

COURT OF APPEAL FOR ONTARIO

CITATION: Block Developments Inc. v. Brewers Retail Inc., 2026 ONCA 431

DATE: 20260618

DOCKET: COA-24-CV-0485

Simmons, Zarnett and Sossin JJ.A.

BETWEEN

Block Developments Inc.

Plaintiff (Respondent)

and

Brewers Retail Inc.

Defendant (Appellant)

Jeff Galway, Christopher DiMatteo, and Sanjit Rajayer, for the appellant

Matthew P. Sammon, Christopher Yung, and Katrina Dods, for the respondent

Heard: September 19, 2025

On appeal from the judgment of Justice Carole J. Brown of the Superior Court of Justice, dated April 2, 2024, with reasons reported at 2024 ONSC 1401.

Zarnett J.A.:

I. OVERVIEW

[1] In June 2015, the respondent, Block Developments Inc. (“Block”), entered into two agreements of purchase and sale (each an “APS”) to acquire properties owned by the appellant, Brewers Retail Inc. (“Brewers”). The properties had been

marketed by Brewers as excellent development opportunities, and Block intended to develop them by constructing a mixed-use condominium project. The parties agreed that a portion of the redeveloped project would be leased back to Brewers.

[2] Brewers unilaterally terminated each APS in November 2015. In December 2015, Brewers sold the properties to another developer, Rosewater Development (“Rosewater”), at a price slightly less than Block had agreed to pay.

[3] Block sued for damages. After a multi-week trial, the trial judge found that Brewers had breached its contracts with Block, including its duty of good faith and fair dealing, and that Brewers had made actionable misrepresentations. The trial judge awarded damages to Block in the amount of \$15.5 million, plus prejudgment interest. She rejected Brewers’ argument that Block had mitigated its damages.

[4] In this court, Brewers does not contest the trial judge’s liability finding. It argues that the trial judge erred in two respects in the damages award.

[5] First, Brewers argues that the trial judge made the very error that was reversed by this court in *The Rosseau Group Inc. v. 2528061 Ontario Inc.*, 2023 ONCA 814, 169 O.R. (3d) 192, by awarding development profits instead of the difference between the contract price Block agreed to pay and the market value of the properties on the date of breach. Brewers submits that market value was the price Brewers obtained on its resale to Rosewater, meaning Block suffered no damages. According to Brewers, it was not open to the trial judge to accept Block’s

experts' calculation of damages (\$15.5 million), or the calculation of Block's damages presented by Brewers' own experts (between \$7.6 million and \$10.2 million) since both calculations took projected development profits into account.

[6] Second, Brewers contends that the trial judge's mitigation analysis was inconsistent with the Supreme Court's decision in *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51, [2012] 2 S.C.R. 675. According to Brewers, *Southcott* required the trial judge to treat property purchases by Block's affiliates as evidence that there were development properties available for purchase by Block itself, and therefore of Block's own failure to mitigate.

[7] For the reasons that follow, I would dismiss the appeal.¹

[8] As this court held in *Rosseau Group*, the normal measure of damages for a failed real estate purchase is the difference between the contract price and the market value of the land on the "assessment date", which is usually the date of breach—the date on which the purchase was to close, but did not. The normal measure puts the innocent purchaser in the position it would have been in had the transaction closed by awarding the purchaser the financial or economic equivalent of what it was deprived of on the closing date, less what it had to pay the vendor to obtain it.

¹ Because I would uphold the trial judge's award of contract damages, it is unnecessary to address Block's alternative argument that her award could be upheld on tort damages principles.

[9] As *Rosseau Group* also held, the fact that the subject of the defaulted purchase is land that could be developed does not, on its own, render the normal measure of damages inapplicable. Market value takes into account the opportunity to profit from the land in the future, including by development; it is “the price at which knowledgeable arms’ length parties are prepared to transact given their assessment of the opportunity the property provides and the chance of realizing on it successfully”: at para. 88.

[10] But *Rosseau Group* does not hold that market value is always equal to the amount realized by the defaulting vendor on a resale, nor that the resale amount necessarily represents, at the assessment date, the economic equivalent of what the purchaser was deprived of on the closing date. The normal measure of damages may be departed from where it does not address the type of loss the innocent party suffered.

[11] Due to Brewers’ breach, Block lost a development opportunity that had a degree of specificity known to the parties at the time of contracting. The trial judge recognized that lost development profits were a recoverable type of loss. The approach of the experts called by both parties and accepted by the trial judge to measure Block’s loss differed markedly from that rejected in *Rosseau Group*. The approach in this case used the date of the breach as the assessment date, as contemplated by the normal measure. It valued what Block was deprived of by looking at what a reasonable person would pay or demand, on the assessment

date, for projected cash flows from the future development in light of the time to realize them and the risks they may not be realized.

[12] Neither the trial judge nor the parties called the approach taken by the experts a market value approach; they called it a lost development profits approach. However, in determining whether a trial judge has departed from the normal measure of damages in a manner that is unjustified and warrants appellate interference, the extent of any departure is important, and substance must prevail over nomenclature.

[13] In these circumstances, the trial judge did not make a legal error in accepting the approach endorsed by both sets of experts rather than the Rosewater sale price that Brewers pointed to. Given the deference afforded to a trial judge's damages assessment in the absence of legal error, there is no basis to interfere.

[14] Nor did the trial judge err in her conclusion about mitigation. At trial, both parties' arguments regarding mitigation treated Block and its affiliates as one. The trial judge found that the Block corporate group could and would have purchased each property it purchased subsequent to the breach in addition to the properties Block was to acquire from Brewers. Accordingly, none of the actual acquisitions arose as a consequence of Brewers' breach—none were mitigating. I see no error in that conclusion.

