

NOVA SCOTIA COURT OF APPEAL

Citation: *FH Development Group Inc. v. Brooks*, 2026 NSCA 13

Date: 20260212

Docket: CA 544678

Registry: Halifax

Between:

FH Development Group Inc.

Appellant

v.

Stephen Brooks and Marianne Su-Ling Brooks

Respondents

Judges: Bryson, Bourgeois and Beaton, JJ.A.

Appeal Heard: February 5, 2026, in Halifax, Nova Scotia

Facts: In January 2021, the Respondents agreed to purchase a new home from the Appellant for \$597,490, with a closing date set for October 14, 2021. The Appellant later sought to increase the purchase price, delay completion, or terminate the agreement due to alleged issues with material and labor costs. The Respondents refused these changes, leading the Appellant to halt construction. The Respondents terminated the contract after the closing date passed without completion and purchased a comparable home for \$853,000, subsequently suing for the price difference (paras [1-4](#)).

Procedural History: • [*Brooks v FH Development Group Inc.*](#), 2025 NSSC 174: The trial judge allowed the Respondents' claim, finding that the Appellant's actions constituted an anticipatory breach of contract (para [5](#)).

Parties' Submissions: • Appellant: Argued that the Respondents failed to mitigate their damages reasonably, inflating their loss by purchasing a more expensive home. They claimed the trial judge misapprehended legal principles regarding mitigation and failed to explain the basis for awarding damages (para [6](#)).

Legal Issues:

- When did the Respondents' duty to mitigate arise?
- Were the Respondents obliged to negotiate with the Appellant to mitigate their damages?
- Was it reasonable for the Respondents to mitigate by purchasing an alternative home on the open market?

Disposition: • The appeal was dismissed with costs awarded to the Respondents.

Reasons: Per Bryson J.A. (Bourgeois and Beaton JJ.A. concurring):

The Court found that the duty to mitigate did not arise until the breach occurred on October 14, 2021, as the Respondents did not accept the anticipatory breach. The trial judge correctly applied the legal principles, noting that the Respondents were not obliged to negotiate with the Appellant, given the loss of trust and the Appellant's inconsistent demands. The Court also upheld the trial judge's finding that it was reasonable for the Respondents to purchase a replacement home in the open market, given the competitive real estate market at the time. The Appellant failed to provide evidence that the Respondents could have mitigated their loss by other means (paras [10-31](#)).

This information sheet does not form part of the court's judgment. Quotes must be from the judgment, not this cover sheet. The full court judgment consists of 32 paragraphs.

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Written Release: February 12, 2026

Held: Appeal dismissed with costs, per reasons for judgment of Bryson, J.A.; Bourgeois and Beaton, JJ.A. concurring

Counsel: Gavin Giles, K.C., and Andrew Kinley, for the appellant
Erin McSorley and Tyler White, for the respondent

Reasons for judgment:

Introduction

[1] On January 19, 2021 Stephen Brooks and Marianne Su-Ling Brooks agreed to purchase a new home from FH Development Group Inc. (“FH”) for \$597,490.00. The home was to be built in Brunello Estates Subdivision, Halifax. The closing date was October 14, 2021.

[2] Some months later, alleging problems with the availability and cost of materials and labour, FH sought to increase the purchase price, delay completion of the house or terminate the agreement and return the Brooks’ deposit.

[3] The Brooks declined these alternatives and insisted on performance of the contract. FH responded by discontinuing construction on their new home.

[4] The closing date came and went. The house was not complete. The Brooks claimed repudiation by FH and terminated the contract. They eventually purchased a comparable home in Clayton Park for \$853,000.00. The Brooks sued FH for the difference between the contract price of \$597,490.00 and the Clayton Park purchase price of \$853,000.00.

[5] Justice Gail Gatchilian allowed the Brooks’ claim.¹ She held that FH’s attempts to increase the purchase price and delay closing constituted an anticipatory breach of contract which the Brooks did not accept. Specifically she found:

- If FH had not ceased construction on the Brooks’ property in April 2021, it would have been ready for closing on October 14, 2021.
- The real reason that FH stopped construction was owing to an increase in the price of building materials and not the unavailability of building materials.
- Building materials and labour for construction of the Brooks’ home was available.
- Although costs for FH increased, those increased costs did not frustrate the contract.

¹ 2025 NSSC 174 [“Trial Decision”].

- FH failed to establish that materials and labour were unavailable and therefore had no contractual right to delay closing.
- The Brooks acted reasonably in mitigating their damages.

