engineering services provided by AEL were not performed at the level of skill of a reasonably competent professional engineer in Alberta, who is engaged as a consultant engineer for large and complex residential projects, between 2011 and 2013, as evidenced by the failures noted in subparagraph (a); and

(c) the engineering services provided by AEL were not performed using reasonable care and diligence as evidenced by the failures noted in subparagraph (a).

Issue 7: Are the defendants liable in negligence?

7.1 Murrays' Negligence claims against the defendants

[333] The Murrays claim that WBL, AEL, KAPO, Luxus and Mr. Bade owed them a duty of care, and specified those duties in their Amended, Amended, Amended Statement of Claim. Not

all of the alleged duties relate to all of the defendants, and they must be slightly revised given my finding that WBL did not subcontract any of Mr. Bade, Luxus or KAPO. I find that the duties that the Murrays alleged that the defendants breached can be paraphrased and grouped as follows:

(a) as against Mr. Bade, Luxus and KAPO, or one or more of them, a duty to:

  (i) sell, supply, import, or distribute properly working doors and windows, including the KAPO Windows and Doors; and

  (ii) avoid causing loss and damage to the Murrays in the provision of defective products;

(b) as against WBL, a duty to install the KAPO Windows and Doors in a good, diligent, workmanlike, and professional manner;

(c) against AEL, a duty to provide engineering work in a good, diligent, workmanlike, and professional manner in accordance with the standard of care of an engineer in Alberta and all applicable standards, including the *ABC*; and

(d) against all of the defendants, a duty to warn the Murrays that the KAPO Windows and Doors had inherent issues arising from their size, weight and intended operation such that significant structural issues and defects had to be considered before they were installed; these alleged inherent issues were limited to those raised in the pleadings, questioning and expert reports.

7.2 Damages claimed by the Murrays

[334] The Murrays pleaded that they incurred damages in the amount of $50,000 for inconvenience and their time spent dealing with the issues. The only evidence on this point was very general commentary and there was no evidence to establish such a claim in law or fact.

[335] The evidence was focussed on the causes of the non-functionality of the Great Room Sliding Doors and the Master Bedroom Sliding Doors and the damages to remove, repair or replace them. Based on my findings of fact, I find that the Murrays suffered the following categories of damages, some of which overlap:

(a) the cost to remove and replace the Great Room Structural Steel with a structure that has limited deflection and will not bind the Great Room Sliding Doors;

(b) the cost to repair or replace the Great Room Sliding Doors that are binding in part due to the deflection in the Intermediary Beam;

(c) the cost to repair or replace the Great Room Sliding Doors that are binding in part due to the sagging of the Guide Header;

(d) the cost to remove and replace the Cantilevered Beams with a structure that has limited deflection and will not bind the Master Bedroom Sliding Doors; and

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

[336] The Murrays presented evidence on all of these damages and WBL and Luxus jointly presented rebuttal evidence on damages. All of the claimed damages relate to the cost of repair; however, only the damages in (b), of the paragraph above, relate to the cost of repair of an item damaged by a defect in another part of the Murray Residence. All of the other damages relate to

the cost of removal, repair or replacement of some element of the Murray Residence. There is no distinction to be made between the categories of damages set out at paragraph [335] because the "complex structure theory" was rejected by La Forest J in ***Winnipeg Condominium Corporation No 36 v Bird Construction Co***, 1995 CanLII 146 (SCC), at para 15. At para 15, La Forest J quoted from the House of Lords decision in ***Murphy v Brentwood District Council***, [1990] 2 All ER 908, where Lord Bridge commented that:

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

[337] In the Murray Residence, the defects all relate to parts of a complex structure. There is no window or door that, due to defect, affected the structure in which it was incorporated. The Great Room Structural Steel affected the Great Room Windows and Doors and the Master Bedroom structure affected the Master Bedroom Sliding Doors. The Guide Track was an integral part of the Great Room Sliding Doors. However, as elements of one complex structure, it cannot be said that one part damaged another part. With all of the defects being part of one structure, there is no possible claim by one defendant against another for one element injuring another element of the Murray Residence.

7.3 Pure economic loss for negligent supply of shoddy goods or structures

[338] The law of negligence has allowed claims against another party, without privity of contract, for physical damage and personal injury. However, the general principles of negligence do not extent to the cost of repair because that would transform a rights-based approach to negligence into a claim of warranty without contract. The evolution of the law of negligence was discussed by Professors Klar and Jeffries in *Tort Law*, 7th ed (Toronto: Thomson Reuters, 2023) at pages 353 and 354, footnotes omitted:

> A final category of cases wherein recovery of pure economic losses has occasionally been permitted comprises economic losses suffered by non-privity users of defective products or buildings. While *Donoghue v. Stevenson* swept away the requirement of privity for persons physically damaged by negligently manufactured goods and buildings, it did not do so in respect of the pure economic losses suffered by these users. Negligence law certainly allows recovery for physical damages and personal injuries caused to foreseeable victims by defective products or structures. It even may allow recovery for physical damage caused to one part of a structure as a result of a defect in another part. It may allow the recovery of money expended in order to avert a threatened accident. However, it does not allow a user of a product or owner/occupant of a structure to sue the manufacturer or builder, in tort, for economic losses associated merely with the poor performance or quality of the product or structure. In the latter case, the common law has confined the complainants to either their contractual recourse against the seller or builder, or to whatever statutory protection might be available.

[339] Since ***Winnipeg Condominium***, the law has been clear that repair to defective products and structures was a type of pure economic loss and only recoverable where it is proven that there is an imminent danger arising from a dangerous defect. There was no dangerous defect alleged or

proven in relation to the Murray Residence. The Murrays have been inconvenienced by the non-functioning Great Room Sliding Doors and Master Bedroom Sliding Doors.

[340] With the decision in ***1688782 Ontario Inc v Maple Leaf Foods Inc***, 2020 SCC 35, the majority of the Supreme Court of Canada has made it clear that it is not possible to claim for the repair of defective products and structures that are not proven to be an imminent danger. As the authors discuss in AM Linden et al, *Canadian Tort Law*, 12th ed (Toronto, Ontario: LexisNexis Canada, 2022), at pages 472, 473 and 478, footnotes omitted:

> ... For the past 25 years, dating back to the Supreme Court's decision in *Winnipeg Condominium*, the rule in Canada has been that one may recover economic loss related to correcting dangerous defects in the product or structure. The question of recovery for non-dangerous defects was left open in *Winnipeg Condominium*. In 2020, the law in Canada was changed quite dramatically by the Supreme Court in the *Maple Leaf* case. In brief, the new rule seems to be that the plaintiff's claim must be based on an imminent danger to the plaintiff's own person or property, and even in that case the claim will not succeed if the plaintiff might have allocated the risk of the dangerous defect by contract. This is a major change from *Winnipeg Condominium*. Most product defect economic loss claims are now unlikely to succeed in Canada. ...
>
> . . .
>
> Finally, the Supreme Court settled this debate in *Maple Leaf Foods*, holding that whatever limited right to recover for product defect loss survived in that case, the right was derived from a danger to persons or property, and there could be no recovery grounded in non-dangerous defects.

[341] In *Tort Law*, at pages 359 and 360, footnotes omitted, Professors Klar and Jeffries state:

> Although the facts of *Maple Leaf Foods* did not comfortably fit into the typical case of the production of shoddy and dangerous products or structures, the judgment is reaffirmation that the basic principle of *Winnipeg Condominium* remains good law, even after *Cooper v. Hobart*. ...

[342] As noted, there was no evidence of any imminent danger in relation to the Murray Residence and no allegation that any poor-quality materials were used; in fact, the evidence was that the Murray Residence is a very well-constructed high-end residence, except for the issues raised in this action. However, the Murrays had an oral contract with WBL, and I have found that WBL breached that contract. While I have found that the Murrays had an oral contract with AEL, they did not claim for a breach of contract.

[343] When a claim relates to building defects, and there is a contract between the parties, the contract is the appropriate method of recovery. This point was made by the majority in ***Maple Leaf***, at para 47:

> ... But merely shoddy products, as opposed to dangerous products, raise different questions pertaining to issues such as implied conditions and warranties as to quality and fitness for purpose, and not of real and substantial threats to person or property ... In our view, those claims are better channelled through the law of contract, which is the typical vehicle for allocating risks where the only complaint is of defective quality ... Further, and even more fundamentally, such concerns do

> not implicate a right protected under tort law. As Laskin J.A. explained in *Hughes v. Sunbeam Corp.* ... , in identifying the limits of the duty, "compensation to repair a defective but not dangerous product will improve the product's quality but not its safety". Again, we observe that, absent a contractual or statutory entitlement, there is no right to the quality of a bargain.

[344] The Murrays and WBL rely on ***ATCO Energy Solutions Ltd v Energy Dynamics Ltd***, 2024 ABKB 162. However, that case dealt with an inherently dangerous product and therefore is distinguishable from this case: see para 89.

[345] The Murrays and WBL assert that this case is distinguishable from ***Maple Leaf*** because the KAPO Windows and Doors were custom designed and manufactured specifically for the Murray Residence, unlike the massed-produced products at issue in ***Maple Leaf***. However, this is not a factor to be considered in the analysis which has broad applicability to the supply of shoddy goods or structures.

[346] In the result, the damages claimed by the Murrays in tort against the defendants relating to supply of shoddy goods or structures are for pure economic loss. In a defective building case, there can be no claim for pure economic loss unless it is proven that there is an imminent danger. This was neither pleaded nor proved. As a result, all of the Murrays for defects in the KAPO Windows and Doors, or the construction of the Murray Residence, against all of the defendants must fail.

[347] WBL has pleaded that Luxus and KAPO were negligent in a number of respects. The claims of negligent misrepresentation and duty to warn are addressed below. All of WBL's other third party claims all fall under the auspices of the negligent supply of shoddy goods.

[348] WBL disclaimed that it had any contract with KAPO, Luxus or Mr. Bade for the KAPO Windows and Doors, but claims against them for the negligent supply of shoddy goods or structures. This claim fails for the same reasons as I have set out in relation to the Murrays' claim for negligent supply of shoddy goods or structures.

7.4 Negligent misrepresentation or performance of a service

Murrays' claims against WBL and AEL

[349] The Murrays pleaded that AEL owed them a duty to provide engineering work in a good, diligent, workmanlike, and professional manner in accordance with the standard of care of an engineer in Alberta and all applicable standards, including the *ABC*. This constitutes a claim of negligent performance of a service.

[350] The Murrays have not pleaded a specific negligent performance of a service against any other of the defendants. However, I have found that WBL performed the services of a project manager / construction manager. Further, the Murrays have pleaded that WBL had a duty to install the KAPO Windows and Doors in a good, diligent, workmanlike, and professional manner which could constitute a claim of negligent performance of a service.

[351] In ***Maple Leaf***, at para 32, the Court said, emphasis in the original:

> In cases of negligent misrepresentation or performance of a service, two factors are *determinative* of whether proximity is established: the defendant's undertaking, and the plaintiff's reliance ... Specifically, "[w]here the defendant undertakes to provide a representation or service in circumstances that invite the plaintiff's reasonable reliance, the defendant becomes obligated to take reasonable care", and "the

> plaintiff has a right to rely on the defendant's undertaking to do so" ... "These corollary rights and obligations", the Court added, "create a relationship of proximity" ... In other words, the proximate relationship is formed when the defendant undertakes responsibility which invites reasonable and detrimental reliance by the plaintiff upon the defendant for that purpose ...

[352] Here, the Murrays had a relationship with, and received an undertaking from, both WBL and AEL to perform their respective services in a manner that would correspond with their respective contracts with the Murrays. There was no evidence to suggest that any duty of care was different or beyond their contractual obligations. From their contractual obligations and breaches, it is possible to determine the scope of the duty of care and how it was breached: see paragraphs [327] and [332].

