

SUPREME COURT OF NOVA SCOTIA

Citation: *Brooks v FH Development Group Inc.*, 2025 NSSC 174

Date: 20250523

Docket: *Hfx* No. 520975

Registry: Halifax

Between:

Stephen Brooks and Marianne Su-Ling Brooks

Applicants

v.

FH Development Group Inc., a body corporate

Respondent

Judge: The Honourable Justice Gail L. Gatchalian

Heard: December 12, 16, 17 and 19, 2024, in Halifax, Nova Scotia

Counsel: Colin D. Piercey, KC and Erin McSorley for the Applicants
Gavin Giles, KC and Andrew Kinley for the Respondent

By the Court:

Introduction

[1] Did the effects of the COVID-19 pandemic on the construction industry relieve the Respondent, a residential property developer, from its contractual obligation to build and deliver a new home to the Applicants, the purchasers, at the agreed-upon price by the agreed-upon closing date?

[2] Pursuant to an Agreement of Purchase and Sale concluded on January 19, 2021, the Respondent, FH Development Group Inc., agreed to build a new house for the Applicants, Stephen Brooks and Marianne Su-Ling Brooks, on Lot 92, Tuscany Run, in Phase 4 of the Brunello Estates subdivision in Halifax (“Lot 92”). The agreed-upon purchase price was \$597,490, including HST. The agreed-upon closing date was October 14, 2021. The agreement went “firm” on February 9, 2021, when all conditions had expired.

[3] On April 16, 2021, at 1:46 p.m., FH Development’s real estate agent, Corinne Zinck, sent an email to the Brooks’ real estate agent, Russell Manderville, stating that “...due to current extraordinary circumstances created by the Covid-19 health crisis and lack of supply, availability and primarily increased pricing of

materials and labor [sic], FH Development Group is forced to exercise its right to delay construction until material costs stabilize which in turn will delay the Closing Date for an equal amount of time; timeframe is undetermined at this point.” Ms. Zinck gave the Brooks two options: (1) “increase of the Purchase Price by \$15,000 to compensate for the increased material/shipping costs,” which “would allow for construction to continue without any delays;” or (2) “FH Development Group will release the Buyer(s) from the contract and return the deposit in full without interest or penalty.” The Brooks were given until April 21, 2021 to decide.

[4] On April 16, 2021, at 6:18 p.m., Ms. Zinck sent Mr. Manderville a second email “as formal notice that pursuant to clause 7 of the Agreement and due to the lack of supply, availability and pricing of materials and labour due to the Covid-19 health crisis and global shipping and material supply issues, the completion of the above noted property will be delayed”. The email went on to say that FH Development was unable to determine or estimate with any degree of certainty when the supply, availability and prices would return to normal, and that “[t]hese unforeseeable circumstances of Force Majeure is [sic] preventing the Seller from fulfilling the contract.” Ms. Zinck again gave the Brooks two options: (1) “share in the additional costs of sourcing materials, alternative materials, shipping and

labour costs, caused by COVID-19,” and “FH Development will use its best efforts to source materials from suppliers, obtain qualified labor [sic] and minimize delays in completion of the home”; or (2) “FH Development will release the Buyer from the Agreement and return the deposit in full without interest or penalty.” The Brooks were again given until April 21, 2021 to decide.

[5] The Brooks refused to pay more. They insisted that FH Development comply with the terms of the contract. As a result, FH Development stopped construction of Lot 92 in April of 2021. At that time, only the footings had been completed. FH Development did not resume construction on Lot 92 until mid-September, 2021. FH Development says that it eventually abandoned its request for an increase. The Brooks dispute this.

[6] FH Development did not complete construction of Lot 92 by the October 14, 2021 closing date. The Brooks considered the contract to have been repudiated by FH Development, and terminated the contract. The Brooks ultimately bought an older house in the Clayton Park subdivision of Halifax at the height of the real estate market for much more than the agreed-upon purchase price for Lot 92.

[7] The Brooks allege breach of contract and seek damages from FH Development for the difference between what they agreed to pay for Lot 92 and

what they ultimately paid for the house in Clayton Park. The Brooks also request punitive damages for FH Development's alleged breach of the duty of good faith contractual performance.

[8] FH Development argues that: (1) the contract was frustrated by cost increases and the unavailability of building materials and labour and (2) Clause 7.1 of the Agreement allowed it to delay the closing date due to unavailability of building materials and labour. FH Development concedes that clause 7.1 did not permit it to delay the closing date because of the increase in building costs. FH Development argues that the Brooks failed to mitigate their damages, and that the Brooks ought to have agreed to pay the extra \$15,000 to FH Development under protest.

[9] The Agreement of Purchase and Sale was a standard form Nova Scotia Real Estate Commission Agreement of Purchase and Sale for New Construction. Clause 7.1 of the Agreement read as follows:

The closing date may be affected if *delays* occur which are *caused by* unfavourable weather, strikes, fire, *availability of materials and/or labour*, decisions of the Buyer or any other causes beyond the reasonable control of the Seller. The Seller shall provide details for the cause of the delay(s) and provide their best estimate to the Buyer of the effect that such delays shall have on the Seller's work and the closing date. No such extension shall be made for the aforesaid delays unless the Buyer is advised by the Seller, in writing, within (7) days of the occurrence of the delay.

