COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *FPS Food Process Solutions Corporation v. XTL Inc.,* 2025 BCCA 305

Date: 20250903
Docket: CA50122

Between:

FPS Food Process Solutions Corporation

Appellant
(Defendant and Plaintiff by Counterclaim)

And

XTL Inc.

Respondent
(Plaintiff and Defendant by Counterclaim)

Before: The Honourable Justice Dickson
The Honourable Madam Justice Horsman
The Honourable Justice Mayer

On appeal from: An order of the Supreme Court of British Columbia, dated August 28, 2024 (*XTL Inc. v. FPS Food Process Solutions Corporation*, 2024 BCSC 1581, Vancouver Docket S197023).

Counsel for the Appellant:	J.R. Shewfelt
Counsel for the Respondent:	J. Zeljkovich
Place and Date of Hearing:	Vancouver, British Columbia May 21, 2025
Place and Date of Judgment:	Vancouver, British Columbia September 3, 2025

Written Reasons by:
The Honourable Madam Justice Horsman

Concurred in by:
The Honourable Justice Dickson
The Honourable Justice Mayer

Summary:

The respondent, XTL, contracted to purchase an industrial freezer from the appellant, FPS. However, XTL repudiated the contract before the freezer was completed and commenced an action to recover its partial payments to FPS. FPS admitted the claim subject to a set-off for lost expenses and its counterclaim for lost profits. The trial judge held that FPS could only recover partial set-off costs because of its duty to mitigate damages. He also dismissed FPS's counterclaim for two reasons: (1) FPS could not claim for both expectation damages (lost profits) and reliance damages (lost expenses), and (2) FPS failed to accurately establish its lost profits. On appeal, FPS alleges that the trial judge erred both by reducing its set-off and by dismissing its counterclaim.

Held: Appeal allowed, and action and counterclaim remitted for a new trial. The judge erred in reducing the set-off because he failed to identify a legal basis for finding that FPS owed a duty to mitigate, including by failing to make any express findings of repudiation and acceptance of repudiation. The trial judge also erred in dismissing FPS's counterclaim. There is no absolute rule that a plaintiff cannot recover both lost profits and lost expenses. Where there is no overlap in the claimed damages and thus no risk of double recovery, a party to a contract is entitled to an award that puts them in the position they would have been if the contract had been performed. In this case, FPS's claims for both lost profits and lost expenses were not inconsistent and there was no risk of double recovery. The trial judge therefore erred in holding that FPS was required to elect between the two. In addition, the trial judge erred in his approach to assessing damages for lost profits by finding that such damages could not be recovered unless they could be assessed with some degree of certainty, and, relatedly, failing to consider material evidence relevant to that assessment.

Reasons for Judgment of the Honourable Madam Justice Horsman:

[1] The appellant FPS Food Process Solutions Corporation ("FPS") entered a contract with the respondent XTL Inc. ("XTL"), under which FPS agreed to manufacture and deliver an industrial freezer (the "Contract"). XTL was ultimately unable to secure financing for the project. At some point in time, XTL repudiated the Contract.

[2] XTL brought an action to recover the partial payments it made to FPS under the Contract. In its response to civil claim, FPS admitted that XTL was entitled to recover the partial payments, but claimed for a set-off for costs it incurred prior to XTL's repudiation of the agreement. FPS also filed a counterclaim seeking damages for its anticipated lost profits on the Contract.

[3] The trial judge held that FPS could not recover all of the set-off costs it claimed because it incurred some of those costs when FPS was under a duty to mitigate its damages. FPS argues that the judge erred in finding it had a duty to mitigate before the Contract had ended. If there was a duty to mitigate, FPS says the judge erred in including FPS's payments to its subcontractor as a cost that had to be mitigated.

[4] The trial judge also dismissed FPS's counterclaim, finding that: (1) FPS had to elect between a claim for reliance damages (the set-off amounts) and expectation damages (lost profits); and (2) FPS had failed to establish with accuracy the profits it would have earned. FPS argues that the judge erred in finding that it had to make an election between its claim for a set-off and lost profits, and in imposing a standard of "accuracy" in assessing the claim for lost profits.

[5] For the reasons that follow, I conclude that the judge erred in law in his findings on FPS's claim for a set-off and its counterclaim for lost profits. In my view, a new trial is necessary.

Background

The contract

[6] FPS is a British Columbia company in the business of manufacturing industrial food processing equipment, including industrial-scale food processing freezers.

[7] On May 4, 2015, FPS entered into the Contract with XTL, a Pennsylvania corporation that operates transportation, logistics, and warehouse facilities throughout the east coast of the United States. Under the Contract, FPS agreed to manufacture and install an industrial carton freezer at a location in the United States (the "Freezer"). The original Contract price for the Freezer, including equipment and installation, was US$3,050,000.

[8] A New Zealand company named Freezing Solutions Ltd. ("Freezing Solutions") owned the patented design of many of the Freezer components. FPS

entered into a subcontract with Freezing Solutions under which Freezing Solutions would carry out the design and engineering work on the Freezer, as well as much of the manufacturing. The total amount payable by FPS to Freezing Solutions under the subcontract was NZ$2,204,673.

[9] The terms of the Contract between FPS and XTL required XTL to make the following payments:

1. an immediate down payment of 15% of the purchase price;
2. progress payments of 10% of the purchase price due on the first of each month, commencing June 1, 2015, and continuing through December 1, 2015;
3. a progress payment of 5% of the purchase price on January 1, 2016; and
4. payment of the final 10% of the purchase price due 60 days after start-up, but no later than 120 days after the Freezer was ready for shipment.