[353] In ***Maple Leaf***, at para 71, the Court raised the concern of using tort law to circumvent contractual arrangements. Although the Murrays' contracts with AEL and WBL were not written, I have considered the evidence and set out the implied terms of those oral contracts. At paras 72 and 73, emphasis in the original, the Court said:

> ... in the case of defective goods and structures, commercial parties between or among whom the product is transferred before it reaches the consumer will have had a chance to allocate risk and order their relationship via contract. And in assessing the proximity of relations among those parties - that is, in evaluating "expectations, representations, reliance, and the property or other interests involved" - courts must be careful not to disrupt the allocations of risk reflected, even if only implicitly, in relevant contractual arrangements.
>
> In sum, under the *Anns/Cooper* framework and its rigorous proximity analysis, the determination of whether a claim of negligent supply of shoddy goods or structures is supported by a duty of care between the plaintiff and the defendant requires consideration of "expectations, representations, reliance, and the property or other interests involved", as well as any other considerations going to whether it would be "just and fair", having regard to the relationship between the parties, to impose a duty of care. In particular, where the parties are linked by way of contracts with a middle party that, taken together, reflect a multipartite allocation of risk, courts must be cautious about allowing parties to circumvent that allocation by way of tort claims. Courts must ask: is a party using tort law so as to circumvent the strictures of a contractual arrangement? *Could* the parties have addressed risk through a contractual term? And, *did* they? In our view, and as we will explain, these considerations loom large here.

[354] Although the Murrays had expectations and relied on AEL and WBL, and AEL and WBL made representations, any duties that AEL and WBL owed to the Murrays are analogous to their obligations arising under their respective contracts. In this context, allowing the claim in negligent performance of a service against AEL and WBL would not be just and fair as it would be an unjustified encroachment of tort law into the realm of contract: ***Maple Leaf***, para 71.

Murrays' claims against KAPO, Luxus and Mr. Bade

[355] The Murrays have not expressly pleaded that any of KAPO, Luxus or Mr. Bade negligently performed any service. However, it was submitted that those defendants had an obligation to

provide instructions (or warnings, addressed below), in English, regarding the assembly and installation of the KAPO Windows and Doors. Since it would be possible to characterize an obligation to provide instructions as the performance of a service, and the failure to do so the negligence performance of that service, this possible claim is addressed here.

[356] The Murrays rely on ***Tom Cannon & Associates Ltd v British Aviation Insurance Group (Canada) Ltd***, [1999] OJ No 3639, at paras 211 and 212, upheld on appeal: 2001 CanLII 32757 (ONCA). That case dealt with a manual for a helicopter and the standard to be applied in its preparation, which is clearly distinguishable from this case. Firstly, there is no allegation here that there was any defect with the assembly or installation of the KAPO Windows and Doors. The Murrays' allegation relates to not being advised, in English, that the Great Room Sliding Doors and Master Bedroom Sliding Doors could not support any weight or deflection from the structure above.

[357] There is no evidence that KAPO had any direct relationship with the Murrays; rather, all communication was with the Murrays' representative WBL. Luxus only interacted with WBL, though there may have also been a discussion between Mr. Grosse and Mr. Murray about a deposit. Ms. Murray met Mr. Bade at the Canmore house viewing and during the window ordering process. There was no evidence that any of KAPO, Luxus or Mr. Bade had any relationship with the Murrays directly in terms of addressing technical matters. Instead, KAPO, Luxus and Mr. Bade interacted at all times with WBL, as the Murrays' representative.

[358] There are a number of reasons why this claim cannot succeed:

(a) at its core, this is another way of framing a claim for damages for negligent supply of shoddy goods, and that is what the damages relate to - it would not be just and fair to allow a claim for the negligent provision of services related to the negligent provision of shoddy goods;

(b) KAPO provided advice to WBL during the Austria Trip that the Great Room Sliding Doors and Guide Track were to have no weight placed on them and WBL understood that requirement; and

(c) there was no evidence that the Murrays or their representative, WBL, relied on instructions in English that no weight could be placed on the KAPO Windows and Doors, this is evidenced by the following:

(i) the Initial Shop Drawings contained a notation, in German, that there was to be no weight placed on the Great Room Sliding Doors and the Master Bedroom Sliding Doors;

(ii) there was no evidence that Mr. Chakrabarti was confused by the Initial Shop Drawings or asked for clarification or a translation; and

(iii) Mr. Chakrabarti, on behalf of WBL, representing the Murrays, signed the Initial Shop Drawings and they became the Approved Shop Drawings, where Mr. Chakrabarti specifically noted there would be no weight placed on the Great Room Sliding Doors.

[359] Based on the above, there was no reliance and, to the extent that there was an expectation, that expectation was fulfilled. It would not be just and fair to find proximity where the negligent performance of a service claim is just another way of presenting a negligent supply of shoddy

goods claim. As a result, there is no proximity between the Murrays and any of KAPO, Luxus and Mr. Bade in relation to the negligent provision of services.

[360] The Murrays did not plead any negligent misrepresentation, except that KAPO held itself out to the public, and to the Murrays, that it was a manufacturer of doors and windows of the highest quality. There was no evidence regarding this allegation, and I find that it was not made out by the Murrays.

WBL's claims against KAPO and Luxus for negligent misrepresentation

[361] WBL alleges in its Third Party Claim against KAPO and Luxus that they owed WBL a duty of care "whether statutory, contractual, common law or otherwise to ensure that the [KAPO Windows and Doors] were fit for their intended purpose, were made in accordance with industry standards and were delivered with the necessary instructions and written specifications to allow for proper installation".

[362] WBL pleaded that KAPO and Luxus negligently misrepresented:

(a) that the KAPO Windows and Doors were reasonably fit for their intended purpose when KAPO and Luxus knew or ought to have known the information was being relied on by WBL and that the KAPO Windows and Doors were not suitable; and

(b) the suitability and usability of the KAPO Windows and Doors, when they knew or ought to have known this was incorrect or inaccurate, or both, and that the information was being relied upon by WBL.

[363] The Court in ***Maple Leaf***, at para 32, noted in cases based on negligent misrepresentation that the proximate relationship is formed when a defendant undertakes responsibility which invites reasonable and detrimental reliance by a plaintiff upon that defendant for that purpose.

[364] At trial, WBL distanced itself from any relationship with KAPO and Luxus to the extent possible. In closing argument, WBL asserted that the custom nature of the KAPO Windows and Doors created a special relationship between WBL and KAPO and Luxus.

[365] There was a relationship between KAPO and WBL because WBL, as a representative of the Murrays, attended the KAPO facilities during the Austria Trip and reviewed the Initial Shop Drawings from KAPO. Luxus facilitated and paid, at least in part, for WBL's participation in the Austria Trip. There was also a foreseeability of injury in that a defect in the KAPO Windows and Doors could affect the Murray Residence. However, it was not demonstrated that any of KAPO, Luxus or Mr. Bade could foresee WBL suffering any injury.

[366] There are a number of reasons why WBL's claims of negligent misrepresentation cannot succeed:

(a) at its core, these claims are another way of framing claims for damages for negligent supply of shoddy goods, and the damages relate to a claim for indemnification for the Murrays' repair cost for which WBL is responsible - it would not be just and fair to allow a claim for the negligent misrepresentation related to the negligent provision of shoddy goods;

(b) there was insufficient evidence to demonstrate that either KAPO or Luxus made any representation that the KAPO Windows and Doors were reasonably fit for their intended purpose;

(c) there was insufficient evidence to demonstrate KAPO or Luxus knew, or ought to have known, that WBL was relying on a representation that the KAPO Windows and Doors were reasonably fit for their intended purpose;

(d) while I have found that the Guide Track was not adequately designed for stiffness, there was insufficient evidence to demonstrate that KAPO and Luxus knew, or ought to have known, the KAPO Windows and Doors were not suitable for the Murray Residence;

(e) there was insufficient evidence to demonstrate that KAPO or Luxus misrepresented their knowledge of the KAPO Windows and Doors, or the suitability and usability of the KAPO Windows and Doors for the Murray Residence, when they knew, or ought to have known, this was incorrect or inaccurate, or both; and

(f) there was insufficient evidence to demonstrate WBL relied on a representation described in (e).

[367] The framework set out in ***Anns v London Borough of Merton***, [1977] 2 All ER 492 (HL), as refined by the Supreme Court of Canada in ***Cooper v Hobart***, 2001 SCC 79 (the *Anns/Cooper* framework), requires a *prima facie* duty of care to be established by the conjunction of proximity of relationship and foreseeability of injury. The *Anns/Cooper* framework must be applied in the context of the specific allegations of negligent misrepresentation. Here there was insufficient evidence of the alleged representations and reliance. As a result, it has not been demonstrated that WBL had a proximity of relationship or that there was any foreseeability of injury.

[368] In ***Maple Leaf***, at para 65, the Court reiterated the importance of the factual context:

> ... as between parties to a relationship, some acts or omissions might amount to a breach of duty, while other acts or omissions within that same relationship will not. Merely because particular factors will support a finding of proximity and recognition of a duty within one aspect of a relationship and for one purpose to compensate for one kind of loss does not mean a duty will apply to all aspects of that relationship and for all purposes and to compensate for all forms of loss. While, therefore, proximity may inhere between two parties at large, it may inhere only for particular purposes or for particular actions; whether it is one or the other, and (if the other) for which purposes and which actions, will depend, as we have already recounted, upon the nature of the particular relationship at issue ... or the type of pure economic loss alleged. ...

7.5 Breach of the duty to warn

Murrays' duty to warn claim

[369] In *Heintzman*, the authors discuss the duty to warn that a consultant may have to an owner. Although these comments are in the context of a consultant, I find that they are equally applicable to the Murrays' claim against WBL, which had a consulting element to its role as project manager and construction manager. At § 13:5, footnotes omitted, the authors state:

> The duty of care between consultant and owner may also include a "duty to warn" of material, design, and construction risks. A duty to warn may arise where one party has created or knows of a risk and where another party might inadvertently engage that risk. For example, a consultant or sub-consultant may owe a duty to

> warn the owner about proceeding with construction without an adequate soils report.

[370] At para 56, the Court in ***Maple Leaf***, noted the context of Laskin J's dissenting, but now accepted, comments in ***Rivtow Marine Ltd v Washington Iron Works***, 1973 CanLII 6 (SCC), and that they related to a claim for the cost of repair:

> ... this overstates the breadth of Laskin J.'s dissent and of this Court's adoption thereof in *Winnipeg Condominium*. In *Rivtow*, the Court was unanimously of the view that the lost profits of the charterer by demise of the defective cranes were recoverable due to the manufacturer's breach of its duty to warn. Laskin J. dissented on one narrow issue: whether the cost of repairing the cranes was also recoverable. The reasoning of Laskin J., therefore, was directed - and applied by this Court in *Winnipeg Condominium* ... only to support the plaintiff's claim for those costs. ...

[371] Here too, the claim for a failure of the duty to warn is made to recover the cost of repair.

[372] The Murrays claim that AEL, WBL, KAPO, Luxus and Mr. Bade owed them a duty to warn the Murrays that the KAPO Windows and Doors had inherent issues arising from their size, weight and intended operation such that significant structural issues and defects had to be considered before they were installed. The Murrays allege that AEL, WBL, KAPO, Luxus and Mr. Bade failed to discharge this duty.

WBL's duty to warn claim

[373] WBL alleges that KAPO and Luxus had a duty to warn it of any defects in the KAPO Windows and Doors when they knew, or ought to have known, such defects existed.

Duty to warn analysis

[374] The Murrays and WBL submit that this is not a case of pure economic loss. I disagree. This is a case where the damages are unconnected to a personal injury or injury to property. The claim in this case is the cost of repair to correct the Great Room Structural Steel and the KAPO Windows and Doors so that the Great Room Sliding Doors and Master Bedroom Sliding Rooms will function properly. That is pure economic loss.

[375] In the alternative, the Murrays and WBL submit that, to the extent that their claims in the established categories for the negligent supply of shoddy goods, negligent performance of services, or negligent misrepresentation, are not permitted, they can succeed in their claims under a full proximity analysis: ***Maple Leaf***, para 66.

[376] Any proximity analysis must be conducted in the context of the allegations set out in the pleadings. A proximity analysis is not an opportunity to look back at the trial evidence and find an allegation that might stick; the analysis must be conducted from the perspective of what was pleaded and what the defendants knew was the case to be met.

[377] There are allegations that each of AEL, WBL, KAPO, Luxus and Mr. Bade, owed a duty to warn. Not being an established category in the context of pure economic loss, the Murrays and WBL submit a full proximity analysis is required.