II. BACKGROUND AND CONTEXT

1. The APSs, the Breach, and the Resale

[15] Brewers is an Ontario corporation. It carries on business as The Beer Store. At the relevant times, Tom Lucas was its Director, Real Estate and Construction, with responsibility for, among other things, sale lease-back transactions.

[16] Block is an Ontario real estate development company. It is part of a corporate group of affiliated and related companies which, in the period leading up to and following the proposed purchases from Brewers, was pursuing, with strong financial backing, a business model of aggressive growth.

[17] In February 2015, Brewers listed ten Ontario properties for sale, including five in Toronto. Two of them were the properties relevant to this appeal, 1200 Dundas St. W. (the “Dundas Property”) and 28 River St. (the “River Property”) (together, the “Properties”).²

[18] The Properties were each marketed as an “[e]xcellent development opportunity”, offered on a lease-back basis: the purchaser would be required to grant Brewers the right to use each Property until it was demolished for redevelopment, and to use a specified amount of retail space on the ground floor of the redeveloped project.

² A third property, 57 Brock Ave., was purchased by Block from Brewers—that transaction was completed and therefore is not relevant to the issues on appeal.

[19] On June 23, 2015, Block and Brewers executed an APS for each of the Properties, under which Block would purchase the Dundas Property for \$6.9 million and the River Property for \$4.9 million. The transactions were to close on December 15, 2015.

[20] Each APS contained conditions. Under the Buyer's Diligence Condition, each APS was conditional on Block being satisfied with the physical and environmental condition of the Property and the economic feasibility of Block's intended use and development of it. Under the Mutual Lease Condition, each APS was conditional on Block and Brewers agreeing to the form and content of an Interim Agreement to Lease (under which Brewers would lease a portion of the Property from Block to operate a retail store until redevelopment) and a Long Term Agreement to Lease (under which Brewers would lease a portion of the Property for a retail store after redevelopment), incorporating terms set out in each APS³. The conditional period was 45 days from the acceptance of the APS. Block could extend the conditional period by an additional 15 days under certain circumstances.

[21] On August 4, 2015, Block exercised its right to a 15-day extension of the conditional period, and the parties thereafter agreed to certain further extensions. On September 25, 2015, the parties executed amended agreements by which

³ In each APS, the schedule of terms relating to the Long Term Agreement to Lease refers to the intention of the parties that Brewers' space be located in an "integrated mixed-use project that may include a residential component".

(a) the parties agreed to price reductions such that the price for the Dundas Property was \$6.15 million and the River Property was \$4.15 million, (b) Block waived the Buyer's Diligence Condition for the Properties, and (c) the deadline for the Mutual Lease Condition was once more extended, to October 29, 2015.

[22] It was an agreed fact at trial that Brewers, through Mr. Lucas, told Block on October 29, 2015 that Brewers would waive the Mutual Lease Condition if Block waived it. The trial judge found that Mr. Lucas made misrepresentations to Block that led it not to waive the Mutual Lease Condition on that day in the belief that discussions were and would be continuing and that finalization of the terms of the leases after October 29 would still satisfy the condition, as a waiver would be backdated.

[23] The trial judge also found that prior to October 29, Mr. Lucas approached Rosewater, which had been interested in the Properties but was outbid by Block. The principal of Rosewater, Mr. Bottero, was a friend and business associate of Mr. Lucas. When Rosewater expressed continuing interest in a purchase, Mr. Lucas sought and obtained instructions from Brewers' Board of Directors to sell the Properties to Rosewater, on the basis of what the trial judge found to be "numerous significant misrepresentations".

[24] On November 5, 2015, relying on the alleged non-fulfillment of the Mutual Lease Condition, Brewers terminated the APS for both Properties.

[25] On November 9, 2015, Rosewater submitted agreements to purchase the Dundas Property for \$5.45 million and the River Property for \$4.5 million—a total that was \$350,000 less than Block had agreed to pay. Brewers closed those sales on December 15, 2015, the same date as the sales to Block were to be completed.

2. The Damages Evidence

[26] Block sought damages based on evidence from four sources:

- (i) an expert who opined on the probable revenues associated with Block's development of the Properties into mixed-use condominiums, including the construction period, the period over which sales of units would take place, the rate of sales, and sales prices;
- (ii) an expert who opined on the capitalization rate for foregone leases to Brewers;
- (iii) two experts from Pelican Woodcliffe Inc. ("PWI") who opined on the development costs of the project (including the costs of acquiring the Properties from Brewers, the "hard" costs of constructing the project, and the "soft" costs such as consultant fees, insurance, development charges taxes and financing) and estimated the profits Block would have earned from development of the properties using the revenues projected and capitalization rate estimated by the first two experts; and

(iv) an expert (Larry Andrade of Deloitte LLP) who opined on Block's economic damages which he calculated as the present value of Block's profits as at November 5, 2015, the date of the breach of each APS.

[27] It was Mr. Andrade whose opinion reflects the damages amount that Block actually claimed and the trial judge awarded. In light of the issues on the appeal, his approach is important.

[28] Mr. Andrade described his approach as a determination of the present value of Block's loss of profit as at November 5, 2015, consisting of three steps. First, relying on the PWI evidence, he calculated the projected profit from the development of the Properties. That profit was projected to be earned over a lengthy period after the acquisition of the Properties (almost 5 years in the case of the Dundas Property, and almost 7 years in the case of the River Property). Second, he deducted any actual profit of Block from development of the Properties, which he took to be nil. Third, by the use of a discount rate, he calculated the economic damages to Block as at the date of the breach. His report described the third step as follows:

In order to assess the damages incurred by Block at [November 5, 2015], we convert the monthly loss of profits to a single point in time, using a discount rate. The purpose of this calculation is to assess what a reasonable party would pay or accept at a certain point in time in exchange for a future stream of cash flows, based on the risk of achieving such cash flows and the time value of money. [Emphasis added.]