[6] FH appeals the judge's decision on mitigation. FH says the Brooks failed to act reasonably and so inappropriately inflated their loss. FH claims in its factum that the judge erred by:

- (a) Misapprehending legal principles regarding the obligation to mitigate damages;
- (b) Finding the Brooks had acted reasonably in mitigating damages by spending \$255,510.00 to buy a replacement home costing more than the agreed price of the home in the FH contract;
- (c) Allowing the Brooks to enjoy a "windfall" at the expense of FH instead of awarding damages that would have put them back into the position they would have been in, had FH fulfilled their contract;
- (d) By not fully explaining the basis upon which damages were awarded.

[7] FH's submissions rightly focused on the first two issues. The third "issue" is really a complaint about the consequence of the judge's alleged errors respecting the first two issues. As argued by FH, the fourth "issue" reproaches the judge for apparently ignoring evidence of what transpired after FH's anticipatory breach. But again success here depends on FH's success on issues #1 and #2. Considering the judge's decision and FH's oral and written submissions, the issues should be restated as follows:

1. When did the Brooks' duty to mitigate arise?
2. Were the Brooks obliged to negotiate with FH to mitigate their damages?
3. Was it reasonable for the Brooks to mitigate by purchasing an alternative home on the open market?

[8] Discussion of the issues will be prefaced by a summary of the mitigation principle.

[9] The duty to mitigate does not limit what an innocent party may do to restore a loss. It only limits what that party may recover from the defaulting party.

Waddams in *The Law of Damages*² refers to the English Court of Appeal which put it this way:

For the purposes of the present case it is important to appreciate the true nature of the so-called “duty to mitigate the loss” or “duty to minimise the damage”. The plaintiff is not under any actual obligation to adopt the cheaper method: if he wishes to adopt the more expensive method, he is at liberty to do so and by doing so he commits no wrong against the defendant or anyone else. ***The true meaning is that the plaintiff is not entitled to charge the defendant by way of damages with any greater sum than that which he reasonably needs to expend for the purpose of making good the loss.***³

[Emphasis added]

When did the duty to mitigate arise?

[10] This is a question of law on which the judge must be correct.

[11] FH complains the judge wrongly found that the duty to mitigate did not arise until FH failed to close on the agreed closing date of October 14, 2021. FH says the judge legally erred in relying upon *Leland Walton & Sons Ltd. v. Hillspring Farms Ltd.*,⁴ which held:

[20] What we are left with is a case in which the seller has repudiated the contract before the time fixed for delivery – an anticipatory breach. Of course, the buyer is under no legal obligation to accept the repudiation. He may sit back and wait until the day of promised performance and claim damages based on the market price on that date. This is just another way of stating that ***the buyer is under no obligation to mitigate any losses that might be accumulating because of rising market prices between the date the anticipatory breach is communicated and the date of the promised delivery.*** Indeed, the buyer’s expert witness calculated damages as if the mitigation principle did not exist. At this point, more facts are required.

[Emphasis added]

[12] The judge found that FH’s insistence on a higher purchase price and a delayed closing date constituted an anticipatory breach of contract. But the breach itself did not occur until the failure to perform on October 14, 2021. When a party

² Stephen Waddams & Patrick Healy, *The Law of Damages*, looseleaf edition (Toronto: Thomson Reuters Canada, 2025) at §15:4.

³ *Darbishire v. Warran*, [1963] 1 W.L.R. 1067 (C.A.) at p. 1075, explained in *Coles v. Hetherington*, [2013] EWCA Civ. 1704.

⁴ 2007 NBCA 7.

is faced with anticipatory breach it may either accept the breach and pursue its legal remedies at that time, or refuse to accept the anticipatory breach and insist on performance of the contract. In that case, the duty to mitigate does not arise until a breach occurs. *Leland* later says as much:

[36] [...] ***If the innocent party refuses to accept the anticipatory breach, the principle of mitigation is not yet in play.*** The innocent party may sit back and watch the losses accumulate in harmony with the fluctuation in market prices. But ***once the promised date of delivery arrives, the principle of mitigation is triggered*** unless the innocent party is content to have damages assessed as of the date of the breach.

[Emphasis added]

[13] FH is correct that the law “... requires a victim of contractual breach to do what is reasonable to mitigate any resulting losses”, but that duty to mitigate assumes a breach has occurred. No such duty arises if the innocent party refuses to accept the defaulting party’s anticipatory breach.

[14] FH mistakenly argues that *Leland*’s summary of the duty to mitigate is “without any authority, and contrary to the great weight of legal authority which requires the victim of a contractual breach to do what is reasonable to mitigate any resulting losses...”.

[15] Contrary to FH’s submission, binding authority supports *Leland*:

[...] where the vendor reneges in anticipation of performance, the innocent party has two options. He or she may accept the repudiation and treat the agreement as being at an end. [...] Alternatively, the injured party may decline to accept the repudiation and continue to insist on performance.⁵

[16] If the innocent party insists on performance, as the Brooks did in this case, no duty to mitigate arises until there is a breach. For that proposition the Supreme Court relied on *McGregor on Damages*:⁶

Where a party to a contract repudiates it, the other party has an option to accept or not to accept the repudiation. ***If he does not accept it there is still no breach of contract, and the contract subsists for the benefit of both parties and no need to mitigate arises.*** On the other hand, if the repudiation is accepted this results in an

⁵ *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415, p. 425 [*Semelhago*].