[378] At paras 62 to 64, 66 and 68, the Court in ***Maple Leaf*** addressed the proximity analysis, while discussing the established category of negligent supply of shoddy goods or structures:

> As the Court explained in *Livent* ... proximity - which is "a distinct and more demanding hurdle than reasonable foreseeability" ... informs the foreseeability inquiry, and should therefore be considered prior to assessing foreseeability of injury. As Professor Klar has explained, "[t]he existence of proximity depend[s] upon the nature of the relationship between the parties [which] in turn dictate[s] the type of injury which could flow from this relationship and hence the losses which could be considered to have been reasonably foreseeable" ... We agree: in all claims, including claims of dangerous goods or structures, the considerations that support a finding of proximity also limit the type of injury that may be reasonably foreseen to result from the defendant's negligence. ...
>
> Assessing proximity requires asking whether, in light of the nature of the relationship at issue ... the parties are in such a "close and direct" relationship that it would be "just and fair having regard to that relationship to impose a duty of care in law" ... This assessment proceeds in two steps.
>
> First, the court must ask whether proximity can be made out by reference to an established or analogous category of proximate relationship ...
>
> . . .
>
> Secondly, if the court determines that proximity cannot be based on an established or analogous category of proximate relationship, then it must conduct a full proximity analysis ... In making this assessment, courts must examine all relevant factors present in the relationship between the plaintiff and the defendant - which, while "diverse and depend[ent] on the circumstances of each case" ... include "expectations, representations, reliance, and the property or other interests involved" ...

[379] Both the Murrays' and WBL's claims that others failed in their duty to warn would, if successful, result in a remedy equivalent to succeeding on their claims for damages for negligent supply of shoddy goods. The damages relate either to the Murrays' cost of repair or indemnification of WBL for the Murrays' repair cost for which WBL is responsible. Would it be just and fair to find a proximity relationship which would allow a claim for the failure of a duty to warn of the defects in shoddy goods when a claim for the negligent supply of shoddy goods is not claimable because there is no real and substantial or imminent danger? For the reasons below, I find that it would not.

Did AEL owe the Murrays a duty to warn?

[380] The Murrays allege that AEL owed them a duty to warn that the KAPO Windows and Doors had inherent issues arising from their size, weight and intended operation such that significant structural issues and defects had to be considered before they were installed.

[381] AEL had a limited role relating to the KAPO Windows and Doors. AEL designed the Great Room Structural Steel within which the Great Room Windows and Doors were to be installed and Mr. Ruggieri said that AEL accounted for their dead load. AEL also prepared the Installation Sequence for the Great Room Windows and Doors. However, AEL had no part in the selection or ordering of the Great Room Windows and Doors. AEL was aware of the size and weight of the Great Room Windows and Doors and the Approved KAPO Shop Drawings indicated their intended operation. Knowing this information about the Great Room Windows and Doors, AEL

was in a position to understand that significant structural issues had to be considered before installation. There was no evidence that AEL was aware of any defects in the Great Room Windows and Doors.

[382] AEL had no involvement in the Master Bedroom Sliding Doors.

[383] After WBL was engaged, it took on the role of project manager and construction manager. As project manager, I have already found that WBL communicated with AEL. I find that the Murrays could not have had a reasonable expectation that AEL would have warned them of any aspect of the engineering design or the Great Room Windows and Doors themselves as they had no relationship with AEL. Further, there was no evidence of AEL ever making any representations to the Murrays and no evidence that the Murrays had any specific reliance on AEL.

[384] Moreover, the Murrays had a contractual relationship with AEL which could have addressed any expectation that AEL had a duty to warn the Murrays about significant structural issues, but it did not.

[385] I find that there was no proximity between the Murrays and AEL upon which to base a duty to warn the Murrays that the KAPO Windows and Doors had inherent issues arising from their size, weight and intended operation such that significant structural issues and defects had to be considered before they were installed.

Did WBL owe the Murrays a duty to warn?

[386] The Murrays allege that WBL owed them a duty to warn that the KAPO Windows and Doors had inherent issues arising from their size, weight and intended operation such that significant structural issues and defects had to be considered before they were installed.

[387] WBL, as the project manager and construction manager, attended the Austria Trip and was familiar with the size, weight and intended operation of the KAPO Windows and Doors. WBL was also aware of the requirement that no weight be placed on them. As the party communicating with both the framer, Emperor Homes, and the consulting engineer, AEL, WBL was aware, or should have been aware, that significant structural issues had to be considered before the KAPO Windows and Doors were installed. There was no evidence that WBL should have considered any defects before the KAPO Windows and Doors were installed.

[388] However, there was no evidence that the Murrays had any expectation that they would be warned about any construction or structural issues, let alone the issues related to the KAPO Windows and Doors. On the contrary, the Murrays testified that they left all of the project management and coordination decisions in the hands of WBL. When Mr. Murray observed that the Intermediary Beam looked like a banana, he was satisfied when Mr. Chakrabarti assured him that he had undertaken the necessary calculations. I find that there was no evidence that the Murrays had an expectation that WBL would bring structural issues to their attention, or that they relied on WBL to do so.

[389] Further, I find that WBL never represented that it would raise structural issues with the Murrays. While the Murrays have a property interest in the Murray Residence and WBL was engaged as the project manager and construction manager, there was no evidence the Murrays anticipated receiving any warning about construction issues or would have changed course if they had. Indeed, the Murrays were hands-off owners in relation to the construction of the Murray Residence.

[390] Moreover, the Murrays had a contractual relationship with WBL which could have addressed any expectation that WBL had a duty to warn the Murrays about significant structural issues, but it did not.

[391] I find that there was no proximity between the Murrays and WBL upon which to base a duty to warn the Murrays that the KAPO Windows and Doors had inherent issues arising from their size, weight and intended operation such that significant structural issues and defects had to be considered before they were installed.

Did KAPO owe the Murrays a duty to warn?

[392] The Murrays allege that KAPO owed them a duty to warn that the KAPO Windows and Doors had inherent issues arising from their size, weight and intended operation such that significant structural issues and defects had to be considered before they were installed.

[393] KAPO had no direct relationship with the Murrays but did have a relationship with WBL who was acting as the Murrays' representative during the Austria Trip. The Murrays and KAPO had no contract between them.

[394] The Murrays, through their representative, WBL, had an expectation that KAPO would provide technical information about the KAPO Windows and Doors and, through WBL, engaged in technical discussions with KAPO's technicians which were translated by either Mr. Grosse or Mr. Bade.

[395] The Murrays, as represented by WBL during the Austria Trip, engaged with KAPO and relied on the information and representations made by KAPO, including technical specifications provided about the KAPO Windows and Doors. As a manufacturer, KAPO had knowledge of the KAPO Windows and Doors. However, there is no evidence that KAPO had any information about, or made any comments on, the structure of the Murray Residence. Nor was there any evidence that the Murrays, or their representative, WBL, had any expectation that KAPO would be obliged to warn them that significant structural issues had to be considered before the installation of the KAPO Windows and Doors. Further, there was no evidence that WBL, as the Murrays representative, relied on KAPO to warn it that significant structural issues had to be considered before the KAPO Windows and Doors were installed.

[396] Given the lack of expectations, representations, and reliance, there was no proximity between KAPO and the Murrays to ground a claim for a duty to warn.

Did Luxus owe the Murrays a duty to warn?

[397] The Murrays allege that Luxus owed them a duty to warn that the KAPO Windows and Doors had inherent issues arising from their size, weight and intended operation such that significant structural issues and defects had to be considered before they were installed.

[398] Luxus had no direct relationship with the Murrays, except through their sales agent Mr. Bade.

[399] There was no evidence that any issues relating to structure or defects were ever raised with Luxus by WBL, acting as the Murrays' representative in relation to the KAPO Windows and Doors. Luxus was behind the scenes in the ordering process, organizing the Austria Trip, providing direction to Mr. Bade regarding the Initial Shop Drawings and the Approved Shop Drawings, the payment of deposits so that fabrication could begin and, later, warranty claims.

[400] There was insufficient evidence to determine whether the Murrays and Luxus were contracting parties through Luxus' sales agent, Mr. Bade. However, the Murrays had the ability to formalize their contractual relationship with KAPO, Luxus and Mr. Bade, but they did not do so.

[401] There was no evidence that the Murrays, through their representative, WBL, had any expectation that Luxus would provide technical information or have any obligation to warn that significant structural issues and defects had to be considered before the KAPO Windows and Doors were installed. There was no evidence that WBL, as the Murrays' representative, relied on Luxus to provide any warnings of any type.

[402] Given the lack of expectations and reliance, there was no proximity between the Murrays and Luxus to ground a claim for a duty to warn.

Did Mr. Bade owe the Murrays a duty to warn?

[403] The Murrays allege that Mr. Bade owed them a duty to warn that the KAPO Windows and Doors had inherent issues arising from their size, weight and intended operation such that significant structural issues and defects had to be considered before they were installed.

[404] Mr. Bade was the sales agent for Luxus and had a direct relationship with the Murrays, and the Murrays' representative, WBL.

[405] Mr. Bade is a master carpenter by trade. Mr. Bade was actively involved in determining the size and configuration of the KAPO Windows and Doors for the purpose of placing the order with KAPO. Mr. Bade attended at the Murray Residence when the KAPO Windows and Doors were delivered to assist with assembly. However, there was no evidence that there was ever any communication between Mr. Bade and the Murrays, or WBL, relating to structure or defects in relation to the KAPO Windows and Doors, except to the extent that Mr. Bade translated conversations between WBL and KAPO.

[406] There was no evidence that the Murrays, through their representative, WBL, had any expectation that Mr. Bade would provide any technical information or have any obligation to warn that significant structural issues and defects had to be considered before the KAPO Windows and Doors were installed. There was no evidence that WBL, as the Murrays' representative, relied on Mr. Bade to provide any warnings of any type.

[407] Given the lack of expectations and reliance, there was no proximity between Mr. Bade and the Murrays to ground a claim for a duty to warn.

Did KAPO owe WBL a duty to warn?

[408] WBL alleges that KAPO owed it a duty to warn it of any defects in the KAPO Windows and Doors when KAPO knew, or ought to have known, such defects existed.

[409] KAPO dealt with WBL, as the representative of the Murrays, when WBL attended the Austria Trip. WBL and KAPO had no contract between them.

[410] The only defect in the KAPO Windows and Doors that has been proven in this trial is that the Guide Track was not designed and fabricated to be stiff enough. As the manufacturer, KAPO had knowledge of the KAPO Windows and Doors. However, there was no evidence that KAPO knew, or ought to have known, that the Guide Track was not stiff enough for the application in the Murray Residence.

[411] WBL had an expectation that KAPO would provide technical information about the KAPO Windows and Doors and WBL engaged in technical discussions with KAPO's technicians during the Austria Trip, which were translated by either Mr. Grosse or Mr. Bade.

[412] I have already found that during the Austria Trip, WBL engaged with KAPO and relied on the information provided, and representations made, by KAPO, including technical specifications for the KAPO Windows and Doors. However, there was no evidence that WBL relied on KAPO to warn it of any defects in the KAPO Windows and Doors. Mr. Halluk and Mr. Chakrabarti did not give any evidence, beyond their discussions of technical specifications, as to their expectations of KAPO.

[413] There was no evidence that KAPO could, or ought to have, foreseen any damage for which WBL could be liable.

[414] Given the lack of expectations and reliance, there was no proximity between KAPO and WBL to ground a claim for a duty to warn.

Did Luxus owe WBL a duty to warn?

[415] WBL alleges that Luxus owed it a duty to warn it of any defects in the KAPO Windows and Doors when Luxus knew, or ought to have known, such defects existed.

[416] Luxus dealt with WBL, as the representative of the Murrays, when they both participated in the Austria Trip. WBL and Luxus had no contract between them.

[417] The only defect in the KAPO Windows and Doors that has been proven in this trial is that the Guide Track was not designed and fabricated to be stiff enough. However, there was no evidence that Luxus knew, or ought to have known, that the Guide Track was not stiff enough for the application in the Murray Residence.

[418] There was no evidence that WBL had any expectation that Luxus would provide any technical information about the KAPO Windows and Doors. The only evidence of Luxus being involved in technical discussions with WBL was Mr. Grosse's role as translator during the Austria Trip.