[Emphasis added]

[10] At the hearing, the Brooks relied on affidavits from: (1) Stephen Brooks, (2) Marianne Su-Ling Brooks and (3) Russell Manderville, their real estate agent. FH Development rely on affidavits from (1) Alaaddin Al-Hammadi, Chief Executive Officer of FH Development, (2) Mohamad Al-Hammadi, Financial Controller of FH Development and (3) Corinne Zinck, FH Development's real estate agent. All affiants were cross-examined at the hearing. The Brooks objected to the admissibility of some of FH Development's affidavit evidence. As will become evident, it is not necessary for me to determine those objections.

[11] In order to determine this dispute, I will consider the following:

1. FH Development's demand for an increase to the purchase price and delay in the closing date.
2. Whether FH Development abandoned its demand for an increase to the purchase price, as asserted by FH Development at the hearing.
3. Whether building materials and labour were unavailable from April to October of 2021.
4. Whether the contract was frustrated because of increased cost and the unavailability of building materials and labour.
5. Whether Clause 7.1 of the Agreement permitted FH Development to delay construction due to unavailability of building materials and labour.
6. Whether FH Development breached the Agreement.
7. If there was a breach, whether the Brooks failed to mitigate their damages.

8. Whether the Brooks are entitled to punitive damages for breach of the duty of good faith contractual performance.
9. The credibility and reliability of Stephen Brooks and Marianne Su-Ling Brooks.

Demands for Increase to Purchase Price and Delay in Closing

[12] I have already reviewed the two emails sent by Ms. Zinck to Mr. Manderville on April 16, 2021.

[13] On April 19, 2021, Ms. Zinck emailed Mr. Manderville again, setting out FH Development's position that it was not possible to build the house for the same price and a "reasonable delay," referring to the increased cost of materials, and setting a deadline for the Brooks' response:

Hi Russ, I thought I would send this response below to another buyer contesting a price increase and requesting only a "reasonable" delay. As information only.

Thank you for your e-mail, I spoke to the builder and he has responded that it is not possible to build the house for the same price and "reasonable" delay, this is why the formal notice was sent.

Contracts that have a higher margin are able to begin construction as the additional material/supply costs are accounted for within the prices they sold. The extent of the delay or possible price increase will need to be determined for each lot individually.

The builder's lawyer is Stephen Ling, please have your lawyer contact him for legal interpretation as a formal response is required by Wednesday, April 21 otherwise construction will be delayed until material/supply costs return to normal.

[14] On April 28, 2021, Mitchell McDade, counsel for the Brooks, wrote to Mr. Ling, counsel for FH Development, stating that the Brooks refused to pay additional money for the home, and that they expected completion of the home in accordance with the original agreed-upon price.

[15] On April 30, 2021, Mr. Ling wrote to Mr. McDade, stating in part that, “[a]ll of the builder suppliers are claiming Force Majeure and not honoring [sic] supply agreements” and that “[i]n order for us to complete these builds we are having to source alternative materials from what is spec’d and from different suppliers at much higher costs.” Mr. Ling wrote that FH Development could not provide a new date for completion because the impacts of the pandemic on supply chains and labour were as yet undetermined.

[16] On May 5, 2021, Ms. Zinck emailed Mr. Mandeville, attaching a proposed amendment to the agreement, which increased the original purchase price by \$15,000 “to compensate for material/labour increases” and changed the closing date to November 15, 2021.

[17] On May 12, 2021, Mr. McDade wrote to Mr. Ling, asserting that materials were still available, just more expensive. According to Mr. McDade, this was not

the type of delay contemplated by Clause 7 of the Agreement. Mr. McDade, on behalf of the Brooks, insisted on adherence to the original terms of the agreement.

[18] On May 12, 2021, Ms. Zinck wrote to Mr. Manderville, forwarding an e-mail from Mr. A. Al-Hammadi on May 11, 2021, who asked whether the Brooks' lawyer was going to contact FH Development's lawyer, or "do they want to hold?" Mr. A. Al-Hammadi stated that he was "scheduling the construction activity there for the framers," so he "want[ed] to get an idea if this one is starting or not."

[19] On May 14, 2021, Mr. Ling wrote to Mr. McDade, in which Mr. Ling forwarded an email dated May 12, 2021 from Mr. M. Al-Hammadi. Mr. M. Al-Hammadi disputed Mr. McDade's assertion that building materials were available, but at a higher cost. Mr. M. Al-Hammadi asserted that "[o]ur suppliers are invoking force majeure and no longer able to have consistent supply or honor [sic] supply agreements," and that, as a result, FH Development was not able to start the framing of the Brooks' house until supply issues returned to normal. He stated that "[t]he additional cost requested is to cover the difference in using alternative material and suppliers that are not currently contracted for this build."

[20] On May 22, 2021, Ms. Zinck informed Mr. Manderville in a phone call that FH Development had set a deadline of May 26, 2021 to negotiate a new price, failing which FH Development would terminate the Agreement.

[21] On June 2, 2021, Gavin Giles, new counsel for FH Development, wrote to the Brooks, care of Mr. Manderville, stating that FH Development would be imposing a “surcharge” on the purchase price of between 5% and 10% (i.e. between \$29,879 to \$59,759), and that failing agreement, FH development would terminate the Agreement.

[22] On June 8, 2021, Mr. McDade wrote to Mr. Giles, refusing the demand for increased payment, and stating that the Brooks expected completion of the home in accordance with the agreed-upon purchase price and closing date.

[23] On June 10, 2021, Ms. Zinck wrote to Mr. Manderville, offering the Brooks a meeting with FH Development, and stating that, failing a mutually acceptable agreement, FH Development would terminate the Agreement. The Brooks did not meet with FH Development, choosing instead to have their lawyer speak for them.