[10] On May 18, 2015, XTL paid FPS US$457,500, which was 15% of the purchase price. Thereafter, XTL did not make the progress payments required under the Contract on the agreed-upon schedule. On December 23, 2015, XTL paid FPS US$305,000, or 10% of the purchase price. This was the last payment made by XTL. The total amount received by FPS under the Contract was US$762,500.

[11] After December 2015, XTL advised FPS on repeated occasions that it was working to secure financing to complete the Contract. In May 2016, XTL requested updated pricing information from FPS in order to secure financing. On May 19, 2016, FPS provided XTL with an updated Contract price of US$3,100,000. In August 2016, XTL arranged a project meeting to discuss moving forward with the Contract.

[12] XTL’s financing never materialized. In June 2018, XTL told FPS that it would not be proceeding with the Freezer purchase.

The pleadings

[13] On June 19, 2019, XTL commenced an action seeking to recover the US$762,500 it had paid to FPS under the Contract.

[14] In its response to civil claim, FPS pleaded that it had incurred engineering, manufacturing, labour, and material costs in partially manufacturing the Freezer. FPS admitted that XTL had a claim against it for recovery of its partial payments, but subject to a set-off for costs incurred by FPS (including payments to Freezing Solutions) and FPS's counterclaim. FPS also pleaded that it "did not accept XTL's repudiation of the [Contract] at any time prior to the filing of this pleading", and claimed an entitlement to set-off its costs up to the time that it accepted XTL's repudiation by way of filing and serving the response to civil claim.

[15] In its counterclaim, FPS sought "contractual expectation damages" in the form of its loss of anticipated profit under the Contract.

The trial judgment

[16] The trial was heard over seven days between December 11, 2023 and April 5, 2024. On August 28, 2024, the judge issued reasons for judgment: *XTL Inc. v. FPS Food Process Solutions Corporation*, 2024 BCSC 1581 (the "Trial Reasons").

[17] At trial, a key issue was whether, and to what extent, FPS could set-off costs it had incurred in partial performance of the Contract. Specifically, FPS argued that it ought to be able to retain CA$479,302.29, comprised of payments it made to Freezing Solutions, travel and other expenses incurred by FPS, and payments it made to an installation contractor. By far the largest component of these expenses were payments that FPS made to Freezing Solutions, which totalled NZ$547,825.25.

[18] The judge reviewed evidence of the communications between the parties starting June 1, 2015, after XTL missed progress payments. The evidence indicated that by December 2015, FPS had real concerns regarding XTL's ability to complete the Contract, prompting it to stop work on the Freezer.

[19] On January 5, 2016, Gladys Leung, a project manager at FPS, sent an email to XTL that stated, in part, "[FPS] will not be able to resume production until we receive further payment": Trial Reasons at para. 27. The judge found this email to be a significant event, stating:

> [28] The language of the January email is unequivocal. FPS tells XTL that it will stop work—and thus stop incurring costs ultimately to be paid by XTL—on the Freezer project. The email sends a clear message that FPS will not continue work on the Freezer until XTL makes further payment. From XTL's perspective, given this communication, it appears reasonable that XTL would understand that FPS had stopped work on the project unless further payment was made. The corollary of this conclusion is that any work FPS continued to perform on the project after January 5, 2016, was undertaken contrary to the message it communicated to XTL. In other words, I conclude that the work and expenses incurred by FPS after January 5, 2016, on the project were expended at the risk that FPS would be unable to recover those costs from XTL.
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> …
>
> [30] Given the foregoing, I conclude that any additional costs incurred by FPS in respect of the project after January 5, 2016, was a business decision made by FPS to hedge against its belief and hope that XTL would ultimately obtain the funding and the project would complete. That business decision carried a risk. The risk, which ultimately materialized, was that XTL would not get financing, the project would not move forward and FPS would not get paid.
>
> [Emphasis added.]

[20] The judge found that, to the extent FPS continued to incur costs in reliance on XTL's assurance that it was working on securing financing, it did so "at its own peril": Trial Reasons at para. 32. Specifically, he held that "after January 5, 2016, FPS failed to properly mitigate its damages related to the project in respect of any expenses it incurred after that date": at para. 32, emphasis added.

[21] The judge then turned to the issue of quantifying the costs incurred by FPS prior to January 5, 2016. As noted, the majority of the costs claimed consisted of the payments FPS made to Freezing Solutions up to February 15, 2016. The judge did not agree that FPS's reasonable expenses could be calculated by reference to the amounts it paid to Freezing Solutions, as these amounts were based on a percentage of the contract price rather than work actually performed by Freezing Solutions. Instead, the judge looked to accounting documents tendered at trial that

detailed the actual expenses incurred by Freezing Solutions prior to January 5, 2016, in New Zealand dollars. He stated:

> [39] I acknowledge that this was not the methodology provided to me explicitly by either party. However, in my view, it achieves a more accurate assessment of the appropriate amounts that FPS is entitled to set off against the deposits paid by XTL and is based on the evidence presented at trial.

[22] The judge reviewed the accounting evidence, and determined that Freezing Solutions had incurred reasonable expenses in the amount of NZ$378,236.87 prior to January 5, 2016. FPS was permitted to set-off this amount from the funds to be returned to XTL. The judge reiterated that to the extent FPS incurred expenses on the Freezer after that date, "they did so of their own volition and at their own risk", and that this "should not be XTL's responsibility": Trial Reasons at para. 52.