[419] There was no evidence that WBL relied on Luxus to warn it of any defects in the KAPO Windows and Doors. Mr. Halluk and Mr. Chakrabarti did not give any evidence as to their expectations of Luxus until the functionality issues arose.

[420] There was no evidence that Luxus could, or ought to have, foreseen any damage for which WBL could be liable.

[421] Given the lack of expectations, representations and reliance, there was no proximity between WBL and Luxus to ground a claim for a duty to warn.

7.6 Conclusion on the negligence claims

[422] For the reasons set out above, none of the claims for negligence in this case have been made out and they are dismissed.

Issue 8: Did KAPO or Luxus breach the *Consumer Protection Act* or the *Sale of Goods Act?*

[423] WBL pleaded the *Fair Trading Act*, RSA 2000, c F-2, which is now known as the *Consumer Protection Act*, RSA 2000, c C-26.3. WBL did not particularize the alleged breach other

than to say the KAPO and Luxus had a duty to avoid unfair practices. However, since WBL is not a "consumer" as defined under that *Act*, it has no rights to assert under it.

[424] WBL also pleaded that KAPO and Luxus owed it a duty to adhere to the conditions of the *Sale of Goods Act*; however, WBL was not a "buyer" under that *Act* and has no rights to assert under it.

Issue 9: What is the quantum of damages?

[425] I have found that WBL breached its contract with the Murrays. I must now determine the quantum of damages suffered by the Murrays.

[426] The well-established principle is that a party who sustains a loss as a result of a breach of contract is, to the extent that money can compensate, entitled to be placed in the same situation as if the contract had been performed: ***Robinson v Harman*** (1848), 1 Ex 850, page 855. While this may appear simple on the surface, there are many considerations and this case raises a number of issues.

[427] While numerous issues were raised regarding the damages claimed by the Murrays, there was no evidence of any diminution in the value of the Murray Residence. Further, it was not asserted that the appropriate measure of damages should be based on a diminution in value, rather than the cost of repair. As a result, this issue will not be addressed.

[428] As of the date of trial, the Murrays had not undertaken any removal, repair, or replacement of any of the Great Room Structural Steel or the KAPO Windows and Doors (collectively, the Remedial Work). Mr. Murray said that they did not undertake the Remedial Work because of the lawsuit and that all he wanted was for the Great Room Sliding Doors and Master Bedroom Sliding Doors to be fixed. Ms. Murray said that she has a great home, other than the issues raised in this action. Ms. Murray also said that they were waiting for the lawsuit to be resolved because the Remedial Work would require dismantling half of the Murray Residence. There was no evidence that the Murrays do not intend on undertaking the Remedial Work and there was no assertion to that effect. As a result, notwithstanding that the Remedial Work has not been undertaken, I accept that the Remedial Work will be undertaken by the Murrays at some point in the future.

[429] The Murrays relied on the expert opinion of Mr. Demitt regarding the scope of the Remedial Work and of Mr. Gouws regarding the cost of the Remedial Work. The Murrays claim damages in the amount of $1,650,293.46, inclusive of GST.

[430] WBL relied on the expert opinion of Mr. Carswell on the scope of the Remedial Work and of Mr. Shrivastava regarding the cost of the Remedial Work. WBL asserts that the cost of the Remedial Work is $458,150.57 and should be reduced to a depreciated cash value of $342,911.09.

[431] The scope and the cost of the Remedial Work was highly contested.

9.1 For which damages is WBL responsible?

[432] Having found that WBL breached its contract with the Murrays, I must determine if those breaches caused some or all of the damages claimed by the Murrays.

[433] At paragraph [327], I set out WBL's breaches of its contract with the Murrays. In paragraph [335], I categorized the damages suffered by the Murrays. WBL is not liable for the damage set out in subparagraph (c) of paragraph [335] because it arose from the design and

manufacture of the KAPO Windows and Doors. However, by breaching its contract, WBL caused the other damage described in paragraph [335].

[434] I have also found that AEL breached its contract with the Murrays as described in paragraph [332]. As a result of those breaches, AEL also caused the damages described in subparagraphs (a) and (b) of paragraph [335], which relate to the Great Room.

[435] Had a breach of contract been alleged against AEL, I would have found WBL and AEL are jointly and severally liable to the Murrays for the damages described in subparagraphs (a) and (b) of paragraph [335] and WBL wholly liable to the Murrays for the damages described in subparagraphs (d) and (e) of paragraph [335]. Since there is no claim in contract against AEL, WBL is wholly liable to the Murrays for the damages described in subparagraphs (a), (b), (d) and (e) of paragraph [335].

9.2 Mitigation

[436] WBL asserts that the Murrays did not mitigate, and such failure diminishes the damages to which they may be entitled. The Murrays have a duty to mitigate. The burden of proof of a failure to mitigate is on WBL: ***Viper Concrete 2000 Inc v Agon Developments Ltd***, 2009 ABQB 91, paras 72 and 73.

[437] What is reasonable in the context of mitigation must be determined on the facts of each case. In ***Viper Concrete***, at paras 75 to 84, Wittmann ACJ, as he then was, reviewed a number of cases discussing the reasonableness of not taking steps to mitigate. In ***Connolly v Greater Homes Inc***, 2011 NSSC 291, at paras 43 to 46, Wright J discussed why in some building cases it is legitimate for the plaintiff to wait for the outcome of the trial before undertaking repair work.

[438] These cases raise two issues relating to mitigation:

(a) is there evidence of any structural or building preservation impact as a result of plaintiff delaying taking mitigative steps (see the paragraphs immediately below); and

(b) if the plaintiff delays taking mitigative steps:

(i) when should damages be assessed (starting at paragraph [513]); and

(ii) if damages are assessed at a date before the trial, can there be a claim for escalation or inflation while waiting for trial (starting at paragraph [527]).

Upper Glazing

[439] WBL asserts that the Murrays did not undertake timely repairs to the Great Room, as no repairs have been undertaken at all. WBL submits that the failure to undertake a timely repair has affected the ability to reuse the Upper Glazing in the Remedial Work.

[440] WBL submits that the evidence at trial demonstrates the KAPO Windows and Doors were not damaged when the functionality issues were discovered. This is not correct. The timing of the functionality issues arose over a period of weeks or months in the latter part of 2013. There was no evidence at the trial about when the KAPO Windows and Doors were damaged and whether that coincided with the functionality issues first being apparent.

[441] However, when commenting on the Carswell Report, Mr. Demitt said in the Demitt Reports that the long period of deflection had damaged the Upper Glazing:

> The window and door frames have been in a deflected shape for almost ten years. There are now failed seals in glazing units and permanent deformations in the wood frames. Additionally, the Carswell Report does not address the deficiencies in the weather seals in the assembly that permit air infiltration and snow to enter the interior space. The door and window frames must be replaced as they are no longer repairable or serviceable.

[442] The Murrays and WBL were involved in discussions about the appropriate remediation until 2015 when the Murrays commenced this action. However, there was no evidence as to when any permanent deformation in the Upper Glazing wood frames and failed seals occurred or when the Murrays ought to have known that the damage was occurring. Mr. Demitt first attended the Murray Residence in January 2015 and issued his first report on April 27, 2016.

[443] There was no evidence that the Upper Glazing could be reused or salvaged. Mr. Robert Belcher testified that the Upper Glazing was glued together, and he was of the view that the frames could not be pulled apart without damaging them. Mr. Robert Belcher also said that the Upper Glazing was affixed to the framing with structural screws but not directly to the Roof Beam. It was also his understanding the Upper Glazing was installed in such a manner that it was bearing on the Intermediary Beam. Other than the Carswell Report, WBL provided no repair plan for the Great Room Windows and Doors and presented no evidence that there was any alternative repair that could reuse the Upper Glazing.

[444] I find that the fact that the Murrays have not repaired the Great Room Windows and Doors is not a failure to mitigate their damages and that they have acted reasonably in the circumstances given the nature of the defects and the complexity of the issues. The Murrays testified that they were seeking a decision in their action before undertaking repair work and this litigation deals with both the responsibility of the defendants and the extent of that liability.

Guide Track

[445] Under cross-examination, Mr. Roy testified that it was possible that the Guide Track could have become more and more twisted and saggy as a result of it being left in a twisted sagging state for almost ten years.

[446] Although Mr. Murray said that he had not “even tried” to repair or replace the Great Room Windows and Doors, or the Master Bedroom Sliding Doors, because of this action, that is not accurate as a repair to the Great Room Sliding Doors was attempted by installing the Turnbuckles. The Turnbuckles were installed to address the twisting and sagging of the Guide Track, but they did not work, as described in paragraph [266]. I find that the Murrays did try to mitigate the Guide Track deformation, but the mitigation efforts were not successful because of the effect of the Intermediary Beam deflection on the Lower Transom, Guide Track and Great Room Sliding Doors.

[447] Other than the installation of Turnbuckles, there was no other evidence of alternate adjustments that could be made to the KAPO Windows and Doors. I find that the Murrays and their experts adequately considered alternative repair procedures and that Murrays have acted reasonably in the circumstances.

9.3 Scope of the Remedial Work

[448] WBL asserts that the Murrays failed to provide a repair procedure and did not instruct their experts to consider repair or adjustment of the KAPO Windows and Doors.

Great Room

Murrays' proposed Great Room Remedial Work

[449] Mr. Demitt testified that he had not been engaged to prepare a repair procedure; however, in the December 7, 2018 Demitt Report, he described the necessary repair as:

> Repair or modification of the affected [Great Room Windows and Doors] will require the stiffening of the [Intermediary Beams and the Cantilevered Beams] above the door openings and the provision of greater stiffness in the [Guide Track] above the [Great Room Sliding Doors]. The stiffening of these elements will likely require the removal of the bulkheads, finishes and door tracks to adequately stiffen these components. Reconstruction of the entire exterior walls is a likely possibility given the observed construction methods.

[450] Mr. Demitt's evidence was that he agreed with the repair scope proposed by Mr. Graham in the Graham Report as follows:

> The [Great Room Sliding Doors are] also problematic. The [Intermediary Beam] above the [Great Room Sliding Doors] needs to be replaced and the [Lower Transom] above needs to be installed properly.

[451] Mr. Gouws said that the repair scope which formed the basis for his cost estimate:

> ... was derived from repair recommendations based on the following:
>
> > Architectural Drawings ... dated November 9, 2012 by Neoteric Architecture.
> >
> > KAPO Shop Drawings dated December 18, 2012.
> >
> > Gaulhofer Shop Drawings October 23, 2012.
> >
> > Window Wall Structure Drawing dated February 1, 2013.
> >
> > Anast Demitt Consulting Engineering Ltd. ... consulting reports and discussion.
> >
> > Site visit conducted on October 20th, 2022.

[452] While Mr. Gouws was qualified as an expert in construction cost consulting and construction defect correction estimation, it was not within his scope to set the scope of the Remedial Work. However, I find that it was within his scope of expertise to review the documents described in the paragraph above and to consult with Mr. Demitt to draft up a repair methodology. Mr. Demitt's evidence was that he met with both Mr. Gouws and Mr. Graham on site and spoke with them many times.

[453] In his October 31, 2022 report, Mr. Gouws set out his proposed repair methodology, which included:

> [Great Room] repairs include but are not limited to the following:
>
> - Remove and reinstall existing exterior and interior light fixtures, downpipes and gutters to facilitate the removal of [the Stone Cladding].
> - Remove and replace [the Stone Cladding] and exterior wall assembly to expose window wall system.

- Construct a temporary road to provide access for equipment such as a crane to provide support during the removal of the [Upper Glazing].
- Removal of the existing [Upper Glazing], [Great Room Sliding Doors] as well as the [Lower Transom] complete with [the Guide Header] and lower door tracks and replace with aluminum window curtain wall system complete with upper and lower door tracks.
- Remove and reinstall the existing interior blinds, curtains and curtain rods.
- Removal of the interior wall assembly to expose the window wall system and reconstruct the interior wall assembly and finishes to match the existing assembly and finishes.
- Stiffen the existing W21x93 beam with an additional 15 Tons of steel.

[454] When the evidence of Mr. Demitt, Mr. Graham and Mr. Gouws is taken together, I find that the Murrays did provide evidence of a repair procedure for the Great Room.