[24] On June 23, 2021, Mr. Giles wrote to Mr. McDade, stating that FH Development was extending the closing date under Clause 7.1 of the Agreement

due to “shortages of building materials and building trades labour”, and that their best estimate was that the closing date would be January 14, 2022.

[25] On June 23, 2021, Colin Piercey, new counsel for the Brooks, wrote to Mr. Giles, rejecting FH Development’s reliance on Clause 7.1, insisting on the original closing date, and requesting “details for the cause of the delay” under Clause 7.1, including identification of the specific building materials required for Lot 92 that FH Development says it is unable to procure.

[26] FH Development did not respond to Mr. Piercey’s request for the details for the cause of the delay.

[27] On August 24, 2021, Ms. Zinck wrote to Mr. Manderville, stating that construction would resume on Lot 92, asking if the Brooks were still interested in including certain upgrades, attaching the previous draft amendment to the Agreement that included the \$15,000 increase to the purchase price, and stating that the closing date would now be the end of January, 2022.

[28] On September 1, 2021, Ms. Zinck wrote to Mr. Manderville, following up to see if the Brooks had decided whether to proceed with the upgrades before she sent an amendment confirming the closing date to be the end of January. Ms. Zinck

asked for a response as soon as possible, as construction had apparently resumed and materials would need to be ordered.

[29] On September 3, 2021, Mr. Piercey wrote to Mr. Giles. In that letter, Mr. Piercey wrote that the Brooks had advised him “that recently the real estate agent for FH Development Group, Corinne Zinck, has again requested an Amendment to the Agreement of Purchase and Sale (the “Agreement”), (a copy of which is enclosed) which includes a request for additional funds in the amount of \$15,000, increased upgrade prices, and an extension on the closing date”. Mr. Piercey reiterated the Brooks’ rejection of the proposed amendment to the Agreement, including the request for additional funds the amount of \$15,000, and insisted on the original closing date and purchase price. Mr. Piercey reiterated the Brooks’ request for details of the cause for the delay.

[30] On September 13, 2021, Mr. Giles wrote to Mr. Piercey, stating that he did not see a closing date of October 14, 2021 as being possible. Mr. Giles declined, on behalf of FH Development, to provide the details of the cause for the delay, stating that if the Brooks decided to litigate, those details would be disclosed as required.

[31] On or about September 14, 2021, FH Development resumed construction on Lot 92.

[32] On October 14, 2021, the agreed-upon closing date, Mr. Piercey wrote to Mr. Giles, stating that if the home was not completed that day, the Brooks would be terminating the agreement.

[33] The home was not completed on October 14, 2021, and Mr. Piercey wrote to Mr. Giles on October 15, 2021, terminating the Agreement. FH Development returned the deposit to the Brooks in December of 2021.

Demand for Increase to Purchase Abandoned?

[34] At the hearing, FH Development argued that it had abandoned its demand for an increase in the purchase price. I reject that assertion.

[35] According to Ms. Zinck, she informed Mr. Manderville that FH Development had abandoned its demand for more money in an email and in a telephone call on or about August 24, 2021.

[36] Ms. Zinck deposed as follows in her Affidavit with respect to the alleged email:

37. In my e-mail message to Mr. Manderville of August 24th, 2021 (attached as Exhibit “A”), I clarified that if the Applicants wished to proceed with the construction of their new house at 92 Tuscany Run, the “extras in which they had earlier indicated an interest had been repriced, as noted.

38. I also clarified that the closing date for the Applicants' new house would be extended to approximately the end of January of 2022, ***but that an increased charge relative to the substantial increased prices of building materials would no longer be applicable.***

[Emphasis added]

[37] In cross-examination, Ms. Zinck acknowledged that her August 24, 2021 email, attached as Exhibit "A" to her affidavit, did not contain any words to the effect that "an increased charge relative to the substantial increased prices of building materials would no longer be applicable." Her email does not address the issue of the price increase at all.

[38] Ms. Zinck asserted in cross-examination that it was implied from the following highlighted words in her email that FH Development was no longer requiring an increase to the purchase price: "...***the builder has confirmed that construction will resume on Lot 92*** and asked that I confirm with you if the buyers are still interested in including the upgrades we had discussed prior to the Notice of Delay" [emphasis added] That implication is not evident to me, particularly when I read the attachment to Ms. Zinck's email, which she omitted from her affidavit.

[39] The attachment to Ms. Zinck's August 24, 2021 email is found in the affidavit Mr. Brooks. The attachment includes the draft amendment to the Agreement of Purchase and Sale, previously sent in May of 2021, which still refers to the proposed \$15,000 increase twice under "Terms and Conditions."

[40] I do not accept that Ms. Zinck's August 24, 2021 email communicated to the Brooks that FH Development was abandoning its demand for a price increase.

[41] It was only in re-examination that Ms. Zinck, for the first time, testified that she called Mr. Manderville to follow up on her August 24, 2021 email, and that during that telephone conversation, she told Mr. Manderville that FH Development was no longer requiring an increase to the purchase price. I do not find this evidence to be credible, for the following reasons:

- This important information was not included in Ms. Zinck's affidavit.
- Ms. Zinck referred to another telephone call with Mr. Manderville on May 22, 2021 at paragraph 33 of her affidavit, yet did not mention in her affidavit a phone call with him about her August 24, 2021 email.
- The information came out in re-direct examination, after Ms. Zinck appeared to have realized, in cross-examination, that, contrary to what she said at paragraph 38 of her Affidavit, her August 24, 2021 email to Mr. Manderville did not say that FH Development would no longer be pursuing an increase to the purchase price.
- Mr. Manderville forwarded Ms. Zinck's August 24, 2021 email to the Brooks at noon the next day, stating, in part, that "[i]t looks to me like there is still a 15k increase in price."
- I find that Mr. Manderville was diligent in communicating information he received from Ms. Zinck to the Brooks in a timely manner, and that had Ms. Zinck told him that FH Development was abandoning the demand for an increase to the purchase price, he would have informed the Brooks of this turn of events in a timely manner, and he did not. See the 106 pages of text messages between Mr. Manderville and Mr.