[23] The judge then turned to FPS's counterclaim for recovery of its lost profit under the Contract. He accepted XTL's submission that FPS was not entitled to recover both its incurred costs (reliance damages) and lost profits (expectation damages) because he found this would amount to double recovery. In support of this conclusion, the judge cited *Sunshine Vacation Villas Ltd. v. Governor and Company of Adventures of England Trading into Hudson's Bay* (1984), 58 B.C.L.R. 33, 1984 CanLII 336 (C.A.) [*Sunshine Vacation Villas*].

[24] Despite this conclusion, the judge went on to address the expert evidence led by FPS in support of its claim for lost profits.

[25] FPS tendered the report of an accounting expert, Robert Mackay, who opined that FPS would have earned a profit of CA$622,047 on the Contract, after deduction of manufacturing and other costs. The judge found that he did not have confidence in Mr. Mackay's evidence for two reasons. First, Mr. Mackay assumed that this was the first time FPS entered into a contract for the manufacture of a carton freezer. He was not provided with information that FPS had manufactured a carton freezer on a previous occasion, and that the project had not been profitable. The judge described this as "an important and relevant omission": Trial Reasons at para. 63. Second, Mr. Mackay relied on a costing sheet dated June 2, 2015, when it emerged at trial

that there was a subsequent costing sheet prepared on August 25, 2015 that had not been disclosed. Even accepting that the two costing sheets had similar information, the judge found that the non-disclosure caused concern about the accuracy of Mr. Mackay's opinion.

[26] The judge concluded that FPS had "failed to, on balance, establish with accuracy the profits it would have earned" if the Contract had completed: Trial Reasons at para. 70. Accordingly, the judge was not persuaded that FPS had "met its burden to establish, on balance, the profits it lost": at para. 71. He dismissed the counterclaim.

On appeal

[27] FPS raises two broad grounds of appeal:

1. The trial judge erred in law by reducing the amount of FPS's allowable set-off, and specifically by holding that:
    i. FPS had a duty to mitigate its damages as of January 5, 2016, while its Contract with XTL was still in force; and
    ii. FPS's payments to Freezing Solutions were subject to the duty to mitigate when, in law, contractual liability to a subcontractor is a non-mitigable expense.
2. The trial judge erred in law in dismissing the counterclaim by:
    i. erroneously holding that FPS was advancing inconsistent claims for "reliance damages" and for "expectation damages", and that FPS could not advance these claims concurrently; and
    ii. failing to apply the proper principles of damages assessment to its claim for lost profits.

[28] Errors of law are reviewed on a standard of correctness: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 105.

Analysis

Issue 1: The duty to mitigate

1. Did the trial judge err in finding that FPS had a duty to mitigate its damages as of January 5, 2016?

[29] It is common ground on this appeal that an innocent party's duty to mitigate their damages following a breach of contract does not arise while the contract remains alive and capable of performance. Where one party to the contract repudiates the contract, the other party has the option to accept the repudiation. If the innocent party does not accept the repudiation, the contract continues and no duty to mitigate arises: *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415, 1996 CanLII 209 at para. 15.

[30] In the present case, the judge found that FPS had a duty to mitigate its contractual losses as of January 5, 2016, and could not recover costs it may have incurred in performing work under the Contract after that date. However, he did not address, at least not explicitly, the basis upon which a duty to mitigate arose as of that date. The judge did not expressly find that XTL's failure to make the progress payments due under the Contract as of January 5, 2016, constituted a repudiation, nor did he find that FPS accepted the repudiation on that date. The Trial Reasons contain no express findings at all on the issues of repudiation and acceptance of repudiation.

[31] XTL makes two arguments in response to this ground of appeal: (1) the judge must have implicitly reached the necessary findings that justified the imposition of a duty to mitigate; and (2) in its final submissions at trial, FPS conceded it had a duty to mitigate its loss and it should not be permitted to resile from that concession on appeal.

[32] I will address each of these submissions in turn.

Did the trial judge make an implicit finding of acceptance of repudiation?

[33] I am not persuaded it is possible to read the Trial Reasons as including implicit findings that justify the judge's conclusion that FPS had a duty to mitigate as of January 5, 2016. Indeed, the Trial Reasons, read as a whole, suggest that the judge assumed the Contract did continue after January 5, 2016, although with considerable uncertainty as to whether XTL would ultimately be in a position to complete. At several points in his judgment, the judge refers to FPS's assumption of a "risk" that it would be unable to recover costs from XTL for work undertaken after January 5, 2016, in the event the Contract did not complete at some future date. This point is illustrated most clearly in para. 30 of the Trial Reasons, which I quote again for ease of reference:

> [30] Given the foregoing, I conclude that any additional costs incurred by FPS in respect of the project after January 5, 2016, was a business decision made by FPS to hedge against its belief and hope that XTL would ultimately obtain the funding and the project would complete. That business decision carried a risk. The risk, which ultimately materialized, was that XTL would not get financing, the project would not move forward and FPS would not get paid.
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> [Emphasis added.]

[34] In my view, this analysis cannot be reconciled with an "implicit finding" that the Contract was over as of January 5, 2016.