WBL's position on the Great Room Remedial Work

[455] WBL relies on Mr. Carswell's proposed scope of repair, which is described in the Carswell Report as a "door repair procedure". As is evident from a review of this scope of repair, it involves the use of "threaded rods" to support the Guide Track, at least in part, and presumably to level the Guide Track given its noted deflection and sagging due to a lack of stiffness.

[456] As discussed at paragraph [266], four Turnbuckles were installed in the Murray residence. Other terms used at trial to refer to a rod between the Guide Track and the Intermediary Bulkhead included "redi-rod", "sag rod", and "hanger rod". For consistency, I will use the term "Turnbuckle" when referring to an adjustable rod installed between the Intermediary Bulkhead and the Guide Track.

[457] Mr. Carswell provided no opinion as to whether or not the proposed repair procedure would correct the functionality issues with the Great Room Sliding Doors. Other than an opening and closing sentence, the Carswell Report only contains the following:

1. Install plate and nut assembly on top of the [Guide Track] ensuring the threaded rods are centered on each mullion.
2. Remove topside interior drywall from [the Intermediary Beam] so as to access the topside of the [Intermediary Beam] for installation of [turnbuckles]. Alternatively, cutting off a 21" x 12" section of the top of the interior drywall at the mullion for the [Turnbuckle] locations is also practical for installation of the [Turnbuckles].
3. Drill holes in [the Intermediary Beam] for each [Turnbuckle].
4. Remove and store [Great Room Sliding Doors] along with [Guide Track].
5. Remove and store [Lower Transom] and assembly.
6. Ensure lower door tracks are level. Re-level as necessary.
7. Re-hang [Lower Transom] to the [Intermediary Beam] ensuring that the bottom of the [Lower Transom] are positively cambered to take into account dead load deflection.

8. Attach the [Guide Track] to the [Lower Transom] and hang the [Guide Track] to the web of the [Intermediary Beam] with the 5/8" diameter [Turnbuckles].

9. Adjust the [Guide Track] by adjusting the nuts of the [Turnbuckles] at the [Intermediary Beam]. Please note that it is worthwhile to have a positive 1/8" camber at the midspan of the [Guide Track] to anticipate an extra deflection due to drywall weight.

10. Install drywall to the [Intermediary Beam].

11. Re-install the [Great Room Sliding Doors].

[458] On July 10, 2014, Mr. Grosse sent Mr. Chakrabarti an email advising that Mr. Hirschhofer had updated the Initial KAPO Shop Drawings to demonstrate a solution to the sag in the Guide Track through the installation of a Turnbuckle. Mr. Hirschhofer's updated Initial KAPO Shop Drawings also showed the Intermediary Beam on its Vertical Axis, contrary to its actual installation.

[459] Mr. Demitt commented on the Carswell Report repair scope in the Demitt Reports:

> In reviewing the Carswell Report, it is very evident that the repair scope is superficial and does not fully address the issues affecting the doors and windows at the Murray Residence. ...

[460] Mr. Demitt also formed the opinion that Mr. Carswell based his repair scope upon a site visit to the Murray Residence in 2016, which they both attended, together with technicians from KAPO who had travelled from Austria. The Demitt Reports also say that the KAPO technicians were in attendance over the course of several hours and that the findings of the KAPO technicians were shared with the other experts in attendance at the end of their site visit, after the representatives from Carswell Engineering had left the site. In addition, as noted at paragraph [85], Mr. Shrivastava also acknowledged that that the Carswell Report did not provide a detailed scope for possible repair work.

[461] Mr. Murray's uncontradicted evidence was that the Turnbuckles were installed, and the functionality of the Great Room Sliding Doors improved for a short time before the binding and non-functionality returned. I find that the Turnbuckle repair scope was attempted, but did not work, and should not be considered for the purpose of the Murrays' damages. As a result, the Carswell Report does not provide a possible repair scope and cannot be considered for the purpose of calculating damages. No other alternative repair scope was in evidence.

Conclusion on Great Room Remedial Work

[462] I accept that the description from Mr. Gouws' October 31, 2022 report, set out in paragraph [453], is a satisfactory description of the Remedial Work for the Great Room.

Master Bedroom Remedial Work

[463] As noted above, Mr. Demitt's evidence was that he agreed with the repair scope proposed by Mr. Graham in the Graham Report which, in relation to the Master Bedroom, said:

> Combined with the weight of the roof load on the [Master Bedroom Sliding Doors] the [Master Bedroom Sliding Doors] do not open and are under stress of the weight above. The fix is removing the roof/Trusses and rebuild properly to hold the weight.

[464] In his October 31, 2022 report, Mr. Gouws set out his proposed repair methodology, which included:

> [Master Bedroom] Sliding Door repairs include but are not limited to the following:
>
> - Remove and replace stone cladding where required to facilitate the installation of a new steel column.
> - Remove and reinstall the existing curtain rods and curtains.
> - Removal of the interior wall assembly where required to expose the sliding door system and reconstruct the interior wall assembly and finishes to match the existing assembly and finishes.
> - Removal of the existing sliding doors complete with upper and lower door tracks and replace with aluminum sliding door system complete with upper and lower tracks.
> - Install steel column supports at corner of each sliding door set and cover with stone cladding.

[465] WBL did not provide any evidence with regard to the repair scope for the Master Bedroom Sliding Doors.

[466] When the evidence of Mr. Demitt, Mr. Graham and Mr. Gouws is taken together, I find that the Murrays provided evidence of a repair procedure for the Master Bedroom. Further, I accept that the description set out in paragraph [464], from Mr. Gouws' report is a satisfactory description of the Remedial Work for the Master Bedroom.

Contingency for collateral damage

[467] In addition to his repair procedure for the Great Room and Master Bedroom, in his October 31, 2022 report, Mr. Gouws included additional work, which he described as follows:

> Additional repair scope (Possible Repairs):
>
> - Floor Tiling: Based on discussions with [Mr. Demitt], the floor tiling installed ... are cut and polished stone which were originally imported from Syria. Should the tiling in the [Master Bedroom] exhibit any damage because of the [Master Bedroom Remedial Work], it is MKA's opinion that it would likely not be possible to procure and install tiling that matches the existing tiles. MKA has therefore estimated the cost to replace the existing floor tiles throughout the entirety of the [Murray Residence].
> - Hardwood Flooring: The hardwood flooring appears to be either 6½" wide authentic hand scraped Hickory or Oak engineered hardwood. As hardwood flooring surface scraping methods have changed over the last 5 years from authentic hand scraped to a mechanically sculpted surface, should the existing hardwood floor exhibit any damage because of [the Great Room Remedial Work], it is MKA's opinion that matching the existing hardwood floor is unlikely. MKA has therefore estimated the cost to replace the existing hardwood floor with mechanically sculpted hardwood flooring throughout the entirety of the [Murray Residence].

- Patio paving: As the patio paving might be damaged during the [Great Room Remedial Work], MKA has estimated the cost to replace the flagstone paving for the patio area immediately outside of the dining room.

[468] Mr. Gouws describes the contingency for replacing the tile floors, hardboard floors and patio paving as "repair scope". However, there is no aspect of this contingency which relates to damage to the Murray Residence as a result of WBL's breach of contract, which is described at paragraph [335]. Rather, the contingency relates to the risk of collateral damage to the existing flooring and paving that may occur during the carrying out of the Remedial Work. The amount claimed is 100% of the cost of replacement of:

(a) the entire tile floor: $349,053.60, plus GST;

(b) the entire hardwood floor: $88,384.38, plus GST; and

(c) portions of the patio paving: $81,604.71, plus GST.

[469] When testifying, Mr. Gouws referred to the contingencies as "three key risk factors", which is more apt and aligns with the contingent nature of these aspects of the Murrays' claim. Under cross-examination, Mr. Gouws acceded that the costs claimed were for contingencies. The Gouws Reports also state that the cost for the contingencies would only be required if there was damage which occurred during the performance of the Remedial Work.

[470] The Murrays rely on the opinion evidence of Mr. Gouws that the contingencies are included because the three types of flooring are "potentially and likely can be damaged throughout the repair process". Under cross-examination, Mr. Gouws said that "due to the nature of this work it's unlikely that [the three areas of flooring are] not going to be damaged".

[471] Mr. Gouws testified that even if the contractor undertaking the Remedial Work used floor protection to prevent damage, there is still a "high risk" that damage could happen. When asked on cross-examination about including the cost of both floor protection and a cost for the contingency of floor replacement, Mr. Gouws said that all contractors include floor protection "if it can prevent damage occurring", however, if a heavy hammer falls, it will break the floor despite the protection.

[472] If the contingencies are accepted, it leads to a further question as to the extent of the cost of the contingencies because Mr. Gouws opined it would be "highly unlikely" that a match could be found for the tile floor and hardwood floor. As a result, he included a cost for the replacement of the entirety of those two floor types. However, there was no evidence that Mr. Gouws undertook any enquiries as to whether a match for those floors could be found.

[473] The Murrays submit that if the quantum of damages is difficult to estimate, then this Court must simply do its best on the material available: ***Viper Concrete***, para 55. In this case, it is not the quantum of damages that is in issue; rather entitlement for contingencies.

[474] The Murrays claim for the cost of the contingencies requires a consideration of the following:

(a) are the contingencies reasonably foreseeable;

(b) if reasonably foreseeable, have the Murrays met the burden of proof that the contingencies will occur; and

(c) if the burden of proof on the contingencies is met, are the amounts claimed for the costs of the contingencies proven.

Are the contingencies reasonably foreseeable?

[475] In SM Waddams, *The Law of Damages* (Toronto: Thomson Reuters, 1991) (looseleaf updated November 2019), at chapter 14, Professor Waddams discusses the application of the rule in ***Hadley v Baxendale*** (1854), 156 ER 145. That rule, which at times has been identified as three rules, implies that the plaintiff in a contract case: (1) is entitled to damages naturally arising from the loss; (2) is not entitled to damages not naturally arising from the loss, unless special circumstances are communicated to the defendant; and (3) is entitled to damages where special circumstances are communicated to the defendant. At § 14.400, footnotes omitted, Professor Waddams summarizes the rule in ***Hadley v Baxendale*** as follows:

> The rule in *Hadley v. Baxendale* has generally been defended, by economists as efficient. It saves transaction costs in that it represents the usual agreement that most parties would make if they negotiated on the question. It saves the plaintiff the cost of explaining the obvious consequences of breach, of which the defendant knows just as much. It creates an incentive upon the plaintiff to reveal facts peculiarly within the plaintiff's knowledge that will cause the cost of breach to be greater than the defendant would have expected. The defendant, knowing of these peculiar facts, can act accordingly by making a rational allocation of resources to reduce the probability of breach, by refusing to contract, by raising the price, or by excluding liability. ...

[476] The oral contract between the Murrays and WBL did not consider any limitations to liability. The parties did not think about any consequences of their actions, or what might occur in the event of a problem. This is not an uncommon situation, as described by Professor Waddams at § 14.110.

[477] Notwithstanding that there was no contemplation of the limitation of damages in the event of a breach of the contract between WBL and the Murrays, it must have been foreseeable to both of them that if some work had to be undertaken to repair the Murray Residence, other portions of the structure could be damaged during that repair. For example, to undertake any work to the Intermediary Beam, the Intermediary Bulkhead and Stone Cladding surrounding it will need to be removed even though such surrounding material may not be defective.

[478] Even though some contingent damage could be reasonably foreseeable, I find that the extent of the claimed contingencies could not have been foreseen by WBL. The significant contingencies are not naturally arising from the loss in this case. While, WBL would have been aware of the process for sourcing the flooring, there were no special circumstances communicated to WBL.

If reasonably foreseeable, have the Murrays met the burden of proof that the contingencies will occur?

[479] In ***100 Main Street East Ltd v WB Sullivan Construction Ltd***, 1978 CanLII 1630 (ONCA), in a case dealing with a real estate transaction that did not close, the Ontario Court of Appeal said:

> ... The basic principle is that the onus is on the plaintiff to prove its damages on a reasonable preponderance of credible evidence. Its damages are that sum of money which would put it in the same position as if the defendant had performed. ...

[480] Here, the contingencies, while in some part foreseeable, have not crystallized because no Remedial Work has been performed.