Brooks between January 17, 2021 and March 7, 2022, attached at Exhibit 37 to Mr. Manderville's Affidavit.

- Mr. Piercey wrote a letter to Mr. Giles on September 3, 2021, specifically referring to the August 24, 2021 email from Ms. Zinck, which Mr. Piercey wrote "includes a request for additional funds in the amount of \$15,000..." Mr. Piercey explicitly rejected the request for an increase in purchase price in this letter.
- When Mr. Giles responded to Mr. Piercey's letter on behalf of FH Development on September 13, 2021, he did not say anything about the issue of the increase to the purchase price. I find that, had FH Development abandoned its request for an increase to the purchase price, Mr. Giles would have informed Mr. Piercey of this important piece of information.
- There is no written communication from anyone on behalf of FH Development to the Brooks, their counsel or Mr. Manderville informing the Brooks that FH Development was abandoning its demand for an increase in the purchase price, despite the fact that FH Development had repeatedly demanded an increase in the purchase price, failing which it said that it would terminate the agreement.

[42] For all of the above reasons, I also reject the evidence of Mr. A. Al-Hammadi, found at paragraph 105 of his Affidavit, that "[t]he moderate increase of \$15,000 was abandoned or waived by the Respondent by June of 2021, and thereafter, the only concession being sought by the Respondent with respect to the Applicants' house was the increase of 32 days in its build-out time." Mr. A. Al-Hammadi did not provide the evidence underlying this bald assertion, for example, who told the Brooks this, when, and in what form of communication.

Availability of Building Materials and Labour

[43] FH Development relied on the asserted unavailability of building materials and labour for both its frustration defence and its Clause 7.1 defence. For this reason, I will discuss my findings with respect to the availability of building materials and labour before turning to FH Developments arguments on frustration and Clause 7.1.

[44] FH Development has failed to persuade me that building materials and labour were not available to complete the construction of Lot 92 by the closing date. I reach this conclusion because FH Development continued to build other houses in Phase 4 of the Brunello Estates subdivision between April and October of 2021 for buyers who agreed to an increase in the purchase price.

[45] The Brooks observed and took numerous pictures and videos of FH Development's construction activities in Phase 4 of Brunello Estates from April to November of 2021. The Brooks observed, and the pictures and videos demonstrate, that building materials, such as lumber and Oriented Strand Board for framing as well as floor joists, were being delivered, and that construction activities, such as framing and the installation of windows and stonework, was being undertaken. See the Affidavit of Stephen Brooks, paras.59 and 101-134 and Exhibits 37 and 76-93 to the Affidavit of Stephen Brooks; Application Exhibit 2; Affidavit of Marianne

Su-Ling Brooks, paras.17-39 and Exhibit 1 to the Affidavit of Marianne Su-Ling Brooks; and Application Exhibit 3.

[46] In the case of Lot 149, Chardonnay Court in Phase 4 of the Brunello Estates subdivision, the agreement of purchase and sale was concluded on February 7, 2021, after the Brooks' agreement with FH Development was entered into. The original closing date was September 30, 2021. On June 18, 2021, the buyers agreed to pay \$25,000 more than the agreed-upon purchase price. On August 27, 2021, the buyers agreed to extend the closing date to October 22, 2021, a week after the Brooks' closing date. The Brooks took a picture of Lot 149 on August 22, 2021, which shows the framing of the house and the installation of windows completed. The Brooks took a picture of Lot 149 on November 12, 2021, which shows that the exterior of the house is completed.

[47] Mr. M. Al-Hammadi conceded in cross-examination that FH Development used the same basic building materials for the houses it was building in Phase 4 of Brunello Estates (for example, the materials required for the foundation, framing, subfloor, roof, and interior plumbing). This is also evident from the construction specifications attached to the agreements of purchase and sale for several of those houses, attached to the Affidavit of Mr. Brooks.

[48] Mr. A. Al-Hammadi and Mr. M. Al-Hammadi both conceded in their Affidavits that building materials were available and that FH Development continued the construction of other houses in Phase 4 during the relevant period for those buyers who agreed to pay more.

[49] Mr. A. Al-Hammadi deposed as follows in his Affidavit:

130) I have reviewed the evidence deposed at Paragraphs 59 and 71 to 134 of the SBrooks Affidavit, and the evidence deposed in essentially the entirety of the Affidavit sworn to herein by Professor Marianne Su-Ling Brooks on June 27th, 2024 (“the MBrooks Affidavit”), and I acknowledge that lumber and other materials were delivered to other properties under construction by the Respondent and by other builders in the Brunello Estates sub-division development during the periods deposed to above.

131) I also agree that framing and other construction of certain other houses took place on these lots during this period, however, in the case of the construction being undertaken by the Respondent, the owners of the subject properties had agreed to the purchase price and buildout timing adjustments, and that these adjustments permitted the Respondent to source alternative or more expensive labour and building materials options such that those construction projects could more safely and economically continue.

...

[50] Mr. M. Al-Hammadi deposed as follows in his Affidavit:

40) In reference to the evidence deposed at Paragraphs 59 and 71 to 134 of the SBrooks, and essentially the entirety of the MBrooks Affidavit, both sworn to on June 27th, 2024, I acknowledge that lumber and other materials were delivered to other lots being developed by the Respondent, and other builders, in the Brunello Estates sub-division during the periods referenced.