[29] Mr. Andrade used a discount rate of 10%.

[30] Brewers argued at trial that the normal measure of damages applied in this case, and that damages for lost profits were not available. However, Brewers also put forward responding experts who gave evidence on (i) projected construction costs and profitability (CB Ross Partners, responsive to PWI's evidence) and (ii) on the economic loss suffered by Block (Dennis Leung of Grant Thornton LLP, responsive to Mr. Andrade's evidence). In light of the issues on this appeal, I describe the approach of Brewers' economic loss expert, Mr. Leung.

[31] Mr. Leung described his mandate as including quantifying "the economic damages, if any, sustained by Block arising from the [termination of the APS for the Dundas Property and the River Property on November 5, 2015]. The economic damages are equivalent to the present value of the potential profit that would be earned from the development and sale of the [Properties]".

[32] Using an approach similar to that of Mr. Andrade, Mr. Leung determined the "present value [as at November 5, 2015] of the projected profits by discounting the projected monthly profitability ...at a single point in time using a selected discount rate...". He stated that the "purpose of this calculation is to assess what a reasonable party would pay or accept at a certain point in time in exchange for a future stream of cash flows, based on the risk of achieving such cash flows and the time value of money." He also used a discount rate of 10%.

[33] Mr. Andrade calculated the present value of Block's loss of profit as \$15,505,056 at the date of the breach. Mr. Leung, using different assumptions about the length of the construction period, calculated the present value of Block's potential profits, as at the date of the breach, as between \$7.6 million and \$10.2 million.

3. The Mitigation Evidence

[34] Before Block entered into each APS, the group of affiliated companies of which Block was a part had been actively seeking to expand its portfolio of mid-size development properties. Following November 5, 2015, that plan continued. Members of the group made offers on 73 properties and acquired six development sites.

[35] Mr. Leung gave evidence that if these subsequent purchases were considered as mitigating, the profits that would have been earned on them offset the loss of potential profits that would have been earned on the Properties.

[36] Block submitted that none of these sites were replacements for the Properties, as the Block group would have acquired all of the sites and the Properties but for Brewers' breach of contract.

III. DECISION BELOW

[37] The trial judge found that Brewers acted egregiously, breaching its contractual obligations. It did not fulfil its duties to act honestly and in good faith,

to cooperate to achieve the objects of each APS, and to fulfil their conditions. She found it was “likely...that Lucas had sought to withdraw from the deals [with Block] and benefit his business associate and friend [the principal of] Rosewater”. Brewers was precluded from relying on its strict legal rights to terminate each APS under the Mutual Lease Condition by virtue of promissory estoppel. Brewers was also liable for misrepresentation arising from Mr. Lucas’ misstatements to Block, which Block relied on to its detriment.

[38] She then proceeded to assess damages for breach of contract.

[39] This court’s decision in *Rosseau Group* was released after closing arguments but while the trial judge’s decision was under reserve. Both parties provided supplemental submissions regarding the appropriate measure of damages based on *Rosseau Group*. Brewers’ position was that the normal measure of damages applied based on that decision. It asserted that market value of the Properties at the assessment date was the sale price to Rosewater, and since that was less than Block’s contract price, there were no damages. Block argued that the expert evidence, including that led by Brewers, showed that Block suffered significant damages, and that since the present-valued loss of profits had been calculated net of the land acquisition costs (i.e. the contract prices Block agreed to pay), the “market value” of the Properties on the date of the breach “did not incorporate the full development value”.

[40] The trial judge rejected Brewers' argument that development profits were unavailable, citing the Supreme Court's decision in *Performance Industries Ltd., v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678, as well as the trial decision in *Rosseau Group*. Turning to this court's decision in *Rosseau Group* and the parties' submissions about it, she said:

I have carefully considered the subject decision [in *Rosseau Group*] and the submissions of the parties. I do not find any reason to alter or change my conclusion as regards measures of damages.

While the Court of Appeal held that the normal measure of damages is the difference between the purchase price and the market value of the property on the assessment date, they also recognized that the normal measure of damages may not address the type of loss allegedly suffered.

In the present case, I find that the market value approach would not appropriately or fairly assess the plaintiff's damages in the circumstances of this case.

I remain of the opinion that the lost development profit approach, adopted by both parties [sic] economic loss experts is the fair and appropriate means to assess damages in all of the circumstances of this case. [Emphasis added.]

[41] Preferring Block's expert evidence to that of Brewers where they conflicted (primarily on the length of the proposed construction period), she assessed Block's damages at a total of \$15.5 million.

[42] Finally, the trial judge rejected the argument that Block had mitigated its damages by the purchases made by its affiliates after November 5, 2015. She accepted that Block's stated business plan and purpose was "aggressive growth, to acquire as many properties for development as quickly as possible for profit." The acquisitions were not mitigating as the properties purchased were not replacements for the Dundas and River Properties; they would have been purchased regardless of whether the Dundas and River Properties had been successfully purchased.

IV. ISSUES

[43] As noted above, Brewers does not appeal the findings of liability made against it.

[44] The issues on appeal are:

- (1) Did the trial judge use an erroneous and unjustified measure of damages?
- (2) Did the trial judge err by concluding that Block's damages should not be reduced due to mitigation?