⁶ 13th Ed., 1972 at p. 149.

anticipatory breach of contract in respect of which suit can be brought at once for damages [...]⁷

[Emphasis added]

[17] FH says that the Brooks knew by August 25, 2021 that the house would not be ready by the closing date of October 14, 2021. Effectively, FH argues that this triggered a duty to mitigate. *Leland* and other cases do not support any duty to mitigate prior to a breach. Even if so, this argument is of no assistance to FH because:

- (a) FH led no evidence concerning the housing market which would demonstrate the Brooks' loss could have been avoided or diminished;⁸
- (b) FH's argument that making a new deal with them would have resulted in lower damages was rejected by the trial judge who found the Brooks had no duty to negotiate with a faithless vendor.

[18] The obligation to mitigate is "consequent on the breach". In this case, the breach of contract occurred on October 14, 2021, not earlier, because the Brooks did not accept FH's anticipatory breach. So the judge was correct to ignore the alleged failure to "mitigate" prior to that time because no such duty had arisen.

Were the Brooks obliged to negotiate with FH to mitigate their damages?

[19] Whether it was reasonable in all the circumstances to deal with FH was a question of fact for the trial judge, reviewable on appeal only if the judge made a clear and material error of fact. Unless there was no evidence to sustain the judge's factual finding, it is unassailable in this Court.

[20] The judge found that it was reasonable for the Brooks to have lost trust in FH. It was therefore appropriate for them to terminate after the closing date rather than pay a greater purchase price under protest for a house that "might or might not be ready by the end of January, 2022".⁹ In so concluding, the judge observed:

⁷ *Semelhago*, p. 426; also *100 Main Street Ltd. v. W.B. Sullivan Construction Ltd.*, [1978] O.J. No. 3448, 20 O.R. (2d) 401 at para. 54.

⁸ FH carried the burden of proof of failure to mitigate: *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51 at para. 24 [*Southcott*] citing *Red Deer College v. Michaels*, [1976] 2 S.C.R. 324, 57 D.L.R. (3d) 386 [*Red Deer College*] and *Asamera Oil Corporation Ltd. v. Sea Oil & General Corporation et al.*, [1979] 1 S.C.R. 633, 1978 CanLII 16 (SCC) [*Asamara*].

⁹ Trial Decision, para. 81.

- FH's demand changed from \$15,000, to a sharing in the additional cost, to a surcharge of between 5% and 10% (i.e. between \$29,879 and \$59,759), back to a demand for \$15,000.
- There was no home to move into on October 14, 2021.
- FH Development repeatedly extended the completion date of the home.
- The Brooks reasonably concluded that building supplies and labour were available to complete the construction of Lot 92 by the closing date, despite FH Development's assertions to the contrary.

[21] Following the Ontario Court of Appeal in *Azzarello v. Shawqi*,¹⁰ the judge made the reasonable observation that accepting FH's submissions would encourage developers to default in a rising market. Any offers made by the developer in those circumstances could be considered "mitigation" and thus insulate the defaulting developer from a higher damage claim from the innocent purchaser. The judge rejected this submission.

[22] FH attempts to distinguish *Azzarello* by saying that the roles were reversed in that case because the innocent party was a vendor. This is a distinction without a legal difference. The cases are mirror images. In *Azzarello* a defaulting purchaser argued that the innocent vendor should accept a lower offer in a declining market, by way of mitigation. In this case, the defaulting vendor seeks a higher price in a rising market. In each case the law should not reward the defaulting party's use of a favourable market to compel the innocent party to comply with a new deal under the guise of mitigation.

[23] FH also notes the court in *Azzarello* questioned whether the evidence supported the defaulting party's alleged offer. FH says in this case the evidence shows that it was prepared to negotiate. An offer to negotiate is even less of an offer than the ambiguous offer of a 10% discount in *Azzarello*. It is no offer at all. Alternatively, FH argued the Brooks should have paid the increased purchase price under protest. The judge found the Brooks had no such obligation.

[24] FH also challenges the decision for failing to engage with all of its cited jurisprudence concerning whether the Brooks should have mitigated by negotiating with FH.

¹⁰ 2019 ONCA 820, paras. 39-40.