41) I also agree that construction and framing of some houses took place on these lots during this.

42) However, in the case of lots being worked on by the Respondent, each owner had agreed to the purchase price and build-out timing adjustments, just like the ones refused by the Applicants.

[51] Messrs. A. Al-Hammadi and M. Al-Hammadi appear to suggest that, even though building materials and labour were available, FH Development would not have been able to complete the Brooks' home by the agreed-upon closing date even if the Brooks had agreed to an increase in the purchase price. I reject this assertion for the following reasons:

1. FH Development placed construction of Lot 92 on hold in April of 2021, when the Brooks refused the demand for an increase in the purchase price. At that time, only the footings had been completed. This was six months before the closing date.
2. Construction of Lot 92 was on hold for five months.
3. FH Development continued to construct houses, which required the same basic construction materials as Lot 92, in Phase 4 of Brunello Estates, while construction of Lot 92 was placed on hold.
4. In late August of 2021, FH Development estimated the new closing date for Lot 92 to be the end of January of 2022, i.e. five months into the future.

[52] The evidence of FH Development fell far short of the standard required to establish that building materials and labour were unavailable to construct Lot 92 by the closing date:

- FH Development did not call any direct evidence from any of its suppliers of material or labour to support its assertion that there were shortages in building materials or labour.
- FH Development did not call as witnesses any of its project managers who are responsible for ordering building materials to testify about shortages of building materials.
- FH Development refused to respond to Mr. Piercey's request for details of the reasons for the delay, including identification of the specific building materials required for Lot 92 that FH Development was saying it was unable to procure. Both Mr. A. A-Hammadi and Mr. M. Al-Hammadi acknowledged in cross-examination that FH Development had the information in its possession as to what building materials were available, but chose not to disclose the information to the Brooks.
- When the Brooks asked FH Development to produce any relevant text messages with Project Managers in 2021, which would have included

messages about the availability of building materials, FH Development responded that there were none.

- When the Brooks asked FH Development to produce any relevant communications with building trades in 2021, FH Development responded that there were none.
- When the Brooks asked FH Development to produce all invoices from specific suppliers in 2021, which would have described the prices for building materials, the dates ordered, quantities ordered, and the date shipped, FH Development responded that the request was not proportional. Mr. M. Al-Hammadi acknowledged in cross-examination that FH Development would have had hundreds of invoices for building materials from 2021. FH Development only placed six invoices from one supplier into evidence: Exhibit I to the Affidavit of Mr. A. Al-Hammadi.
- FH Development relied on eight letters from five suppliers attached as Exhibits A to H to Mr. A. Al-Hammadi's affidavit to support its position that its suppliers were invoking "force majeure" to not honour supply agreements. Six of the eight letters advised FH Development of price increases, not shortages of building supplies. Of the two letters that

referred to material shortages, they did so in general terms, and did not support the position of FH Development that the specific building materials required to build Lot 92 were unavailable. Only one of those letters used the term “force majeure,” and only in general terms as follows: “...[S]ome of the increases are coming without notice with raw material suppliers and manufacturers claiming *force majeure* in many cases.”

[53] Based on all of the above, I find that, had FH Development not ceased construction of Lot 92 in April of 2021, the Brooks’ home would have been ready by the October 14, 2021 closing date, six months later.

[54] I find that the real reason that FH Development stopped construction on Lot 92 was because of the increase in the price of building materials, and not the unavailability of building materials. I rely on the following for this conclusion:

- As discussed already, FH Development built other houses in Phase 4, for buyers who agreed to pay more, during the period of time that it placed construction of Lot 92 on hold.
- In her email on April 19, 2021, Ms. Zinck wrote that “[c]ontracts that have a higher margin are able to begin

construction as the additional material/supply costs are accounted for within the prices they sold.”

- In his April 30, 2021 correspondence, Mr. Ling wrote that “[i]n order for us to complete these builds we are having to source alternative materials from what is spec’d and from different suppliers at much higher costs.”
- In his May 12, 2021 email, Mr. M. Al-Hammadi wrote that “[t]he additional cost requested is to cover the difference in using alternative material and suppliers that are not currently contracted for this build.”
- Mr. M. Al-Hammadi deposed as follows in his Affidavit:

35 ... [B]ecause of the referenced supply issues, the Respondent was not able to start on the framing of the Applicants’ new house until such time as the building supply issues returned to normal, *or until a price adjustment would permit coverage or [sic] the differences between the building supplies availabilities as they were in January of 2021, and as they were only two months later.*

[Emphasis added]

- Mr. A. Al-Hammadi deposed as follows in his Affidavit:
 - 108) Most of the Respondent’s customers complied with its requests for moderate pricing increases or moderate increases in the build-out times for its houses, but for the most part both.
 - 109) A few of the Respondent’s customers who did not comply with its requests for moderate pricing increases and moderate increases in the

build-out times for its houses, simple [sic] abandoned their agreements.

- 110) *The Applicants did neither, and insisted that the Respondent fully perform the construction of their new house in the manner contemplated in January of 2021, without variation.*
- 111) *The Respondent refused, as to do otherwise would have exposed it to an unreasonable loss on the construction of the Applicant's new house.*

[Emphasis added]

Frustrated by Extreme Expense and Unavailability of Materials and/or Labour?

[55] FH Development states that its performance of the contract was “impossible” in the sense of “impracticality of performance due to extreme and unreasonable difficulty, expense, injury or loss” because of the increase in the cost of building materials and labour, and because of the unavailability of materials and labour.