[481] Mr. Gouws opined on the risk factors related to the undertaking of the Remedial Work. Mr. Gouws was qualified to provide an opinion about the cost of performing the Remedial Work, but he was not qualified to speak to the construction risks relating to the performance of the Remedial Work. Mr. Gouws' expertise relates to the calculation of repair costs and does not extend to the frequency or likelihood of collateral damage when repair work is undertaken. Mr. Gouws has extended beyond the scope of his expertise and his opinion as to whether the collateral damage is "likely" cannot be accepted. The Murrays have not demonstrated that the collateral damage is a loss that they will suffer and cannot be compensated for it.

[482] Mr. Gouws stated in his October 31, 2022 report that he spoke with Mr. Demitt regarding the existing tiling but that discussion appears to have been restricted to where it had been imported from. Mr. Gouws makes no mention of having spoken with any contractors about the specific risks in undertaking the Remedial Work. The Gouws Reports state that the approach used to prepare the estimates is based on contacting suppliers to obtain pricing; and relying on the experience of the consulting company at which Mr. Gouws works; and reviewing industry accepted publications relating to labour productivity rates. There is nothing to suggest that Mr. Gouws made any investigation regarding the risk associated with undertaking the Remedial Work.

[483] There are risks in every construction project, including repair work. For example, there is the risk that the repair work could result in a fire that destroys the building that is being repaired. In such cases, the parties may be able to seek some indemnification through insurance. While there was no specific evidence on insurance for the Remedial Work, a cost for insurance is claimed by the Murrays.

[484] Mr. Gouws is not qualified to give evidence with regard to the likelihood of damage occurring during the performance of the Remedial Work. No evidence was called with regard to the anticipated procedures for the Remedial Work or the protection that would be undertaken for the existing elements of the building. In that same vein, there was no evidence about the likelihood or frequency of damaging flooring surfaces when repair work is undertaken.

[485] The Murrays rely on ***Argus Machine Co Ltd v Stan's Power Tong Service Ltd***, 1988 ABCA 370, at para 19, for the proposition that a plaintiff alleging a chance of future loss is not required by law to prove a better than 50% chance of the loss in order to be successful in a claim for damages on account of a risk. Similarly, in *Heintzman*, at § 9:13, footnotes omitted, the authors state:

> This principle is particularly applicable to disputes over building contracts due to the complexity of the events and the relationship between the parties on a construction project making it difficult, if not impossible, to calculate with mathematical precision the financial impact of one particular wrongful act. While the damages will not be assessed on the basis of speculation, they will not be assessed solely on a balance of probabilities and will also allow for possibilities and chances. In *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, the Supreme Court of Canada adopted the following proposition from Halsbury's Laws of England:
>
> > Whilst issues of fact relating to liability must be decided on the balance of probability, the law of damages is concerned with

> evaluating, in terms of money, future possibilities and chances. In assessing damages which depend on the court's view as to what will happen in the future, or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will happen or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages which it awards.

[486] Notwithstanding these legal principles, on the facts, I find that the Murrays have not proven that the contingencies have any likelihood of occurring at all. In addition, the Murrays have not demonstrated that the availability of preventative measures, including those for which they have claimed, such as floor protection, insurance, and a percentage for Remedial Work contingency, do not sufficiently address the risk factors in performing the Remedial Work. In the result, I find that the Murrays have not proven any loss related to the contingencies and therefore the percentage of chance to be applied in this case is zero.

If the burden of proof on the contingencies is met, are the amounts claimed for the costs of the contingencies proven?

[487] Even if I am incorrect about the Murrays failing to prove sufficient evidence about the contingencies, I find that the Murrays have also failed to prove that it is not possible to source matching floor tile and hardwood floor. While it was Mr. Gouws' opinion that it was highly likely that these flooring types could not be matched, there was no evidence that he made any inquiries whatsoever to determine that there was no available material for a match. Given the lack of any effort to locate any matching material, I find Mr. Gouws' opinion on this point is speculative and I do not accept it.

[488] Lastly, even if the contingency for collateral damage is foreseeable and proven, I find that the claimed amount is disproportionately high. Without adding 15% for overhead and profit, and GST, the Murrays' claim is for $1,429,236.50, consisting of:

(a) $910,193.81 for direct and indirect costs; and

(b) $519,042.69 contingency for the possible collateral damage.

[489] Therefore, contingency for possible collateral damage is over 36% of the Murrays' total claim, not including 15% for overhead and profit, and GST. If the collateral damage does not occur, the contingency would be a windfall for the Murrays at the expense of WBL.

[490] In *The Canadian Law of Architecture and Engineering*, at page 218, footnotes omitted, the authors address claims for damages where the cost to correct is disproportionately high:

> The true rule appears to be that the plaintiff can obtain the full cost of reinstatement of his or her property regardless of the fact that the loss of value is less, only where the court concludes that the plaintiff's desire to reinstate the property is reasonable. This rule, while arguably lacking certainty, permits courts to do justice on the particular facts of the case before them. In some cases, where the intention of the parties was precise performance and the breach is serious and flagrant, justice requires that the plaintiff recover from the defendant the cost of complete performance notwithstanding an uneconomic result. In others, where the breach is trivial and innocent, the court may allow the plaintiff, not the cost of repair or

> replacement, which would be great, but the difference in value between the work as it ought to have been built and as it has in fact been built. The court weighs the purpose of the contract, the intention of the parties at the time of contracting, the excuse for deviating from the contract, and the hardship to the defendant of insisting on exact performance. Where the cost of remedying the breach to the letter is greatly out of proportion to the hardship of the defendant and the value to be gained thereby, the court may be slow to find that the plaintiff should have the cost of repair in excess of the loss of value sustained as a result of the breach.

[491] Here the contingency claimed is for possible collateral damage. It is not known if the collateral damage will come to pass as the Remedial Work has not been performed. There was no evidence from a person in the applicable trades as to the steps that would be taken to provide protection for the flooring and paving. There was no adequate explanation for including both the cost of floor protection and the contingency for replacing the entirety of the flooring and some parts of the paving. There was no evidence regarding why the insurance, the cost of which is included in the claim, would not cover collateral damage. For these reasons, I find it in appropriate to award damages for the contingencies.

[492] Even if all of the concerns I have noted were addressed, the contingency in the amount of $519,042.69 relative to the claim of $910,193.81 for the cost of the Remedial Work is disproportionately high and it would not be reasonable to award such an amount: ***Viper Concrete***, paras 56 to 71; ***Can-West Development Ltd v Parmar***, 2019 BCSC 1573, paras 106 to 108; ***514953 BC Ltd dba Gold Key Construction and Chiu v Leung***, 2007 BCCA 114, paras 11 to 22; and ***Safe Step Building Treatments Inc v 1382680 Ontario Inc***, 2004 CanLII 35054 (ONSC), paras 60, 68 and 69. There was no evidence regarding the possible diminution of value had damages for the contingencies been awarded even though that would be a more appropriate method of calculation damages, had they been awarded in this case.

Appropriate scope of the Remedial Work

[493] The Remedial Work must align with the fit and finish of the existing Murray Residence which is a large home built beyond many residential standards and contains high end finishing, which was noted by Mr. Kraychy in his report:

> I found the quality and finish exceptional, as would be expected from a competent and experienced Custom Home Builder. There were no signs of any defects in workmanship, other than the issues with the [KAPO Windows and Doors].

[494] While the fit and finish will affect the cost of the repair, that does not mean that all of the Murrays' proposed repairs should be accepted. I find that the Great Room Remedial Work and the Master Bedroom Remedial Work describe the scope of the repairs necessary to compensate the Murrays for WBL's breach of its contract. As a result, the cost to perform the Great Room Remedial Work and the Master Bedroom Remedial Work must be calculated.

9.4 Calculation of damages

[495] The Gouws Reports set out cost estimates for the Remedial Work, the scope of which I have determined consists of:

(a) the Great Room Remedial Work, see paragraph [462]; and

(b) the Master Bedroom Remedial Work, see paragraph [466].

[496] As noted in paragraphs [84] and [85], the Shrivastava Reports set out cost estimates based on the Carswell Report, which I have not accepted, and the Latera Engineering report which was not entered into evidence. As a result, I cannot consider Mr. Shrivastava's calculation of damages.

[497] Notwithstanding that Mr. Shrivastava based his estimate on a different repair scope, it necessarily included some of the same items in the Gouws Reports, and the two experts commented on the other's reports. To the extent that the reports differ, I prefer the Gouws Reports because they are more detailed and cover all aspects of the Remedial Work. However, in the process of preparing his calculations and responding to the Gouws Reports, Mr. Shrivastava raised a number of issues that must be considered when calculating damages.

[498] As a result of Mr. Gouws providing the only estimate for the Remedial Work, I accept it with the exception of those items discussed below either raised by Mr. Shrivastava, or during the trial, that must be addressed in the calculation of damages.

Stone Cladding

[499] As I have already determined, there was no evidence that the Stone Cladding is full stone. Indeed Mr. Murray testified that he thought it was stone veneer. As a result, the cost of replacement must be based on what was proven at trial.

[500] Mr. Gouws included $43,125.84 for the cost of the Stone Cladding replacement based on discussions that he had with a mason who informed him that the Stone Cladding is "dry stacked natural stone cladding". However, this is hearsay evidence and cannot be accepted to prove that the Stone Cladding is natural stone.

[501] The only evidence I have on the cost of replacing the Stone Cladding, based on it being veneer, is that provided by Mr. Shrivastava, and I accept his estimate of $21,226.08.

Bonding and insurance

[502] Mr. Gouws opined that standard practice is that bonding and insurance should be calculated as a separate line item at 1.5% of the direct cost of performing the Remedial Work. Mr. Gouws prepared his estimate on the basis that there would be a project manager overseeing the Remedial Work. Mr. Shrivastava said that bonds and insurance should be part of a contractor's overheads. While not addressed at trial, these conclusions may depend on who is obtaining the insurance:

(a) the project manager overseeing the performance of the Remedial Work; or

(b) the trade performing a particular portion of the Remedial Work.

[503] There was no evidence that the Murray Residence was ever bonded and that the Remedial Work ought to be bonded. Without this evidence, I cannot accept any damages for bonding which covers a different risk than insurance and is sold a separate product.

[504] It is not clear from the Gouws Reports whether the claimed 1.5% includes an amount for bonding and insurance.

[505] Where the quantum of damages is difficult to estimate, then this Court must do its best on the material available. I accept that the quotes from the trades would include insurance; however, the project manager or contractor may price insurance separately. I have no information on what portion of the 1.5% of direct costs claimed by the Murrays relates to insurance. In light of no evidence on that issue, and having rejected a claim for bonding, I find that the Murrays are entitled

to an amount for insurance for half the amount claimed; in other words, 0.75% of the direct costs. This is for the insurance for the project manager or contractor undertaking the Remedial Work.

Should damages be subject to depreciation?

[506] Mr. Shrivastava provided an estimated "depreciated cash value" or "ACV" of the damages, which he explained as follows in his February 10, 2023, report:

> GNC Group has taken into account the depreciation of the building materials required for the repair work for all the categories. The estimated depreciated cash value is calculated for the component considering its loss of value over time. But repair cost is the value to repair a component considering its current cost for like, kind, and quality. The depreciation value includes the cost of the non-material component and depreciated material component values for all categories.
>
> The building was built in 2014, as per documents provided to GNC Group, and the building age was calculated accordingly. The age of the building is calculated based on the year when the repair work has been estimated. The remaining age for the components in each category has been calculated based on their standard life expectancies.
>
> The ACV for 2015 has been calculated in the amount of $281,503.50 considering the repair process would have started in 2015 after the identification of issues in 2014 because of the engagement of engineers, their inspection, scope preparation, contract award, permits, and mobilization of the contractor to the site would have taken time.
>
> The ACV for 2023 has been calculated in the amount of $342,911.09. GNC Group has reviewed all building components to be repaired, their total age, and the remaining life of the components, as per the below breakdown: ...

[507] Mr. Shrivastava used the acronym "ACV" for "depreciated cost value". "ACV" is also used as an acronym for "actual cost value" which is the price of an item immediately before it is damaged or destroyed. In other words, "actual cost value" is the cost of an item, minus depreciation. This also accords with what Mr. Shrivastava described as his method of determining "depreciated cost value".