V. ANALYSIS

1. The Measure of Block's Damages

[45] In order to address Brewers' submission that it was an error in light of this court's decision in *Rosseau Group* for the trial judge to award Block damages on

the basis that she did, I begin by describing the standard of review. I then outline the principles reaffirmed in *Rosseau Group* and the nature of the damages calculation that was set aside there. Against that backdrop, I examine the premises of Brewers' argument.

a. The Standard of Review

[46] Damages are inherently factual and contextual. A trial judge's assessment of damages attracts considerable deference. Appellate interference is justified only where the trial judge made an error in principle, misapprehended the evidence, failed to consider relevant factors, considered irrelevant factors, made an award without any evidentiary foundation, or otherwise made a wholly erroneous assessment of damages: *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58, [2001] 2 S.C.R. 943, at para. 80; *Rougemount Capital Inc. v. Computer Associates International Inc.*, 2016 ONCA 847, 410 D.L.R. (4th) 509, at para. 41; *TMS Lighting Ltd. v. KJS Transport Inc.*, 2014 ONCA 1, 314 O.A.C. 133, at para. 60; *SFC Litigation Trust v. Chan*, 2019 ONCA 525, 147 O.R. (3d) 145, at para. 112.

b. The Principles in *Rosseau Group* and the Damages Calculation that was Set Aside

[47] *Rosseau Group* reaffirmed the normal or presumptive measure of damages for a failed real estate purchase. It is the difference between the contract price and the market value of the land on the assessment date which is generally the date

of breach—when the purchase was scheduled to close but did not. Use of that measure is supported by the core principle governing the assessment of damages—to put the innocent party in the position it would have been in if the contract were performed—as well as by the commercial certainty that follows from a predictable damages methodology. As explained at paras. 62-64:

The normal measure of damages for a failed real estate purchase is the difference between the contract price and the market value of the land on the "assessment date". The assessment date is usually the date on which the purchase was scheduled to close. Although the court may set a later date if the party seeking damages satisfies certain criteria, the presumption is that damages are to be assessed as of the date of the breach. That presumption is not easily displaced; any deviation from it must be based on legal principle: *100 Main Street Ltd. v. W.B. Sullivan Construction Ltd.* (1978), 20 O.R. (2d) 401, 88 D.L.R. (3d) 1 (C.A.), at para. 55, leave to appeal refused (1978) 20 O.R. (2d) 401 (S.C.C.); *642947 Ontario Ltd. v. Fleischer* (2001), 56 O.R. (3d) 417, 209 D.L.R. (4th) (C.A.), at paras. 41-43; *Rougemount Capital Inc. v. Computer Associates International Inc.*, 2016 ONCA 847, 410 D.L.R. (4th) 509, at para. 50; *Akelius Canada Ltd. v. 2436196 Ontario Inc.*, 2022 ONCA 259, 161 O.R. (3d) 469, leave to appeal refused, [2022] S.C.C.A. No. 183, at para. 27.

There are several reasons why the normal measure is the presumptive measure of the innocent party's damages and is not to be easily displaced.

First, when a purchase contract is performed, the purchaser pays the purchase price on closing and obtains, on the same date, ownership of an asset. Damages are awarded on the principle that the innocent party, as nearly as possible, should be put in the position

it would have been in if the contract had been performed. Using, as the measure of damages, the difference between the purchase price and the land's market value on the closing date puts this principle into effect: *100 Main Street*, at paras. 55-56. The market value represents the financial equivalent of the asset itself.

Second, commercial certainty is enhanced by a predictable damages methodology. This court has stated that an early, and predictable, date on which the innocent party's damages are crystallized promotes efficient behaviour and reduces uncertainty and speculation: *Kinbauri Gold Corp. v. Iamgold International African Mining Gold Corp.* (2004), 246 D.L.R. (4th) 595 (Ont. C.A.), at para. 125, *per* Laskin J.A. (concurring), leave to appeal refused, [2000] S.C.C.A. No. 658. Although made in the context of a sale of goods, the observation applies equally to the sale of land.

[48] The fact that the subject of the failed purchase is land that was, to the knowledge of the parties, being purchased for redevelopment does not, on its own, render the normal measure inapplicable. The purchaser's loss of the opportunity to acquire the land and earn profits through its future development is a recoverable *type* of loss, in the sense of it not being too remote. But that type of loss is, presumptively, properly *measured* by comparing the contract price with market value on the date of breach, since market value takes into account the land's highest and best use, including the value of the land's development potential. In other words, market value takes into account, as at the valuation date, the market's perspective of the value of the current and potential future uses and opportunities available to the land's owner, including development: at paras. 70-71.

[49] Market value at the assessment date also accounts for the time it would take to realize on the opportunity the land presents, and the risk that the opportunity might not be realized in full or at all. Market value is “the price at which knowledgeable arms’ length parties are prepared to transact given their assessment of the opportunity the land provides and the chance of realizing on it successfully”: at paras. 69-75, 88.

[50] The normal measure may be departed from, but it will not be lightly disregarded and there must be a reason, grounded in legal principle, to do so. In this regard, it is important to underscore two aspects of the normal measure. One is the use of the breach date as the assessment date. Departing from this aspect of the normal measure is usually tied to consideration of the date the innocent party might reasonably have been expected to enter the market to mitigate (see *Rosseau Group*, para. 62 and the cases cited therein). The second aspect is the use of market value. Departing from its use may be justified when market value will not address the type of loss suffered by the innocent party. This may occur in situations where the purchaser could extract a special value from developing the land that other market participants could not, because, for example, the purchaser already owned adjacent land that could be combined with the subject land, or had special development techniques not known to the market generally: at paras 70, 78-80, and fn 4.