[35] Further, the Trial Reasons do not address how the January 5, 2016 email from Ms. Leung could constitute an acceptance of XTL's repudiation of the Contract, even if one could identify an implied finding of repudiation within the judgment. Read in full, the relevant portion of Ms. Leung's email stated:

> Are there any updates on the status of the below six (6) outstanding invoices? We will not be able to resume production until we receive further payment. If we receive payment in the next couple of weeks, we are looking at delivery in April.
>
> [Emphasis added.]

[36] It is difficult to see how this email meets the legal standard of a "clear" and "unequivocal" acceptance by FPS of XTL's repudiation: *Kaur v. Bajwa*, 2020 BCCA

310 at para. 30. In addressing the import of Ms. Leung's email, the judge did not quote or consider the portion underlined above. He therefore did not address the potential significance of FPS's willingness, as reflected in the underlined portion, to complete the Contract if payment was received.

[37] Finally, there is the evidence of the continued communication between XTL and FPS after January 5, 2016 about contractual performance. In May 2016, XTL requested, and FPS provided, an updated contract price. In August 2016, FPS attended a project meeting for the Contract arranged by XTL. While the trial judge refers to these events, his reasons do not provide a rationale for how they could be reconciled with a finding that the Contract was over as of January 5, 2016.

[38] XTL argues that it is possible to reconcile the parties' conduct after January 5, 2016 with an implied finding that FPS elected to accept XTL's repudiation on that date, because after January 5, 2016 they were negotiating the terms of a new contract. XTL cites case law standing for the proposition that there are instances where an innocent party's election to accept the repudiation can be inferred from the factual circumstances: *Morden v. Pasternak*, 2023 BCCA 252 at para. 37; *Kaur* at paras. 30–32. XTL also relies on the decision of the Ontario Superior Court of Justice in *Com Dev Ltd. v. Microsat Systems Canada Inc.*, 2016 ONSC 289, aff'd 2017 ONCA 372, where the Court found an innocent party's communication that it was unwilling to continue performance of a contract until outstanding payments were made constituted acceptance of repudiation.

[39] I have no doubt that, depending on the facts, it may be open to a court to infer repudiation from the circumstances, including circumstances where the innocent party has refused to further perform a contract due to non-payment by the repudiating party. However, as I have explained, there was no such finding by the trial judge in this case, and no basis to infer that he made the necessary findings by implication. The issue of repudiation is not addressed at all by the trial judge. His express finding that there was a risk that the Contract would not complete after January 5, 2016, is inconsistent with an implied finding that the Contract was over as of that date.

[40] Accordingly, I reject XTL's argument that the imposition of a duty to mitigate on the part of FPS as of January 5, 2016 can be justified on the basis that the trial judge implicitly found that FPS had clearly and unequivocally accepted XTL's repudiation of the Contract on that date.

Did FPS concede the existence of a duty to mitigate at trial?

[41] XTL argues, in the alternative, that FPS conceded the existence of a duty to mitigate at trial by taking the position that it met its duty to mitigate, relying on events that occurred in February 2016. XTL says that FPS should not be permitted to now resile from this concession on appeal.

[42] In support of this argument, XTL relies on a portion of FPS's final submission regarding the effect of an agreement between FPS and Freezing Solutions, as reflected in an exchange of emails in February 2016. Ms. Leung, on behalf of FPS, asked Freezing Solutions to agree that "in the event that XTL does cancel this project and [FPS] need to refund the amount XTL paid to FPS minus [its] expenses", Freezing Solutions would agree to refund the amounts that FPS paid to it, less Freezing Solutions' incurred expenses (emphasis added). Freezing Solutions agreed to this term. In final argument, FPS made the following submission on the significance of this agreement:

> Well, the submission I do make on that later on is that there was an exchange of emails in February of 2016 between [Freezing Solutions] and FPS when they came to this – I don't know if it's a collateral agreement or an understanding that the – if there were unexpended monies – that is, money that wasn't expended by [Freezing Solutions] – that it should then be returned to FPS, and FPS could then return it to XTL. That agreement was initiated by FPS. It's, I think, an extraordinary thing to do. They were under no obligation to do that.
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> And that agreement, in my submission, is in and of itself an act of mitigation and a reasonable act of mitigation. And the question, then, for this court becomes did FPS take reasonable steps to mitigate its loss and – and by extension the loss of XTL. And I would say that by making that agreement it certainly did.
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> [Emphasis added.]

[43] I agree with FPS that this submission does not amount to a concession that its duty to mitigate arose as of January 5, 2016. Instead, the February 2016

agreement was cited as evidence of, in effect, the anticipatory steps that FPS took to mitigate its damages in the event the Contract did not complete. FPS made no concession at trial that would prevent it from raising the ground of appeal that it now advances in relation to the duty to mitigate. Further, FPS expressly pleaded that XTL repudiated the Contract in late 2018, and that FPS only accepted the repudiation when the response to civil claim and counterclaim were filed and served in 2019. The arguments FPS makes on appeal are, therefore, consistent with its pleaded position at trial.

[44] It is certainly true that the parties' submissions to the judge at trial discussed the duty to mitigate without any context. Neither party provided the judge with a framework that clearly set out the steps of the contractual analysis he was required to undertake. Although FPS's pleading put the date it accepted XTL's repudiation of the Contract in issue, neither FPS nor XTL made any submission to the judge as to when repudiation, and acceptance of repudiation, occurred. FPS's submission referred to the duty to mitigate, but did not explain that the duty only arose once the Contract was over. Neither party cited *Semelhago* to the trial judge. While it is true that a trial judge is presumed to know the law, it is also true that parties have an obligation to assist a trial judge in identifying the law and legal principles they are required to apply. Most unfortunately, the judge was provided with limited assistance in this case.