General Principles

[56] A contract is frustrated when an event has arisen for which the parties made no provision in the contract, and performance of the contract becomes “a thing radically different from that which was undertaken by the contract”: *Naylor Group Inc. v. Ellis-Don Construction Ltd.*, 2001 SCC 58 at para.53.

[57] In order for an intervening event or change in circumstances to amount to frustration, the event or change in circumstances must be of “so catastrophic or fundamental a nature as to render the performance of the contract impossible”:
Kesmat Investment Inc. v. Industrial Machinery Co. (1985), 70 N.S.R. (2d) 341 (C.A.) at para.18.

[58] Hardship, inconvenience or material loss or the fact that the work has become more onerous than originally anticipated are not sufficient to amount to frustration. However, courts have interpreted impossibility of performance to encompass not only absolute impossibility but also “impossibility in the sense of impracticality of performance due to extreme and unreasonable difficulty, expense, injury or loss”: *Kesmat* at para.21.

[59] In addition to establishing that the contract became a thing radically different from that which was undertaken by the contract, the party asserting frustration of contract must establish that the supervening event was not reasonably foreseeable: see *Naylor* at para.56.

[60] FH Development cited J.D. McCamus in *The Law of Contracts* (3d ed., 2020) at pp.679-681, where the author notes that a hundredfold increase in the cost of performance should be considered to be a change in circumstances that renders

performance of “a thing radically different from that which was undertaken by the contract,” notwithstanding the fact that the performance remains literally possible: para.53 of FH Development’s brief.

[61] FH Development also relied on *First Real Properties Ltd. v. Biogen Idec Canada Inc.*, 2013 ONSC 6281, where the court, partly on the basis of the doctrine of frustration, held that a lease was not enforceable. In that case, the tenant learned that the windows replacement would cost approximately ten times the sum anticipated when the offer to lease had been signed. However, as stated by the court in *FSC (Annex) Limited Partnership v. Adi 64 Prince Arthur L.P.*, 2020 ONSC 5055 at para.30, *First Real Properties* is more nuanced than that. In *First Real Properties*, the landlord had agreed to install windows along the wall of a building to accommodate the tenant’s wishes. Both landlord and tenant thought the windows would cost approximately \$48,000. The wall turned out to be load-bearing. This increased the cost of installing the windows by a factor of ten, exceeding the capped budget for renovations in the contract. As the court held, “[t]o compel Biogen to proceed with the smaller windows would be to order Biogen to do something ‘radically different’ from what the parties had agreed to:” *First Real Properties* at para.44; see also *Smith v. Bryant* at para.68.

[62] Increased expense or decreased profitability alone does not frustrate a contract: see *FSC (Annex) Limited Partnership v. ADI 64 Prince Arthur LP*, 2020 ONSC 5055 at paras.27-28, cited in *Smith v. Bryant* at para.66. *ibid.* See also GHL Fridman, *The Law of Contract*, 6th ed., at pp.618-619.

Extreme Expense

[63] FH Development has not persuaded me that its performance of the contract was impossible in the sense of impracticality due to extreme and unreasonable expense. I rely on the following reasons for this conclusion:

1. FH Development was willing to construct the Brooks' house for an extra \$15,000. At the hearing of the Application, FH Development argued that the Brooks failed to mitigate their damages because they should have paid the extra \$15,000 demanded by FH Development under protest rather than go back out into the crazed real estate market. An extra \$15,000 does not amount to such an extreme price increase that performance of the contract becomes "a thing radically different from that which was undertaking by the contract."

2. FH Development's argument at the hearing of this application that it had abandoned its request for additional money defeats its assertion that the contract was frustrated due to extreme cost.
3. As I have already concluded, had FH Development not ceased its construction of Lot 92 in April of 2021 when the Brooks refused the demand to pay more money, FH Development would have completed construction by the agreed-upon closing date.
4. For those purchasers who agreed to a price increase, the price increases ranged from \$5,000 to \$25,000. An additional cost of between \$5,000 to \$25,000 does not amount to such an extreme price increase that performance of the contract becomes "a thing radically different from that which was undertaken by the contract."
5. FH Development asserted that it cost approximately 25% more to build the style of house contracted for by the Brooks after the pandemic than it did before the pandemic. Nonetheless, FH Development still made a profit. Mr. A. Al-Hammadi calculated the actual cost of building Lot 92 as being \$455,039.13. At the agreed upon purchase price of \$597,490, this would have resulted in a profit for FH Development of \$142,450.87: see the Affidavit of A. Al-

Hammadi, Exhibit “J.” In cross-examination, Mr. Al-Hammadi asserted that the profit was less, as FH Development had to pay HST on the total price. Even if this were the case, FH Development would have still made a profit on the house at the original purchase price. While FH Development made vague references to the existence of “indirect costs,” it did not adduce evidence of same.

[64] Construction of the Brooks’ home at the original purchase price was clearly not “impossible” in any sense of the word. FH Development completed the construction of other homes of the same style in the same subdivision during the five months that it ceased construction on the Brooks’ home for price increases ranging from \$5,000 to \$25,000. It asserted in this hearing that it abandoned its request for a price increase from the Brooks. Building supplies and labour were available. The increase in costs did not render FH Development’s performance of the contract “a thing radically different from that which was undertaken by the contract.” The price increases made the deal less profitable for FH Development, but the law of frustration does not concern itself with profitability. The potential for rises in building costs is an inherent risk in an agreement of purchase and sale for new construction. FH Development must bear the risk of choosing to build for a fixed-price when market conditions could change and make the agreement less

prosperous for it, just as FH Development would have reaped the benefit had building costs decreased.