[51] In *Rosseau Group*, the trial judge's calculation of damages departed fundamentally from both aspects of the normal measure. It did not use the breach date as the assessment date, and it did not use market value or any equivalent of it at any date. The calculation rested solely on an estimate of the total profits that would have been earned six years after the aborted purchase, at the end of a potential redevelopment. In other words, standing at a point in time long after the presumptive assessment date for damages, the calculation totaled what the purchaser would then have in its pocket if a potential development had gone through. No present value of that amount was calculated as of the date of the breach. No discount rate was used. Risks and contingencies of there being a successful development were not considered. The calculation did not purport to reflect or address what, on the date the land was to have been acquired, a person would have paid for the economic opportunity to earn the projected profits that the land presented, considering the time it would take to realize on the opportunity and the risk that the opportunity might not be realized: at paras. 24-26, 82-88.

[52] The trial judge's damages assessment was set aside as an unjustified departure from the normal measure of damages. "There was no suggestion...that a calculation of market value at the closing date would somehow miss or exclude the development value of the lands", given the trial judge's finding that the property had increased in value by the closing date based on offers and expressions of interest received by the owner from other developers. The matter was remitted for

a new hearing on the issue of damages according to the normal measure at paras. 75, 81, 90.

c. Brewers' Argument

[53] Brewers' submission turns on the following premises. First, nothing in this case justified a departure from the normal measure of damages and, in any event, a departure was not adequately explained. Second, the amount realized in an actual sale of the Properties—here, the sale to Rosewater—must be taken as market value and used in applying the normal measure of damages, especially because Rosewater was a developer purchasing a similar opportunity as that for which Block contracted. Finally, the trial judge's acceptance of Block's calculation of damages reflects the same error as the trial judge made in *Rosseau Group*, by using lost development profits where the normal measure of damages applies.

[54] I agree with Brewers that a justification grounded in legal principle is necessary to depart from the normal measure of damages. But, before determining whether such a justification was present and adequately explained, it is necessary to first determine the nature and extent of the alleged departure from the normal measure.

[55] Accordingly, I first examine Brewers' other two propositions before returning to that question.

i. Was the Trial Judge Required to Accept the Rosewater Sale Price as Market Value?

[56] Market value, as used in the normal measure of damages, posits a hypothetical transaction. To determine it one must ask “what a seller and buyer ‘each knowledgeable and willing’ would pay for [the land] on the open market”: *Musqueam Indian Band v. Glass*, 2000 SCC 52, [2000] 2 S.C.R. 633, at para. 37 (emphasis added). This includes consideration of what the hypothetical parties would consider the future prospects of the land to be. “[M]arket value may reflect a higher and better use of the land than its current state – in other words, recognizing the land’s development potential”: *St. John’s (City) v. Lynch*, 2024 SCC 17, 491 D.L.R. (4th) 581, at paras. 29-30, 32. To determine market value, one must determine “the price at which knowledgeable arms’ length parties are prepared to transact given their assessment of the opportunity the land provides and the chance of realizing on it successfully”: *Rosseau Group*, at para. 88.

[57] It follows that market value will not always equate to what was paid in an actual transaction involving similar land or the same land. An actual transaction in the same land may be strong evidence of market value: *Scott v. Forjani*, 2021 ONSC 1996, at para. 44; *345176 Canada Inc. et al. v. James Selkirk Custom Homes Ltd*, 2026 ONSC 600, at para. 52. Nevertheless, one transaction, even in the same land, is only a data point. There can be circumstances in which an actual sale price may not accurately reflect market value. For example, the parties to the

actual transaction may not have been operating at arm's length, one or both of them may not have been knowledgeable, the property may not have been sufficiently marketed, or one party may have been under compulsion to transact: see, for example, *Medway v. Manitoba (Department of Urban Affairs)* (1983), 29 L.C.R. 89 (Manitoba Land Value Appraisal Commission), at pp. 95-96; 1427814 *Ontario Limited v. 3697584 Canada Inc.*, 2012 ONSC 156, at paras. 859-868; *Northern Meat Packers Ltd. v. Roynat Ltd.* (1986), 71 N.B.R. (2d) 212 (C.A.), at paras. 14-15; and discussion in *BCE Place Ltd. v. Municipal Property Assessment Corp., Region No. 9*, 2010 ONCA 672, 103 O.R. (3d) 520, at paras. 19-20.

[58] The trial judge did not make an express finding of the market value of the Properties on the date Brewers breached each APS. I reject Brewers' argument that the trial judge was obliged to find that the Rosewater sale price equated to market value. The Rosewater sale was effected almost immediately upon Brewers' termination of each APS. The Rosewater sale price was less than Block originally agreed to pay and the amended amount Block was willing to proceed with when each APS was wrongfully terminated. Mr. Lucas' conduct in bringing about the termination of each APS with Block and closing the Rosewater sale was the subject of harsh criticism by the trial judge, who found it "likely...that Lucas had sought to withdraw from the deals [with Block] and benefit his business associate and friend [the principal] of Rosewater". Moreover, recognizing that market value of land recognizes its development potential, it is noteworthy that neither

Mr. Andrade or Mr. Leung considered the Rosewater sale price to be determinative of “what a reasonable party would pay or accept at [November 5, 2015] in exchange for a future stream of cash flows [from development of the Properties] based on the risk of achieving such cash flows and the time value of money”. If they did, they would not have reached their damages conclusions.

[59] Accordingly, it does not follow that the damages approach the trial judge accepted was erroneous or unjustified solely because it did not use the Rosewater sale price.

ii. Was the Approach the Trial Judge Accepted the Same as That Rejected in *Rosseau Group*?