[45] In any event, the judge was required to apply the correct law regardless of the degree of assistance he was provided by the parties. In my view, the trial judge's failure to identify the legal basis for finding that FPS owed a duty to mitigate as of January 5, 2016, or to make any findings (express or implicit) to support such a duty, constitutes an error of law that justifies appellate intervention.

2. Did the trial judge err in finding that FPS's payments to Freezing Solutions were subject to the duty to mitigate?

[46] In light of my conclusion that the trial judge erred in finding a duty to mitigate as of January 5, 2016, it is not necessary for me to address FPS's alternative argument that if a duty to mitigate was owed, the judge erred in finding that FPS had

a duty to mitigate its liability to its subcontractor, Freezing Solutions. The arrangement between FPS and Freezing Solutions does bear some relevance to the issue of remedy, to which I will return after addressing the second broad issue on appeal: the dismissal of FPS's counterclaim for expectation damages.

Issue 2: Expectation damages

1. Did the trial judge err in finding that FPS was advancing inconsistent claims for "reliance damages" and "expectation damages"?

[47] FPS argues that it did not advance inconsistent claims for reliance and expectation damages, but rather sought the ordinary measure of contractual damages; that is, an award that would place it in the same position as if the Contract had been performed. FPS says that in a case involving a contract for the sale and manufacture of machinery, this ordinary measure of damages includes both lost profits and the unmitigated costs of manufacture. Contrary to the finding of the trial judge, FPS says it was not seeking double recovery. Rather, because the Contract price included both (i) the cost of manufacture, and (ii) a profit margin, FPS must be entitled to recover compensation for both, or it would not be placed in the same position as it would have been in if the Contract had been performed.

[48] XTL maintains that the trial judge was correct to decide that FPS should not be awarded both expectation damages (the lost profit sought in the counterclaim) and reliance damages (the set-off sought in the response to civil claim). XTL says that this result is supported by the decision of this Court in *Sunshine Vacation Villas*, which is cited in the Trial Reasons at para. 58.

Reliance damages and double recovery

[49] In *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45 [*Callow*], the majority of the Supreme Court of Canada outlined the difference between expectation and reliance damages as follows:

> [107] The ordinary approach is to award contractual damages corresponding to the expectation interest (*Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19, [2020] 2 S.C.R. 420, at para. 108). That is, damages should put Callow in the position that it would have been in had the duty been performed.

> [108] While it has rightly been observed that reliance damages and expectation damages will be the same in many if not most cases, they are nevertheless conceptually distinct. As Professor Stephen Smith wrote: "Defendants are ordered to do what they promised to do, not to do whatever is necessary to ensure the claimant is not harmed by relying on the promise" (*Atiyah's Introduction to the Law of Contract* (6th ed. 2006), at p. 405). Damages corresponding to the reliance interest are the ordinary measure of damages in tort (*PreMD Inc. v. Ogilvy Renault LLP*, 2013 ONCA 412, 309 O.A.C. 139, at para. 65). This measure may be appropriate where it would be difficult for the plaintiff to prove the position they would have been in had the contract been performed. Reliance damages in contract mean putting the injured party in the position it would have been in had it not entered into the contract at all (para. 66).

[50] There is some support in the case law for the proposition that reliance and expectation damages are mutually exclusive, requiring the plaintiff to elect between them. In *Sunshine Vacation Villas* at 40 this Court cited *McGregor on Damages*, 14th ed. (1980) for the proposition that:

> Just as expenses rendered futile by the breach may generally be claimed as an alternative to the normal measure of damages, so they may also be claimed as an alternative to recovering for gains prevented by the breach. Again, it is important to realize that such expenses form an alternative and not an additional head of damage, since they represent part of the price that the plaintiff was to incur in order to secure the gain. Sometimes this may have been lost sight of, and a double recovery involving an inconsistency of compensation allowed.

[51] As can be seen from the above passage, the rationale for the general principle that reliance and expectation damages are mutually exclusive is to avoid double recovery.

[52] In *Introduction to Contracts*, 5th ed. (Toronto: LexisNexis Canada, 2019) at § 23.01(2)(c), Professor Bruce MacDougall explains that:

> The basis for this view is that one has to make expenditures in order to gain an expected profit. One should not be able to have the other party pay, therefore, by way of damages, both the lost profit and one's own expenses that were needed to get those profits…

However, Professor MacDougall also notes that the view that reliance and expectation damages are always mutually exclusive is an oversimplification:

> In particular, it can oversimplify what is meant by profits. It does not adequately differentiate between gross profits and net profits. If an item is

> delivered that does not have the quality of that which ought to have been delivered and that causes extra costs and a reduced income stream, then it may well be appropriate to recover lost net profits as well as some of the costs. In such cases, some courts have no difficulty awarding damages in various categories, some of which would fall into expectation interest and others into the reliance interest: *Sunnyside Greenhouses Ltd*. *v. Golden West Seeds Ltd.*, [1972] A.J. No. 140, [1972] 4 W.W.R. 420 (Alta. C.A.), aff'd [1973] S.C.J. No. 21, [1973] 3 W.W.R. 288 (S.C.C.).