[25] The judge was not required to consider every authority cited to her. Even so, resort to FH's cases would avail them nothing in this case.¹¹ None of FH's cases insist that an innocent party must negotiate with the defaulting party to mitigate their loss. In each instance, it is a question of whether or not it is reasonable to do so. To quote from the English Court of Appeal in *Payzu, Ltd. v. Saunders*,¹² on which FH relies:

It is plain that the question what is reasonable for a person to do in mitigation of his damages cannot be a question of law, but must be one of fact in the circumstances of each particular case. There may be cases where as a matter of fact it would be unreasonable to expect a plaintiff in view of the treatment he has received from the defendant to consider an offer made.

[Emphasis added]

[26] Later Canadian cases are consistent with *Payzu*. The question of whether an innocent party must mitigate by negotiating with the defaulting party is a question of fact involving an assessment of what is reasonable in all the circumstances.¹³

[27] Some cases find that it was reasonable to negotiate with the defaulting party.¹⁴ Other cases decide otherwise.¹⁵ Like here, a loss of confidence in the defaulting party may make it reasonable for the innocent party to decline further dealings with the party in default.¹⁶

[28] As earlier described, the judge found that it was reasonable for the Brooks to decline to negotiate with FH.

Was it reasonable for the Brooks to mitigate by buying in the open market?

[29] FH criticizes the Brooks for buying a replacement home from a third party. FH insists it was unreasonable to buy in the inflated real estate market in the Fall of 2021 and early Winter 2022. Instead, the Brooks should have made another deal with FH. Again, whether it was reasonable to buy in the open market was a

¹¹ *Asamera; British Columbia v. Canadian Forests Products Limited*, 2004 SCC 38; *Red Deer College; Southcott; British Westinghouse Electric Manufacturing Co. v. Underground Electric Railways Co.*, 1912 A.C. 673.

¹² [1919] 2 K.B. 581 (Eng. C.A.).

¹³ *Redpath Industries Ltd. v. Cisco (The)*, [1994] 2 FC 279 at p. 312; *Delco Automation Inc. v. Carlo's Electric Limited*, 2016 ONCA 591 at para. 25 (*Delco*); *North America Construction (1993) Ltd. v. Yukon Energy Corporation*, 2018 YKCA 6 at paras. 118-122 (*Yukon*).

¹⁴ *Nashville Contractors Ltd. v. Middleton*, [1984] O.J. No. 99 (Ont. C.A.); *Westland Investment Corp. v. Carswell Collins Ltd.*, [1996] A.J. No. 21, [1996] A.W.L.D. 153.

¹⁵ *Canadian Flexible Skate Co. Ltd. v. Monarch Brass Mfg. Co. Ltd.*, [1925] 2 D.L.R. 387, 56 O.L.R. 362.

¹⁶ *Delco* at para. 26; *Yukon* at para. 122.

question of fact for the trial judge. She accepted the evidence of the Brooks' real estate agent concerning the state of the real estate market between October 2021 and February 2022:

[83] I accept the evidence of Mr. Manderville concerning the state of the real estate market when the Brooks were looking for an alternative home from October, 2021 to February of 2022:

- The market had become very competitive, with there often being more than 20 bidders on a single property submitting blind bids. Houses were selling well over the asking price during this time period, sometimes in the tens of thousands of dollars above asking and particularly so in the winter of 2022.
- Properties were selling well over asking price.
- His advice to the Brooks was to put their best foot forward when making an offer to purchase a house that they really wanted, knowing that there would likely be many offers on the property and knowing that it would likely sell well above the asking price.
- Mr. Manderville submitted several offers on properties on behalf of the Brooks in the fall of 2021 and the early winter of 2022.
- The Brooks continued to be outbid on the properties on which they submitted offers, despite offering above the asking price on each of the properties.
- In one case, the Brooks offered \$566,000 for a house listed at \$380,000. The Brooks were outbid, the house having sold for \$585,000.

[see the text messages between Mr. Brooks and Mr. Manderville, attached as Exhibit 37 to Mr. Manderville's Affidavit]

[30] FH adduced no evidence of availability of alternative houses between October 2021 and February 2022 other than two homes sold by FH in Brunello Estates. The judge had already ruled that it was reasonable for the Brooks not to buy a home from FH. She concluded that the Brooks acted reasonably in purchasing a comparable home in the open market:

[88] FH Development has failed to persuade me that the Brooks, acting reasonably, could have purchased a home comparable to Lot 92 in the fall of 2021 or early in 2022 for less than what they paid for 21 Barkton.

[31] There was evidence to sustain the judge's conclusion that it was reasonable for the Brooks to have purchased an alternative home in Clayton Park. She made no clear and material errors of fact in so finding.

Conclusion

[32] The appeal should be dismissed with costs in the amount of \$24,000.00, inclusive of disbursements, payable to the respondents, representing 40 percent of the costs awarded at trial.

Bryson, J.A.

Concurred in:

Bourgeois, J.A.

Beaton, J.A.