[60] Contrary to Brewers’ submission, the approach to damages accepted by the trial judge in this case, although referred to as a lost development profits approach, was different, in four important ways, from that rejected in *Rosseau Group*.

[61] First, damages were calculated in this case using the assessment date that the normal measure contemplates. In contrast, the damages calculation in *Rosseau Group* departed starkly from that assessment date. In other words, although they both started with a projection of profits or cash flows from a redevelopment that was to take place years after the acquisition of the land, the calculation in this case did not end there. Here, the calculation was the present value of those cash flows, at the date of breach, achieved through the application of a discount rate.

[62] Second, in contrast to what was rejected in *Rosseau Group*, in this case the damages calculation took into account the time that it would take to realize the cash flows from redevelopment and the risks in achieving them, through the use of the discount rate. As the trial judge found, “the risk of any development not being achieved in the timeline is addressed in the discount rate”.

[63] Third, unlike in *Rosseau Group* where no consideration was given to what someone would pay at a particular point in time for the projected profits from the envisaged development, the formulation of the discount rate and its use in this case was derived by answering the question of “what a reasonable party would pay or accept at a certain point in time [in this case, the date of the breach-- November 5, 2015] in exchange for the future stream of cash flows, based on the risk of achieving such cash flows and the time value of money”.

[64] Fourth, the damages approach accepted by the trial judge was the same approach taken by Brewers’ experts.

[65] In light of these differences, I reject Brewers’ argument that the damages approach accepted by the trial judge was flawed for the same reasons as that in *Rosseau Group*.

iii. Was the Trial Judge Justified in Accepting the Damages Approach She Did, and Were Her Reasons for Doing So Adequate?

[66] The trial judge said she was accepting the lost development profits approach taken by the parties' experts rather than a market value approach. Whether it was appropriate for her to do so, and whether her reasons for doing so were adequate, turns in part on the type of loss that was claimed, and in part on the extent that the approach she took differed from the normal measure. These are questions of substance, not nomenclature.

[67] *Rosseau Group* held that the normal measure of damages applies "unless the party seeking damages shows that that measure does not address the type of loss claimed": at para. 70. An example cited was the award of lost development profits in *Performance Industries*. In that case, one joint venturer denied the other a promised opportunity to engage in a specific residential housing development, and market value would not take into account the expected profit from that development: *Rosseau Group*, at paras. 78-80.

[68] In *Remington Development Corporation v. Canadian Pacific Railway Company*, 2025 ABCA 244, 87 Alta. L.R. (7th) 1, the Alberta Court of Appeal set aside a finding that Canadian Pacific had breached a contract to sell lands to Remington for \$7.7 million. The court went on to say that, had it upheld the liability finding, it would have set aside the trial judge's \$165 million damages award in favour of Remington for lost development profits. The normal measure of damages

was the “presumptive approach” which should have been applied by the trial judge but was not. The normal measure “may be rebutted by special circumstances showing the market’s knowledge is deficient—for example, by failing to capture an enhanced value (including for a specified development) known to the parties at the time of contracting”, but those circumstances were not present: at para. 103. Remington had no specific plan, or even a clear idea, at the time of contracting, for development of the land it was to acquire; the lands had, at the time, only “nascent development potential”: at para. 110. It was therefore wrong for the trial judge to proceed on the basis that Remington would develop the lands in the most profitable way possible based on market conditions at the time of development. This was in contrast to *Performance Industries* which the majority referred to as a case of a “crystallized development plan that invited exceptional damages for lost profits”, since the plan was known to the parties at the time of contracting, and the Supreme Court implicitly held that development profits would not be captured by a market value approach: at para. 102.

[69] In this case, Brewers marketed the Properties as excellent development opportunities. As Mr. Lucas admitted at trial, at the time each APS was entered into, both parties contemplated that a mixed-use condominium would be constructed on the sites. Importantly, each APS required a portion of the redeveloped sites be leased back to Brewers for the operation of a Beer Store in the mixed-use project, further indicating a shared understanding about the

proposed redevelopment that would involve both parties. The trial judge noted that Brewers did not challenge Block's expert's opinion describing the probable redevelopment that would occur on the Properties. Accordingly, the development opportunity had a significant degree of specificity that was known to the parties at the time of contracting. In context, the trial judge's reference to *Performance Industries* as a basis to reject the proposition that development profits were not recoverable should be taken as her recognition of this.

[70] It was thus open to the trial judge to approach the matter on the basis that Block's damages should take into account the specific development opportunity that it lost as a recoverable type of loss. The question remains whether the way that loss was measured constituted a legal error because it departed unjustifiably from the normal measure. Relying on the Rosewater sale, Brewers argues that the trial judge could not justifiably reach the conclusion that the normal measure would somehow ignore or exclude the development profits that would flow from the Properties, as the development opportunity was known to the market.

[71] I do not accept that argument. I have explained above why the trial judge was not legally required to treat the Rosewater sale as determinative of market value. While it would have been preferable for the trial judge to have been more detailed in her explanation, her conclusion that the approach endorsed by both sets of experts was fair and appropriate in all the circumstances to measure and

calculate Block's loss necessarily entails the conclusion that the approach urged by Brewers would not fairly and appropriately capture those losses, in this case.

[72] In some cases, development profits and the approach taken under the normal measure of damages for land with development potential are distinct conceptual categories—the former viewing the matter at the end of a hypothetical development to total what was earned, and the latter viewing the matter at the date of breach to assess, on that date, the price at which reasonably informed market participants would transact for the land, in light of their estimate of the amount, timing and risks of achieving future profits from its development. But the concepts are not straightjackets. In cases such as this one, they can overlap to a significant degree.