Unavailability of Materials

[65] The parties addressed the possibility of the unavailability of materials and/or labour in Clause 7.1 of the agreement. Clause 7.1 of the agreement allowed FH Development to delay the closing date if the delay was caused by the unavailability of materials and/or labour.

[66] The parties also addressed the unavailability of materials in clause 3 of Schedule “A” to the agreement of purchase and sale, which states that “[t]he Seller may substitute materials and equipment of equal or superior quality to those specified in the construction of the building.”

[67] The unavailability of materials and/or labour was foreseeable. FH Development cannot rely on supply issues to establish frustration of the contract.

[68] Moreover, as I have already found, FH Development has failed to persuade me that building materials and labour for the construction of Lot 92 were unavailable.

Conclusion on Frustration

[69] The contract was not frustrated.

Clause 7.1 of the Agreement

[70] In order to rely on clause 7.1 to justify the delay in the closing date, FH Development must establish, on a balance of probabilities, that the availability of materials and/or labour caused delays in the construction of the Brooks' new home. FH Development conceded that Clause 7.1 of the Agreement did not entitle it to insist on being paid more money.

[71] FH has failed to meet its burden, as it failed to establish that building materials and labour were unavailable to construct Lot 92 by the agreed-upon closing date.

[72] FH Development had no right to delay the closing date under Clause 7.1 of the Agreement.

Breach of Contract

[73] The agreement of purchase and sale was a valid contract. It was a fixed-price contract, with a "time is of the essence" clause. FH Development breached the contract when it insisted on an increase to the agreed-upon purchase price, failing which it would terminate the contract, and when it did not deliver vacant

possession of the home on the agreed-upon closing date, and the Brooks were ready, willing and able to close: see Victor di Castri, *Law of Vendor and Purchaser*, 3rd ed. (Toronto: Thomson Reuters, 2020) at para.12.56; *3 Gill Homes Inc. v. 5009796 Inc.*, 2024 ONCA 6 at para.24; and *Multani Custom Homes Ltd. v. 1426435 Ontario Ltd.*, 2018 ONSC 4566 at paras.44-51.

Did the Brooks Fail to Mitigate?

[74] The onus is on FH Development to establish a failure to mitigate on the part of the Brooks. FH Development must prove both that the Brooks failed to make reasonable efforts to mitigate, and that mitigation was possible: see *Smith v. Bryant* at para.81.

[75] FH Development states that it was foolhardy for the Brooks to wait until late 2021 to take steps to mitigate their damages. FH Developments points to Mr. Giles' letter of June 23, 2021, which made it clear that the house would not be ready on October 14, 2021.

[76] The duty to mitigate damages does not arise until the innocent party accepts the anticipatory repudiation and brings the contract to an end. Should the innocent party refuse to accept the anticipatory repudiation, there is no duty to mitigate until

the date of promised delivery or performance. See *Leland Walton & Sons Ltd. v. Hillspring Farms Ltd.*, 2007 NBCA 7 at para.20.

[77] In this case, the duty to mitigate did not arise until October 14, 2021.

[78] Moreover, FH Development adduced no evidence of equivalent homes available to the Brooks at any time between June and October 14, 2021.

[79] Instead, FH Development says that the Brooks should have mitigated their damages by paying FH Development the extra \$15,000 under protest and waiting for the new home to be built. FH Development says that it was unreasonable for the Brooks to go back into the crazed real estate market in the fall of 2021 and early winter of 2022, and buy a house that was 30 years old and cost over \$200,000 more than Lot 92, even with the extra \$15,000. (I likely do not need to point out to the reader the inconsistency between this argument and FH Development's position that it abandoned its request for the \$15,000 increase in the purchase price).

[80] I do not accept the assertion of FH Development that the Brooks acted unreasonably when they choose to go back out into the real estate market in the fall of 2021 rather than paying the extra \$15,000 to have the new house constructed by FH Development. I rely on the following for this conclusion:

- FH Development'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.

[81] Given these facts, it was reasonable for the Brooks to have lost trust in FH Development, and therefore it was reasonable for the Brooks to terminate the agreement rather than pay the \$15,000 under protest for a house that might or might not be ready by the end of January, 2022.

[82] Furthermore, if I were to accept the position of FH Development, it would encourage developers to default in a rising market, and to insist on a higher price for the same property, leaving purchasers such as the Brooks with the risk and expense of pursuing litigation to recover the additional payment demanded in

breach of the contract. See, by analogy, *Azzarello v. Shawqi*, 2019 ONCA 820 at paras.39-40.

[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]

[84] On February 4, 2022, the Brooks decided, briefly, to "throw in the towel." However, they were looking again later that day. On February 11, 2022, they reluctantly agreed to increase their budget to \$900,000.

[85] Mr. Manderville submitted an offer on behalf of the Brooks to buy 21 Barkton Lane in Clayton Park in February of 2022. Given that they had been outbid over the previous several months despite offering well above asking, the Brooks submitted their best offer, and their offer was accepted.

[86] The only evidence adduced by FH Development about the cost of houses that might have been available to the Brooks between October, 2021 and February, 2022 was as follows: (a) FH Development sold Lot 92 for \$729,680.50 on December 9, 2021, and (b) it sold another house, 50 Tuscan Run for \$750,000 on December 1, 2021.

[87] FH Development's evidence about the selling prices of these two homes is some evidence of what might have been available to the Brooks during the relevant time. However, as I already stated, it was reasonable for the Brooks not to buy a home from FH Development.