[53] Similarly, in *The Law of Contracts*, 7th ed. (Toronto: Thomson Reuters Canada, 2017), at para. 735, Professor S.M. Waddams states the following about cases involving double recovery:

> A second question that arises in many of these cases is that of expenses incurred by the buyer. If the buyer incurs expenses in connection with the goods, for example installation costs, can the buyer combine a recovery of these with a claim for loss of profit? The seller's argument may be that the expenses would have had to be incurred in any event and therefore cannot be combined with loss of profits. The logical answer appears to be that wasted expenses may be claimed provided that they are not claimed twice over by being included also in the measure of the potential profits. That is the profits must be net profits, not gross potential income.
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> [Emphasis added.]

[54] In support of this proposition, Professor Waddams also cites *Sunnyside Greenhouses Ltd. v. Golden West Seeds Ltd.*, 27 D.L.R. (3d) 434, 1972 ALTASCAD 97 (CanLII) [*Sunnyside Greenhouses*], as well as *Ticketnet Corp. v. Air Canada*, 154 D.L.R. (4th) 271, 1997 CanLII 1471 (ONCA), leave to appeal ref'd [1998] S.C.C.A. No. 4 [*Ticketnet*].

[55] In *Sunnyside Greenhouses*, the issue was the sale of greenhouse roof coverings by the defendant to the plaintiff which turned out to be defective, breaching both an implied term in the contract for sale and a condition in Alberta's *The Sale of Goods Act*, 1970 R.S.A., c. 327. The Alberta Court of Appeal found that it was appropriate to award damages both for wasted expenses due to the breach (for the purchase price paid for the panels and for installing and removing the panels), as well as for damages "akin to loss of profit" for crops grown in the greenhouse that failed to mature due to the defective roof coverings: at 440. After canvassing a number of older cases, the Court held that (at 441):

> … the correct principle is that loss of profit (or similar loss) which is the direct and natural consequence of the breach, may be claimed for the period during which the breach is the effective cause of the loss,
> in addition to other heads of damage which fairly come within s. 53 [of *The Sale of Goods Act*].

[56] In *Ticketnet*, the Ontario Court of Appeal dealt with the issue of whether the trial judge failed to properly award expectation damages because he did not include out-of-pocket expenses that the plaintiff, Ticketnet, incurred. The trial judge did not include them on the basis that the expenses "[were] already taken into account in the profit projections" done by the plaintiff's experts, as these "'ordinary' (and planned) expenses would be Ticketnet's ticket of admission to the industry": at para. 165.

[57] On appeal in *Ticketnet*, the Ontario Court of Appeal held that the trial judge had erred in his approach to the damage assessment, stating:

> [166] My difficulty with the trial judge's reasoning is that the projected expenses were already included in the Smith and Gain [the plaintiff's experts] loss of profits estimate. By not awarding Ticketnet its actual expenses in addition to the present value of its loss of projected profits, the trial judge may have double counted these expenses. As Mr. Bell submitted during oral argument, accepting that out-of-pocket expenses were the "ticket of admission", Ticketnet was not obliged to buy two tickets.
>
> [167] The trial judge's approach is supportable by adopting the proposition that a party claiming damages for breach of contract must elect between claiming for loss of profits or for wasted expenditures. It cannot claim both. This proposition was succinctly stated by Lord Denning in *Anglia Television Ltd. v. Reed*, [1971] 3 All E.R. 690 at 692, a case cited by the trial judge:
>
> > It seems to me that a plaintiff in such a case as this had an election: he can either claim for his loss of profits; or for his wasted expenditure. But he must elect between them. He cannot claim both. If he has not suffered any loss of profits—of [*sic*] if he cannot prove what his profits would have been—he can claim in the alternative the expenditure which has been thrown away, that is, wasted, by reason of the breach.
>
> [168 I do not see the need for an election in a case like this one, where loss of profits are claimed and actual expenses are not included in projected profits.
>
> [Emphasis added.]

[58] After citing, and expressing agreement with, the passage from Professor Waddams that I have quoted at para. 53, above, the Court continued:

> [169] This passage [from Waddams] implicitly endorses the methodology used by Smith and Gain. This methodology is discussed in detail in Biger and Rosen, "A Framework for the Assessment of Business Damages for Breach of Contract" (1980-81) 5 C.B.L.J. 302, in which the authors reduced their discussion to a simple formula at p. 307:
>
> > It is true that capital and profits are different concepts and must be treated as such. However, avoidance of double-counting can best be accomplished by focusing on the general principle governing damages assessment: place the innocent party in as good a position as he would have been in if the contract had been performed. That is, measure the injured party's expected post-contract position, measure his actual position, and compute the difference. Following this scheme will automatically incorporate capital and profit aspects of the damages and eliminate any potential for double-counting…
>
> [170] Thus applying the methodology used by Smith and Gain, as the trial judge did, out-of-pocket expenses must also be considered to avoid double counting those expenses. To that extent, I agree that the trial judge erred in his treatment of Ticketnet's actual costs.

[59] Other Ontario cases have cited *Ticketnet* for the proposition that lost expenses and lost profits can be awarded for breach of contract, provided that there is no double recovery: *Dolente Concrete and Drain Co. v. Fiera Foods Co.*, 2005 CanLII 31582, [2005] O.J. No. 3724 at para. 16 (S.C.J.); *2505243 Ontario Limited o/a ByPeterandPaul.com v. Princes Gate GP Inc. et al.,* 2021 ONSC 4649 at para. 389, aff'd 2022 ONCA 859, leave to appeal to SCC ref'd, 40506 (4 May 2023).