[508] Mr. Shrivastava said that the "ACV for 2015 has been calculated ... considering the repair process would have started in 2015 ...". At paragraph [515], I explain why I have found that the earliest reasonable date to undertake the Remedial Work would have been January 1, 2017. I do not accept that the Remedial Work could have been reasonably undertaken in 2015.

[509] Mr. Shrivastava provided no explanation for discounting the damages for "depreciated cost value" in 2023. If the KAPO Windows and Doors are replaced with windows and doors that are newer than the remainder of the Murray Residence, the replacement cost is set at the date when the new windows and doors are supplied and installed. The replacement cost does not change even if the 10-year-old KAPO Windows and Doors are worth less at the date of replacement than when they were new.

[510] In any event, I find that the Murrays have not been able to use the Great Room Sliding Doors and the Master Bedroom Sliding Doors since they moved into the Murray Residence in 2014, except for a short period of time after the Turnbuckles were installed. As a result, the

Murrays have not had the use of the Great Room Sliding Doors and the Master Bedroom Sliding Doors for almost the entire period of time starting from when they moved into the Murray Residence to the date of trial.

[511] WBL did not assert that the Murrays' damages should be discounted for any betterment. This is likely because the claimed damages did not upgrade the Murray Residence and the life span of the Murray Residence would not be affected by the replacement of the KAPO Windows and Doors.

[512] There is no principled basis for reducing the damages for "depreciated cost value" and I reject such a deduction.

When should damages be assessed?

[513] WBL submitted in its closing brief that had the KAPO Windows and Doors been replaced "when they were first noticed or at least much sooner than now (more than 10 years later), they would have been likely repairable and significantly less costly to repair".

[514] The issues of functionality were first noticed in 2013. WBL was still the Murrays' project manager in 2014. Mr. Chakrabarti, on behalf of AEL, wrote a letter to the County's agent on February 19, 2015. In his evidence given on re-direct, Mr. Chakrabarti said that he was unaware of any Intermediary Beam deflection issues when he wrote that letter. Further, WBL never recommended replacing the KAPO Windows and Doors while it was project manager. WBL cannot now suggest that the KAPO Windows and Doors should have been replaced before February 2015.

[515] As noted in paragraph [442], Mr. Demitt said that he first visited the Murray Residence in January 2015 and issued his first report in April 2016. I find that the earliest date on which it would have been reasonable for the Murrays to consider undertaking the Remedial Work was April 2016. However, as has been clearly shown by the evidence in the case, that would not have been something that could have been done quickly or easily. Indeed, it took months to order, manufacture and deliver the KAPO Windows and Doors in 2012 and 2013, and there was no suggestion that this one item would not take equally as long in the context of the Remedial Work. As a result, I find that it would not have been reasonable for the Murrays to have commenced the Remedial Work before January 1, 2017, at the earliest.

[516] In *Heintzman*, at § 9:19, footnotes omitted, the authors note that an owner has a duty to undertake remedial work in a reasonable time after discovering the defects:

> The mitigation principle also impacts a party's obligation to repair defects. Generally speaking, if the owner has a claim against the contractor due to the contractor's faulty work, the owner has a duty to take mitigating steps within a reasonable time of discovering the defects. However, the owner is obliged to act reasonably, not perfectly. ...

[517] In ***Viper Concrete***, Wittmann ACJ considered whether it was reasonable for the plaintiff-by-counterclaim, Agon, to put off the replacement of the concrete from September 2005, when it obtained an expert opinion, to 2006. The costs in 2006 were "significantly higher" than the initial quote from Viper given in 2003: para 68. At paras 84 and 89, Wittmann ACJ commented on cost inflation:

> Whether or not inflation of building costs will render otherwise reasonable delay unreasonable was considered by Wallace in *Hudson's Building and Engineering Contracts* at para. 5.061:
>
> > A further argument for reducing cost of repair damages has been advanced on the basis of the factor of domestic inflation of building costs, so that delay by the plaintiff in initiating repairs on discovery of defects is said to be a failure to mitigate damage or, alternatively, an independent causative factor... It can be said that the above arguments have in general met with little success in English or Commonwealth courts... [A]ttacks on the attendant rises in cost of repair due to inflation have been similarly unsuccessful. ... [citing *Radford v. De Froberville* [1977] 1 W.L.R. 1262, *per* Oliver J., *Dodd Property (Kent) Ltd. V. Canterbury City Council* [1980] 1 All E.R. 928, and *William Cory Ltd. V. Wingate Investments* (1981) 17 BLR 109.]
>
> . . .
>
> Although Viper asserts that if Agon had completed the New Work in 2005, rather than 2006, the work would have been less costly, this falls short of establishing that completing the New Work in 2006 was unreasonable. I find no reason to depart from the general principle suggested in *Hudson's Building and Engineering Contracts* that domestic inflation should not reduce damages for the cost of repairs. As such, Agon is not disentitled to recover the costs of the New Work. Moreover, although there was evidence installation costs of concrete increased by $2 per square foot from 2004-2006, there is no evidence as to how much the increase was 2005-2006. And the onus to lead that evidence is Viper's.

[518] The above quote from ***Viper Concrete*** includes a reference to ***William Cory Ltd v Wingate Investments*** (1981), 17 BLR 109 (CA), 1980 WL 619053. ***William Cory*** has been referred to in several Canadian decisions. It arose from a construction project where the car park was not constructed in accordance with the specifications but with materials that would not last as long as those specified and cost more to maintain. The facts are somewhat different because the plaintiff held a lease for the premises and argued that if it replaced the car park surface and then did not succeed on its claim it would have done so for the benefit of the defendant lessor. However, the comments of Ormrod LJ, at pages 121 to 124, are nevertheless apt:

> Then we have to consider the time of assessment of the cost. The so-called general rule specifies that the cost is to be assessed at the time of the breach of contract; in this case that would be the summer of 1972. But this so-called general rule, as has been pointed out, particularly in the *Dodd* case, has been so far eroded in recent times ... that little of practical reality remains of it. The general rule, like the rule that judgments must be expressed in sterling converted where necessary at the rate of exchange prevailing at the date of breach, is, I think, a survival from the days of stable money, when assessment at the date of breach represented a broadly fair approach in the great majority of cases. Like the sterling rule, its rationale has been extensively undermined by unstable money ...
>
> . . .

> That brings me to the question of the date at which the cost of resurfacing the car park is to be assessed. Following ... the *Dodd* case, I think this too is an aspect of the duty to mitigate. If it would have been reasonable for the plaintiffs to do this work in 1972 or 1973 then no doubt the damages should be assessed in 1972 or 1973 pounds; similarly if it can be shown that they ought to have gone to the Court earlier than they did, which was in 1974, then some later date might be appropriate. The learned Judge held that the plaintiffs in this case had acted reasonably throughout. I entirely agree ...
>
> . . .
>
> ... It is clear that the defendants have had the use of this money ever since the date when they became liable to compensate the plaintiffs for breach of contract.
>
> It does not stop there. If the damages in this case are to be assessed at 1972 or 1973 pounds, the defendants will save an enormous amount because they will be able to pay a debt due in 1972 in 1980 pounds, which is not reasonable, equitable or just.

[519] In James Edelman, *McGregor on Damages*, 21st ed. (London: Thomson Reuters, 2021), at § 31-013, footnotes omitted, the author comments as follows about the ***William Cory*** decision:

> *Cory & Son v Wingate Investments*, went beyond all these decisions by allowing as damages the cost of reinstatement at the time when the claimants' claim was heard and when prices had risen steeply. The reinstatement had still not been effected at the date of trial since the claimants had felt unable to incur the considerable expenditure needed before they were assured of recovering this amount from the defendants, who had vigorously disclaimed liability right to the door of the court. This decision is in line with others appearing when inflation was severe, though not in the context of building contracts, where claimants have been held justified in deferring reinstatement up to the time of trial without being branded with a failure to mitigate.

[520] In ***Sproule v Nichols***, 2024 NSSC 26, the plaintiffs did not have the funds to undertake repairs. At para 76, Coughlan J said:

> I do not accept [the defendants'] position concerning mitigation. [One of the plaintiff's] evidence which I accept was [the plaintiffs] did not have the funds to pay for the necessary repairs. It was not unreasonable for [the plaintiffs] to establish [the defendants'] liability before carrying out the extensive repairs required. These issues were addressed by Saunders J. in *Stoddard v. Atwill Enterprises Ltd* ...:
>
> > [108] I also find no merit to the defendant's second argument. The general principle which underlies the law of mitigation is that a plaintiff must act reasonably to avoid further damage or increased costs against the defendant. This duty to act reasonably is related to the date for assessment of damages, in that the plaintiffs' duty to mitigate does not arise until a reasonable time after the assessment date. Normally the date of assessment is the date the contract is breached. However, there are certain exceptions to the "breach date rule". One of these exceptions is found, as here, in the so-called "repair" cases. The shift began with *Dodd Properties v. Canterbury*

> *City Council*, [1980] 1 W.L.R. 433 (C.A.), where it was held that the plaintiff was justified in deferring repairs up to the time of trial. This principle was also applied in a case of defective construction, where:
>
> > "… the plaintiffs had felt unable to incur the considerable expenditure needed before they were assured of recovering this amount from the defendants who had vigorously disclaimed liability right to the door of the court."
>
> *MacGregor on Damages*, referring to *Cory & Son v. Wingate Investments* (1980), 17 Build. L.R. 104 (C.A.)
>
> [109] This same approach was taken in *Costello v. Cormier Enterprises Ltd. ...* where the New Brunswick Court of Appeal held that the owner of the house was justified in waiting to establish the builder's liability before embarking on a full program of repair.
>
> [110] The Appeal Division of this court, in the case of *Canso Chemicals Ltd. v. Canadian Westinghouse Ltd. ...* , referred to *McGregor on Damages* (13th edition), at p. 229, for eight rules with respect to mitigation including:
>
> > "1. a plaintiff need not risk his money too far …
> >
> > "8. a plaintiff will not be prejudiced by his financial inability to take steps in mitigation."

[521] In ***Connolly***, Wright J, said at paras 41 and 42:

> Unquestionably, the plaintiffs bear the burden of proving their damages. The defendant, on the other hand, bears the burden of proving that the plaintiffs failed to mitigate their damages and that any unsuccessful expenditures intended to mitigate the damages were unreasonable. A plaintiff cannot recover damages which it could have avoided by reasonable conduct in the circumstances.
>
> These legal principles are nicely summarized in *Halsbury's Laws of Canada*, 1st ed., (2008 Construction Volume) at pages 217-219. It is unnecessary to quote at length from this authority other than to insert the following:
>
> > What is reasonable depends on all of the circumstances of the case. The innocent party is not held to a high standard. The innocent party is only required to act based on what it knows at the time, without the application of hindsight. It need not undertake anything risky. The wrongdoer is entitled to expect the aggrieved party to act reasonably, not perfectly.

[522] Wright J then quoted with approval the passage from ***Stoddard v Atwil Enterprises Ltd***, 1991 CanLII 4329 (NSSC), also quoted above in ***Sproule***. Wright J continued, at paras 44 and 45:

> Justice Saunders went on to find (at para. 111) that it was entirely sensible for the plaintiffs to have waited to ascertain their final legal position before deciding on the extent of the corrective measures they were willing to take. He added that there was

> no onus on them to incur further debt to effect these repairs and then await the outcome of trial and the determination of liability, noting that the defendant disclaimed any responsibility throughout.
>
> The plaintiffs are in a similar situation here with respect to the extent of the corrective measures to be taken, having testified that carrying out the necessary remedial work would require further borrowing on their part. I likewise conclude that there was no onus upon them to incur such further debt to carry out all the necessary remedial work prior to the outcome of this trial.