[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.

Damages

[89] The Brooks are entitled to damages in the amount of \$255,510, which represents the difference between the contract price for Lot 92 (\$597,490) and the purchase price for 21 Barkton (\$853,000): see *Chai v. Dabir*, 2015 ONSC 1327 at para.47. This is because, in order to acquire a property that was as equivalent as possible to the one that FH Development agreed to build for the Brooks (a house that would accommodate the Brooks and their two school-aged children, closer to the children's school and their work), in a severely restricted, competitive and rising real estate market, the Brooks were forced to pay an additional \$255,510. In other words, to be placed in the position the Brooks would have been in, but for the FH Development's breach, the Brooks had to pay an extra \$255,510.

Additional Interest Paid

[90] The Brooks also seek an award of \$25,000 in damages to compensate them for the additional interest they paid on their mortgage as a result of FH Development's breach of contract. The Brooks had secured a favourable interest rate of 1.99% on their mortgage for Lot 92. They had to pay increased interest, at a rate of 3.04%, on the mortgage they secured for 21 Barkton. They calculated the additional interest paid by them using the original principal amount of \$477,922 in the original mortgage for Lot 92, over the five-year term of the mortgage, as being slightly over \$25,000. FH Development did not challenge this calculation. See para.171 of Mr. Brooks Affidavit.

[91] The Brooks shall be awarded a further \$25,000 in damages to compensate them for additional interest paid on the mortgage resulting from FH Development's breach of the contract.

Punitive Damages for Breach of the Duty of Good Faith Contractual Performance

[92] An award of punitive damages is only justified in exceptional cases, when the defendant's conduct departs markedly from ordinary standards of decency and is malicious, oppressive or high-handed, and requires punishment. Punitive damages are generally given only where the misconduct would otherwise be

unpunished or where other penalties are or are likely to be inadequate to achieve the objectives of retribution, deterrence and denunciation. See *Whiten v. Pilot Insurance Company*, 2002 SCC 18 at para.94.

[93] I am not satisfied that this is one of those exceptional cases warranting an award of punitive damages. While FH Development misrepresented the availability of labour and building materials to build Lot 92, I do not find that the conduct of its principals was malicious, oppressive or high-handed.

[94] The request for an award of punitive damages is dismissed.

Credibility and Reliability of Stephen Brooks and Marianne Su-Ling Brooks

[95] I wish to comment on the credibility and reliability of the Brooks, given how FH Development characterized the Brooks in their Notice of Contest, their brief, and in oral argument.

[96] In their Notice of Contest, FH Development asserted that the Brooks “approached their dealings with [FH Development] at all materials times in manners which were *unrealistic, unreasonable, and belligerent*, and which failed to reflect an understanding of the pandemic, the Suez Canal blockage, the Texas Freeze-Up, or of the workforce and supply chain limitations which had resulted

from those events, and which were well-known locally, provincially, regionally, nationally, and globally” [emphasis added].

[97] FH Development described the conduct of the Brooks as follows at paragraphs 6 and 11 of its brief:

6. In respect to the unprecedented and unforeseeable circumstances with which they were presents, the Respondents sought small and eminently reasonable adjustments to a contract they had entered into with the Applicants. Both *unreasonably*, and in manners *wildly inconsistent* with the applicable law, the Applicants demurred, stood on their *alleged principles*, and insisted that the Respondents complete the subject contract, despite limitations which neither the Respondent nor the Applicants could ever have legitimately perceived or for which allowances could have been made. This was a *patently unreasonable* response on the parts of the Respondents.

...

11. The Applicants’ stated position, in a nutshell, was/is that a “deal is a deal.” And *despite significant educational accomplishments and the establishment of senior educational positions*, the Applicants have generally eschewed the notion that the COVID-19 pandemic could have had any measurable impact on the residential house building industry, or on the Respondent’s participation in that industry in particular.

[emphasis added]

[98] During oral argument, counsel for FH Development characterized certain evidence given by Stephen Brooks as “disingenuous.”

[99] The Affidavits of Stephen and Marianne Su-Ling Brooks were detailed, thorough, and supported by the numerous documents attached to their affidavits. Their evidence was not internally inconsistent, nor was it inconsistent with the evidence of the other witnesses.

[100] In cross-examination, both Stephen Brooks and Marianne Brooks testified in a calm, measured and fair manner, despite surely having read what FH Development had written about them in advance of the hearing.

[101] The evidence of the Brooks was not shaken in cross-examination.

[102] I found both Stephen Brooks and Marianne Su-Ling Brooks to be credible and reliable witnesses. I categorically reject FH Development's characterization of the Brooks as belligerent and unreasonable and of Mr. Brooks as disingenuous, as well as FH Development's implied questioning of the Brooks' principles and their intelligence.

Conclusion

[103] FH Development breached the agreement of purchase and sale between it and the Brooks by insisting on an increase to the contract price, failing which it would terminate the agreement, and failing to deliver vacant possession of Lot 92 on the agreed-upon closing date.

[104] FH Development failed to establish that the contract was frustrated or that the closing date was delayed by increased cost or unavailability of building materials and labour brought about by the Covid-19 pandemic.

[105] FH Development must pay the Brooks \$280,510 in damages for breach of the contract.

[106] The Brooks are not entitled to punitive damages.

[107] The Brooks are entitled to pre-judgment interest.

[108] If the parties are unable to agree on costs and/or the rate or amount of prejudgment interest, I will receive written submissions from the Brooks within two weeks of this decision, and from FH Development within four weeks of this decision.

Gatchalian, J.