[60] Although *Ticketnet* does not appear, to date, to have been applied in British Columbia for this proposition, the principles articulated in *Ticketnet* appear to me to be consistent with the decision of this Court in *Sunshine Vacation Villas*. In that case, the defendant breached an agreement that would have allowed the plaintiff to operate travel agencies in the defendant's department stores. The trial judge awarded the plaintiff damages for its loss of profits, as well as "loss of capital" consisting of the shareholders' initial investment in the plaintiff company and an increase in the company's line of credit to the date of breach: *Sunshine Vacation Villas* at 39. On appeal, this Court noted that, although characterized as "loss of capital", this head of damages was, in fact, a measure of expenses incurred by the plaintiff in part performance of the contract. This Court reduced the damage award to

the amount of lost capital only, noting that the plaintiff did not prove that "a proper award for loss of profits would have exceeded the amount of the lost capital": at 46.

[61] As I read *Sunshine Vacation Villas*, the key issue was that the trial judge attempted to both place the plaintiff in the position it would have been in had the contract not been performed (the reliance damages approach) and place the plaintiff in the position it would have been in had the contract been fully performed (the expectation damages approach). In doing so, he applied "two approaches [which] must be alternatives": at 39. Further, it appears that the projected profits did not take into account the loss of capital, and so the risk of double recovery arose: at 44–45.

[62] I do not interpret *Sunshine Vacation Villas* as establishing an invariable rule that a plaintiff can never recover both lost profits and incurred expenses as compensation for a breach of contract, even though those types of damages are usually considered under the distinct heads of expectation and reliance damages, respectively. As the Court noted in *Sunshine Vacation Villas*, the rationale for not awarding damages for expenses and lost profits is to avoid double recovery: at 40. Where there is no overlap in the claimed damages, and thus no risk of double recovery, a plaintiff is entitled to an award that puts them in the position they would have been in if the contract had been performed. This may include both incurred expenses and lost profits, if the latter are calculated after taking expenses into account. As observed in *Callow*, while expectation and reliance damages are conceptually distinct, as a practical matter these two heads of damages "will be the same in many if not most cases": at para. 108.

Discussion

[63] In my view, this is not a case in which FPS was required to elect between damages for lost profits and incurred expenses in claiming compensation for XTL's breach of the Contract. The purchase price under the Contract included manufacturing costs and FPS's anticipated profit. If XTL had performed the Contract and paid the full purchase price, FPS would have recovered both its manufacturing costs and its profit. FPS's claim for lost profit consisted of the amount it expected to profit, after accounting for the cost of the manufacture of the Freezer. In other words,

its claimed expenses were not included in the measure of potential profits, and therefore there is no risk of double recovery. In my view, the present case falls within the principle set out at para. 168 of *Ticketnet* that plaintiffs do not need to elect between damages for lost profits and incurred expenses in cases where "actual expenses are not included in projected profits".

[64] Accordingly, I conclude that the judge erred in law in finding that FPS could not concurrently pursue its claim for damages for lost profits and for the actual costs it incurred in partial performance of the Contract. An award of both heads of damages would not necessarily lead to double recovery in this case, and therefore there was no basis to put FPS to an election.

2. Did the trial judge err in his approach to assessing loss?

[65] XTL argues that even if the judge erred in finding that FPS had to elect between damages for lost profits and lost expenses, his decision to dismiss the claim for lost profits is nevertheless supported by his factual finding that FPS had not met its onus of proving some loss. FPS counters that the judge's assessment of the evidence reflects legal error.

[66] The contest between the parties turns on whether the Trial Reasons reflects a finding that FPS had not proven a loss of profit, or whether the trial judge actually found that such loss was not recoverable because it could not be assessed with accuracy. The critical passages of the Trial Reasons immediately follow the judge's explanation of his reasons for rejecting Mr. Mackay's opinion:

> [70] Expectation damages are unavailable where the plaintiff has either not lost profit or cannot prove what the profits would have been. FPS has failed to, on balance, establish with accuracy the profits it would have earned if the parties completed the project. FPS failed to sufficiently establish a "pattern of earning" related to producing the Freezer, or similar types of the carton freezers upon which the Court may base an award of expectation damages: See Halsbury's Laws of Canada (online), *Damages*, "Breach of Contract: General Principles: Introduction: Measuring the Plaintiff's Damages for Breach of Contract" (V.1(1)(b)) at HDA-36.
>
> [71] Based on the foregoing, I am not persuaded that FPS has met its burden to establish, on balance, the profits it lost, known as expectation

> damages, resulting from the failure of XTL to complete the project. I dismiss FPS's counterclaim.
>
> [Emphasis added.]

[67] The difficulty with the trial judge's reasoning is in his reference to FPS's failure to "establish with accuracy" the profits it would have earned if the parties completed the project. As FPS argues, the law is clear that damages for breach of contract do not have to be assessed with certainty. Rather, where the plaintiff proves some loss, the court will estimate that loss even if it requires some "guess work": Waddams at para. 736.

[68] In the seminal case of *Chaplin v. Hicks*, [1911] 2 K.B. 786, [1911-13] All E.R. 224 (C.A.) at 795, a case involving a loss of opportunity for employment, the Court held that:

> …where it is clear there has been actual loss resulting from the breach of contract, which it is difficult to estimate in money, it is for the jury to do their best to estimate; it is not necessary that there be an absolute measure of damages in each case.