[523] In ***Cormier Enterprises Ltd v Costello***, 1979 CanLII 2709 (NBCA), at para 15, emphasis in the original, in overturning the decision of the trial judge to apply a deduction to the cost of repair, Richard JA said:

> I find that the law is well summarized on this particular topic in *Hudson's Building and Engineering Contracts*, 10th ed. (1970), at p. 591, where it is stated that:
>
> > It is now clear beyond doubt that *a plaintiff who has not unreasonably delayed carrying out repairs or completing the work after he becomes aware of the breach will obtain the cost of repair prevailing at the date the repairs are done, whenever that may be*.
> >
> > However; it undoubtedly appears to be the law of England at present that, once he knows of the existence of a breach, a plaintiff will be limited to the cost of repair *at or within a reasonable time of discovery*, so that if he waits unreasonably before carrying out repairs the additional cost due to inflation in the interim period will not be recoverable.
>
> (Additional emphasis added.) Even if one applied this principle, can it be said that the three or four years delay, which is the time that it generally takes to have a matter tried and finally disposed of in certain cases, be termed unreasonable? Likewise, can it be said to be an unreasonable delay where that delay is caused by the necessity or desire of a plaintiff to ascertain his final legal position before deciding on the extent of the corrective measures that he is willing to take? At p. 592 of *Hudson's Building and Engineering Contracts* it is interestingly stated that:
>
> > In times of steady monetary values, a plaintiff can choose the time when, for many different reasons, it suits him to carry out repairs, without suffering loss when he sues for his damages. He may not be in a position to vacate premises. He may, faced with a very heavy repair bill, and with an alternative cheaper but far less satisfactory way of dealing with the defects, wish to establish liability in a disputed case before deciding on the full programme of repair. All these are perfectly foreseeable as a result of a breach, it is submitted, and do not offend against any principle of mitigation of damage. Furthermore it is financially naive, it is submitted, to regard the plaintiff's action as increasing the defendant's loss - the defendant has had the use of the money during the period he has not had to pay the damages, and it is unrealistic to suppose that his assets or income

> are laid out or regulated in such a way as to remain static in the face of inflation - indeed most builders operate on borrowed working capital, and inflation actually operates to their real advantage in that respect, to which the present rule adds a further advantage by imposing a reduced liability in real terms. It would be interesting, incidentally, to know whether the courts would apply the same rule during a period of deflation, thereby conferring a profit on the [owner] if he delayed repairs.
>
> In the overall circumstances of this case, taking into consideration the period during which certain negotiations and attempts at correcting the defects took place, I do not find that the delay in bringing the action and trying the case was an unreasonable one and I believe that the 1978 estimate should govern. I would, accordingly, increase the award by $4,000. As to the award of general damages in the amount of $2,500, I have reviewed the evidence bearing on this issue and I cannot say that the award of the trial Judge is inordinately low.

[524] Here, there was no evidence that Murrays were unable to undertake the Remedial Work due to a lack of financial resources. However, the difference between the scope of an adjustment to the Guide Track, as suggested in the Carswell Report, and the Remedial Work which includes the reinforcement of the Great Room Structural Steel and replacement of the KAPO Windows and Doors is great. At no time did WBL concede that the Remedial Work should be taken, but only suggests that it should have been undertaken earlier if WBL is liable and, since it was not undertaken earlier, the Murrays should not be entitled to the cost of replacement as at the date of trial.

[525] I find it was not unreasonable of the Murrays to delay undertaking the Remedial Work. I further find that, in the circumstances, the Murrays have acted reasonably by not undertaking the Remedial Work before the determination of the liability of the defendants and the quantum of damages to which they are entitled. In making this finding, I have considered:

(a) the extensive nature of the Remedial Work;

(b) the absence of evidence that the failure to undertake the Remedial Work after January 1, 2017 (the earliest reasonable date) and the date of trial would have reduced the scope or cost of the Remedial Work;

(c) the fact that the defendants vigorously disclaimed liability throughout the action;

(d) that the alternative position of WBL was that the damages were limited to:

  (i) the Carswell Report and installation of Turnbuckles, as costed out in Mr. Shrivastava's September 6, 2021;

  (ii) the Latera Engineering repair work, not in evidence, with a total estimated cost of $458,150.57, as set out in Mr. Shrivastava's February 10, 2023 report, reduced to $342,911.09 for "depreciated cash value"; and

(e) that the cost of the Remedial Work is hundreds of thousands of dollars higher than the alternative position of WBL, which even for plaintiffs who are not impecunious would be a substantial sum.

[526] Having determined that that it was not unreasonable for the Murrays to wait until the trial of this action to undertake the Remedial Work, I must further determine whether the Murrays' claim for "escalation" is valid.

Claim for escalation or inflation

[527] Under cross examination, Mr. Gouws admitted that his calculation for "escalation" was the same as a claim for inflation. In his April 4, 2023 report, footnotes omitted, Mr. Gouws said:

> Due to the extent and invasive nature of the required repairs, and to avoid additional heating and hoarding costs, it is MKA's opinion that a more appropriate time to conduct the repairs would be during suitable weather conditions. Therefore, as the repairs at the [Murray Residence] will likely not commence prior to the 2023/2024 winter season, MKA has included escalation up to April 2024, which is around the time when construction will likely commence. In order to determine a reasonable increase in construction costs between April 2023 and April 2024, MKA has calculated the escalation for the period between April 2021 and April 2022, being a past known escalation rate in order to apply a forecasted future escalation rate. ...

[528] Mr. Gouws then applied a 17.12% inflation factor to his April 2023 costs based on construction inflation during the period between April 2021 and April 2022. Mr. Gouws did not calculate inflation over any other period than the 12 months immediately preceding April 2023. Mr. Shrivastava did not provide evidence on the inflation factor, if any, that should be applied from April 2023 to April 2024 to account for the work not being performed in 2023. However, Mr. Shrivastava noted that during the pandemic that inflation generally rose more rapidly than at other times.

[529] Pre-judgment interest is intended to account for inflation and the lost opportunity to earn profit on capital that one should have received; a court should only deprive a litigant of such interest for a compelling reason: ***Cornelson v Alliance Pipeline Ltd***, 2015 ABQB 152, at para 24; which was not raised on appeal: 2017 ABCA 13.

[530] Section 2(1) of the *Judgment Interest Act*, RSA 2000, c J-1 (*JIA*) provides that the court shall award interest from the date the cause of action arose to the date of the judgment in accordance with Part 1 of the *JIA*. Under s 4(2) of the *JIA*, the rate of interest for pecuniary damages is set by the *Judgment Interest Regulation*, AR 215/201. In 2023, it is 3.8%, and for 2024, it is 5.15%.

[531] Under s 2(3) of the *JIA*, a court may depart from the general provision set out in s 2(1):

> 2(3) If it considers it just to do so having regard to changes in market interest rates, the circumstances of the case or the conduct of the action, the court may
>
> (a) refuse to award interest under this Part,
>
> (b) award interest under this Part at a rate higher or lower than the rate set out in this Part, or
>
> (c) award interest under this Part for a period other than the period provided for in this Part.

[532] In ***Neste Canada Inc v Allianz Insurance Company of Canada***, 2008 ABCA 71, at para 81, the Court of Appeal discussed the discretion granted by s 2(3) of the *JIA*:

> It would be unwise to construe s. 2(3) of the *Judgment Interest Act* narrowly. It is obviously designed to make prejudgment interest depend on the substance of the matter, not on abstract concepts or technicalities. So any narrow interpretation could greatly reduce the beneficial effects of this Act. Before this Act, prejudgment interest was unusual, and was generally unobtainable in most litigation. Prejudgment interest is beneficial because it discourages a host of evils:
>
> (a) A defendant who stalls the plaintiff, having nothing to lose by delay and everything to hope for, including loss of evidence, either earning income on money invested, or saving interest otherwise paid to lenders, where money is not paid until late to plaintiffs;
>
> (b) A defendant who does not deliberately stall, but is inefficient and gives the suit low priority, having no incentive to do otherwise;
>
> (c) No recompense to the plaintiff for its losses from delay, whether by inflation, investment income foregone, interest paid to lenders, or otherwise;
>
> (d) Arguments and uncertainty about the date on which some head of damage should be deemed to occur; and
>
> (e) Lack of symmetry between the parties: the common law exacts deductions because losses will occur only in the future, but allows nothing extra for losses long past.

[533] Here, the issue is whether the inflation factor of 17.12% between April 2023 and April 2024 is appropriate. I am not bound by the rates set out in the *Judgment Interest Regulation* and, where just to do so, having regard to changes in market interest rates, the circumstances of the case or the conduct of the action, I can set a different rate.

[534] The difficulty with the 17.12% applied by Mr. Gouws was that it was based on the 12 months immediately preceding April 2023 and was not reflective of the longer-term increases in construction costs. Inflation is caused by a number of complex factors but there was no analysis that the steep 17.12% inflation would carry on from one year to the next. In this case, I find that without any analysis of longer-term inflation rates in construction costs it would be inappropriate to apply the proposed 17.12% inflation factor.

[535] In the absence of any other evidence, I find that the rates set out in the *Judgment Interest Regulation* are applicable to the damages from April 4, 2023 (the date of Mr. Gouws' second report) to the date of the issuance of this judgment.

Calculation of damages

[536] I have calculated the Murrays damages to be $914,946.59, based on the following items:

Item	Description	Damages
Direct Costs		
1	Demolition	$55,409.84
2	Masonry	$21,226.08
3	Structural Steel Framing	$128,982.12
4	Openings	$232,064.56
5	Sliding Glass Doors	$105,300.00
6	Gypsum Board	$12,695.20
6	Window Blinds	$439.74
6	Electrical	$1,200.00
6	Interior Lighting	$540.00
6	Exterior Lighting	$720.00
6	Storm utility water drains	$377.52
		$558,955.06
Indirect Costs		
7	General Conditions	$93,960.60
8	Insurance (0.75%)	$4,192.16
9	Contingency (15%)	$83,843.26
10	Consultants (2.5%)	$13,973.88
11	Permit Fees (0.5%)	$2,794.78
		$198,764.68
Contingency for collateral damage		
12	Replacement of hardwood floor	$0.00
13	Replacement of flagstone paving	$0.00
14	Replacement of floor tiles	$0.00
Remedial Work Subtotal		**$757,719.74**
	Overhead/profit (15% of subtotal)	$113,657.96
Total, excluding GST		**$871,377.70**
Total, including GST		**$914,946.59**

Conclusion and costs

[537] The Murrays are successful in their breach of contract claim against WBL. WBL is liable to the Murrays in the amount of $914,946.59, plus pre-judgment interest pursuant to the *Judgment Interest Regulation* from April 4, 2023, to the date of issuance of this judgment.

[538] The Murrays did not claim in contract against any of the other defendants.

[539] The Murrays claims against the defendants for negligent supply of shoddy goods or structures, negligent provision of services and breach of a duty to warn, are dismissed. None of AEL, WBL, KAPO, Luxus and Mr. Bade are liable to the Murrays in negligence.

[540] WBL pleaded that KAPO and Luxus made negligent misrepresentations, breached a duty to warn and breached certain statutory duties. I have dismissed all of those claims. It is not clear from the Third Party Notice whether WBL pleaded that there was a contract between it and KAPO or it and Luxus. However, even if this was pleaded, which would be directly contrary to the position of WBL at trial, I have found that WBL did not have a contract with either KAPO or Luxus and

therefore no contract claims arise as between these parties. As a result, WBL's third party claim against KAPO and Luxus is dismissed.

[541] KAPO's Notice of Co-defendant against WBL, Luxus and Mr. Bade is dismissed.

[542] Luxus' Notice of Co-defendant against WBL, KAPO and Mr. Bade is dismissed.

[543] AEL's third party claim against KAPO is dismissed.

[544] In the event that the parties are unable to agree to costs, then any one of the parties may write to me, no later than 30 days after the issuance of this decision, with a proposal for addressing costs which has been canvassed with all parties.

Heard on the 5th day of June, 2023 to the 19th day of June, 2023, with further written argument, oral closing argument on the 7th day of September, 2023, with further written argument, and oral closing on the 3rd day of May, 2024.
Dated at the City of Calgary, Alberta this 17th day of May, 2024.

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

Appearances:

Paul J Stein KC
for the Plaintiffs

Erika Carrasco & Logan Maddin
for the Defendant Windsor Brunello Ltd

Damian Shepherd
for the Defendant and Third Party Luxus Haus Imports Ltd

Sebastian Bade operating as CS Eurohaus
self represented at trial and appeared only on selected dates

No one appeared
for the Defendant Alberta Engineering Ltd

No one appeared
for the Defendant and Third Party KAPO Fenster und Türen GMBH