[73] The damages approach accepted by the trial judge comported with the first aspect of the normal measure—it used the date of breach as the assessment date. As for the second aspect, Brewers has not shown how the approach accepted by the trial judge (which was the approach taken by the parties' experts, including their own) departs in a significant way from the purpose of the market value aspect of the normal measure, so as to warrant appellate interference in this case.

[74] As explained in *Rosseau Group*, the market value aspect of the normal measure is used to determine, as at the assessment date, the financial or economic equivalent of the asset of which the purchaser has been deprived by

asking at what price knowledgeable arms' length parties would be prepared to transact, given their assessment of the economic opportunity the land provides and the risks and time it will take to realize on it successfully. It thus accords with the basic premise of expectation damages: to put the innocent party in the economic position it would have been if the contract were performed. It does this in a way that enhances commercial certainty. By "focusing on reasonably informed participants in the marketplace, [the normal measure] reinforces that foreseeable loss is generally constrained by commercially predictable and proportional outcomes, which advance fairness": *Remington Development*, at para. 99.

[75] As I have noted above, the discount rate formulated by the parties' experts and their use of it addresses a profoundly similar question with a profoundly similar focus as the normal measure. Both parties' experts formulated and applied their discount rate "to assess what a reasonable party would pay or accept at a certain point in time [the date of breach] in exchange for a future stream of cash flows, based on the risk of achieving such cash flows and the time value of money."⁴

⁴ Indeed, case law has recognized in various contexts that an income approach—calculating or projecting future income from a property and then discounting it to the valuation date—can be an approach to determining market value for certain types of properties: *Steel Brothers Canada Ltd. v. R* (1986), 34 L.C.R. 210 (Fed. Ct., Trial Div.), at pp. 214-15; *Brian Higgins Holdings Ltd. v. Bentall Properties Ltd.*, 56 B.C.L.R. (3d) 263 (C.A.), at paras. 8 and 15. Moreover, courts in expropriation cases have recognized that different methodologies can be employed to determine market value, which is the basic measure of compensation in that context because the object is to put the displaced property owner in "the same economic position that they were in prior to the expropriation: no better and no worse", and thus "market value may reflect a higher and better use of the land than its current state – in other words, recognizing the land's development potential": *St. John's (City)*, at paras. 29-30, 32. Those methodologies have involved, in suitable cases and subject to caveats, forecasting revenues to be derived from redeveloping the land to its highest and best use, forecasting costs to achieve that revenue, adjusting for risks, and arriving at a present value: see, for example, *Re Shields and Etobicoke (Township) Board of Education*, [1954] O.R. 831 (C.A.); *North York*

[76] It was open to Brewers at trial to contest Mr. Andrade’s approach and discount rate, arguing they did not reflect what a reasonably informed market participant, as at the date of breach, would have perceived as the time to realize the projected profits from a potential redevelopment or the risks in doing so. Brewers could have relied on the prices Block⁵ and/or Rosewater agreed to pay, other market data, or expert evidence for that purpose. Instead, it led evidence from its own expert, Mr. Leung, who endorsed the same approach and discount rate as Mr. Andrade, and calculated Block’s damages as between \$7.8 and \$10.2 million. It was also open to Brewers to challenge the projections that underpinned Block’s damages calculations, which it did, but only to a limited extent, through its own expert evidence. As the trial judge noted, Brewers “did not take issue with [Block’s expert’s] opinions on probable developments that would have occurred...” challenging only the projected construction period and associated timelines. However, the trial judge preferred Block’s experts on those points, and that finding is not challenged on appeal.

[77] I return to the trial judge’s conclusions:

(*Township*) *Board of Education v. Village Developments Ltd.*, [1956] S.C.R. 539, at pp. 541-2, 548; *Re Devitt and Minister of Public Works for Ont.*, [1968] 2 O.R. 464; *Halifax v. S. Cunard & Co.*, [1975] 1 S.C.R. 458, at pp. 463-64; *Associated Builders v. Newfoundland (Minister of Public Works & Services)* (1978), 19 Nfld. & P.E.I.R. 371 (Nfld. C.A.), at paras. 10-17.

⁵ Block negotiated a reduction in the purchase price on waiving one of the conditions. In *Remington Development*, the majority observed that although “disproportionality” does not guide the damages analysis, a considerable disproportionality between the damages award and the purchase price “can signal a departure from the expectations of reasonable commercial actors and the parties’ assumptions of risks when the contract was formed”: at para. 113. In that case, the comparison was between an award of \$165 million and a purchase price of \$7.7 million.

In the present case, I find that the market value approach would not appropriately or fairly assess the plaintiff's damages in the circumstances of this case.

I remain of the opinion that the lost development profit approach, adopted by both parties [sic] economic loss experts is the fair and appropriate means to assess damages in all of the circumstances of this case.

[78] Read in light of the positions put to her, the trial judge's rejection of the "market value approach" was a rejection of Brewers' proposition that Block had no damages because market value had to be equated to the Rosewater sale price and thus was the economic equivalent, at the assessment date, of what Block had been deprived of. It was open to her to reject that position in light of the nature and circumstances of the Rosewater sale and the expert evidence.

[79] The trial judge's finding that "the lost development profit approach" adopted by both parties' economic loss experts was "the fair and appropriate means to assess damages" has not been shown to be a legal error in the circumstances of this case. The economic opportunity that the Properties provided was the potential for profits from a redevelopment about which the parties shared an understanding at the time of contracting. The approach taken by both parties' experts aimed to determine the economic equivalent, on the assessment date, of what Block was deprived of when it lost that opportunity due to Brewers' breach of contract, viewed through the lens of what a reasonable person would pay or demand for the future profits in light of the time to realize them and the risks. To the extent that approach

differed from the normal measure, the trial judge explained why she accepted it as the approach endorsed by both parties' experts and the fair and appropriate way to measure damages in this case.