[69] This Court recently cited the above quote from *Chaplin* with approval in *Ojanen v. Acumen Law Corporation*, 2021 BCCA 189, noting that "[t]he law has long recognized that the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages for a breach of contract": at para. 62.

[70] FPS says that it clearly suffered a loss in this case in the form of a loss of opportunity to earn a profit on the Contract. While the trial judge rejected Mr. Mackay's opinion as to how to assess the loss, FPS says he failed to go on to consider other evidence adduced at trial, which provided an alternative basis for estimating loss. That evidence included:

1. The method by which FPS determined a suitable selling price for the Freezer and its profit expectation, by reference to the June 2015 Project Costing Sheet that was based on years of prior data relating to manufacturing and installation costs;

2. The one component of the Freezer that was actually manufactured for the Contract was shelves, and they cost less to manufacture than budgeted in the Project Costing Sheet;

3. Profit margins that FPS made on other freezer sales, as reflected in its 2015 and 2016 financial statements, which were higher than the projected margin for the Freezer; and

4. Reports of the strong growth in FPS's annual contract revenue after 2016.

[71] XTL emphasizes that the judge was not required to refer to every piece of evidence. It cites *Housen* for the proposition that appellate courts must presume, based on the full trial record, that the trial judge has considered all relevant evidence.

[72] The concern I have is not simply that the judge failed to refer to a piece of evidence, but rather that he failed to appreciate that his rejection of Mr. Mackay's opinion did not relieve him of his obligation to assess other evidence. In the critical paragraph of the Trial Reasons, the trial judge states that FPS failed to establish a "pattern of earning" relating to the Freezer, and did not establish its lost profits with "accuracy": at para. 70. However, Mr. Mackay's report did not provide the only basis for estimating loss, and accuracy in the estimation of loss was not required. Further, the trial judge does not cite cases such as *Chaplin v. Hicks*, or review the principles set out in the case law that demonstrate that the court must do its best to estimate damages resulting from a breach of contract even where it is difficult to ascertain the amount of the loss.

[73] It is unnecessary for me to address FPS's further argument that the judge also erred in rejecting Mr. Mackay's evidence. For the purpose of determining the issues on appeal, it is sufficient for me to conclude that the judge erred in finding that FPS could not recover damages for its lost profits flowing from XTL's breach of contract unless the damages could be assessed with some degree of certainty, and, relatedly, failing to consider material evidence that was relevant to the assessment of loss.

Remedy

[74] FPS submits that a new trial is required on its counterclaim seeking expectation damages because, among other things, the judge made no express findings on critical factual issues: *Ackley v. Audette*, 2017 BCCA 283 at para. 62. I agree. In my view it would not be feasible or in the interests of justice for this Court to attempt to render its own decision on expectation damages when critical issues and evidence were not addressed by the trial court: *West Moberly First Nations v. British Columbia,* 2020 BCCA 138 at para. 135.

[75] In contrast, FPS argues that this Court should render a decision on its claim for a set-off rather than remitting that issue back to the trial court. FPS says that once the error of the trial judge is corrected, and it is recognized that FPS's duty to mitigate did not arise until 2019, there is no basis to deny FPS all of its claimed costs. Accordingly, FPS seeks an order increasing the amounts it is permitted to set-off against the return of partial payments to XTL from NZ$378,236.87 to NZ$547,825.25.

[76] As I have explained, the set-off claimed by FPS primarily consists of payments it made to Freezing Solutions that FPS maintains it was required to make under the subcontract. In its pleadings, FPS admitted XTL's claim for return of the payments subject to its ability to recover its incurred costs. In light of that admission, the only issue is what those costs—whether conceptualized as damages or a set-off—should be. FPS says that the payments it made to Freezing Solutions under the subcontract were contractually required, and therefore plainly reasonable, and there is no reason why it should be deprived of the ability to set-off the amounts. FPS argues that this is an issue that can be decided on the existing record without the need to remit the issue to the trial court.

[77] I am not persuaded that FPS's proposed remedy is an appropriate one. First, such a remedy would require this Court to make original findings of fact on contested issues, such as: (1) the date of repudiation of the Contract by XTL; (2) the date the repudiation was accepted by FPS; (3) the terms of the subcontract between FPS and Freezing Solutions, which is largely oral; and (4) whether, in fact, FPS had an

obligation to pay the set-off amounts in issue to Freezing Solutions under the subcontract. There are no findings by the judge on these issues, due at least in part to the parties' failure to provide comprehensive submissions to the judge. The trial court should make the necessary findings on these issues in the first instance, and on the basis of a full evidentiary record and proper submissions from the parties.

[78] Second, I do not consider it to be feasible or in the interests of justice to bifurcate the adjudication of FPS's damages claim. As FPS has emphasized on this appeal, it seeks a single measure of damages: an amount that would put it in the position it would have been in had the Contract been performed. It is impossible to say at this stage that there is no risk that findings of this Court on FPS's claim for a set-off would fetter the trial court in making the necessary findings to address the counterclaim.

Disposition

[79] I would allow the appeal, set aside the trial judgment and remit the action, including the counterclaim, for a new trial.

"The Honourable Madam Justice Horsman"

I AGREE:

"The Honourable Justice Dickson"

I AGREE:

"The Honourable Justice Mayer"