[80] Where a trial judge accepts a departure from the normal measure of damages, they should explain the nature and extent of the departure, and why it is justified. Brewers argues that the trial judge's reasons are insufficient.

[81] I reject this argument. The trial judge's reasons on the approach to the measure of damages are brief, but must be read in light of her reasons as a whole (which contain detailed findings about the circumstances leading up to the Rosewater sale and the content of the expert evidence) and the trial record (which includes detailed reports from the experts whose approach she accepted). Taking a contextual and functional approach, the reasons permit meaningful and effective appellate review: *Gholami v. The Hospital for Sick Children*, 2018 ONCA 783, 2019 C.L.L.C. 210-007, at paras. 63-64.

d. Conclusion on the Measure of Damages

[82] The trial judge did not make a reversible error in the measure of damages she used.

2. The Trial Judge Did Not Err in Her Conclusions on Mitigation

[83] Brewers argues that the trial judge erred in principle in her analysis of mitigation. Brewers argues that even if Block's expectation damages were

calculated correctly, those damages should be reduced because Block failed to mitigate its damages. This differs from Brewers' position at trial, where it argued that Block had fully mitigated its damages. I see no error in the trial judge's conclusions.

[84] After each APS was terminated, Block's affiliates purchased several other development properties. At trial, Brewers said that these were "replacement properties" purchased to mitigate Block's losses, and that any damages award to Block should be correspondingly reduced.

[85] The trial judge disagreed, holding that all the purchases were transactions Block or its affiliates would have entered into in addition to the APS purchases. As such, they could not constitute mitigation of Block's losses arising from the breach of each APS.

[86] On appeal, Brewers argues for the first time that Block failed to mitigate its damages because Block itself did not acquire some or all of the development lands that, in fact, were acquired by its affiliates. Brewers now argues that the trial judge erred by conflating Block with its corporate affiliates and ignoring Block's independent obligation to mitigate. According to Brewers, the Supreme Court's decision in *Southcott* mandated, in these circumstances, a finding that Block could have fully mitigated its damages but failed to do so.

[87] I reject this argument for two reasons.

[88] First, the common approach of the parties at trial on the subject of mitigation was to consider Block and its affiliates as one. Purchases that were made by Block's affiliates were treated as purchases by Block; Brewers argued that by making them Block had in fact mitigated its damages, while Block argued that due to its substantial financial resources it would have made those purchases in addition to the Properties. to be acquired from Brewers: see, for example, Trial Decision, at paras. 303-4. The trial judge found that Block could and would have purchased each property actually purchased in addition to the Properties Block was to acquire from Brewers, and thus no mitigation occurred. I reject the argument that the trial judge committed a reversible error by addressing the issue on the premise the parties put forward.

[89] Second, this case is unlike *Southcott*, because Brewers failed to demonstrate a causal link between Brewers' breach of each APS and Block's ability to mitigate. A plaintiff only has a duty to mitigate losses "consequent on the breach": *Asamera Oil Corp. v. Sea Oil and General Corp.*, [1979] 1 S.C.R. 633 at p. 661, quoting *British Westinghouse Electric and Manufacturing Co. v. Underground Electric Railways Co. of London Ltd.*, [1912] A.C. 673 (H.L.) at p. 689. The defendant bears the onus of proving that the plaintiff could have mitigated its losses but failed to do so: *Southcott*, at para.45.

[90] In *Southcott*, the plaintiff had some capacity to mitigate its losses but made the strategic decision not to. *Southcott* was a special purpose vehicle with the

ability to deploy just enough capital to fulfill the agreement with the defendant. When the defendant's breach freed up that limited capital, instead of redeploying those funds elsewhere, Southcott made the calculated decision not to acquire any assets in Southcott's name for litigation reasons: *Southcott*, at paras. 11, 27-28. In other words, instead of seeking a "replacement purchase" to mitigate Southcott's damages, the corporate group used affiliates to acquire desirable properties while preserving Southcott's litigation strategy.

[91] In this case, on the trial judge's findings Block had no such capital constraints, and there was no causal connection between Brewers' breach and its ability to make purchases. The trial judge accepted Block's evidence that it had "substantial backing and no operational or financial constraints". Unlike *Southcott*, Brewers' breach did not change Block's financial position or impact decision-making across its corporate group. There is no evidence that Block strategically avoided profitable transactions by steering other transactions to its affiliates to maximize Block's damages.

[92] The trial judge concluded that the six properties purchased post breach were "independent transactions" because even if Brewers had fulfilled its obligations, "Block" would have bought those properties anyway. Unlike in *Southcott*, on the trial judge's findings, whether the properties were purchased by Block itself or its affiliates, they would be independent transactions which cannot mitigate a plaintiff's damages because they are unrelated to the defendant's breach, and so

irrelevant to the plaintiff's losses arising from it: *British Columbia v. Canadian Forest Products Ltd.*, 2004 SCC 38, [2004] 2 S.C.R. 74, at para. 106.

VI. CONCLUSION

[93] For these reasons, I would dismiss the appeal.

[94] Block is entitled to costs of the appeal fixed in the agreed sum of \$60,000, all inclusive.

Released: June 18, 2026 "J.S."

"B. Zarnett J.A."

"I agree. Janet Simmons J.A."

"I agree. Sossin J.A."