COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Facility Condition Assessment Portfolio Experts Ontario Ltd. v. Bouchard,* 2026 BCCA 89

Date: 20260305
Dockets: CA50222; CA50259

Docket: CA50222

Between:

Facility Condition Assessment Portfolio Experts Ontario Ltd., also known as Roth IAMS Ltd.

Appellant
(Defendant)

And

Joseph Raynald Alexandre Bouchard and 0935079 BC Ltd.

Respondents
(Plaintiffs)

- and -

Docket: CA50259

Between:

Joseph Raynald Alexandre Bouchard and 0935079 BC Ltd.

Appellants
(Plaintiffs)

And

Facility Condition Assessment Portfolio Experts Ontario Ltd., also known as Roth IAMS Ltd.

Respondent
(Defendant)

Before: The Honourable Mr. Justice Groberman
The Honourable Justice Riley
The Honourable Justice MacNaughton

On appeal from: An order of the Supreme Court of British Columbia, dated October 9, 2024 (*Bouchard v. Facility Condition Assessment Portfolio Experts Ontario Ltd.*, 2024 BCSC 1870, Chilliwack Docket S38308).

Counsel for Facility Condition Assessment Portfolio Experts Ontario Ltd., also known as Roth IAMS Ltd.:	K. Armstrong, K.C. J. Pham, Articled Student
Counsel for Joseph Raynald Alexandre Bouchard and 0935079 BC Ltd.:	L.S. Smith
Place and Date of Hearing:	Vancouver, British Columbia October 15, 2025
Place and Date of Judgment:	Vancouver, British Columbia March 5, 2026

Written Reasons by:
The Honourable Justice Riley

Concurred in by:
The Honourable Mr. Justice Groberman
The Honourable Justice MacNaughton

Summary:

These two appeals arise out of an agreement under which Mr. Bouchard sold his engineering consulting business to Facility Condition Assessment Portfolio Experts Ontario Ltd. ("FCAPX"), for $120,000, along with a commitment to employ Mr. Bouchard, and his corresponding commitment not to compete with FCAPX for a specified time following his employment. FCAPX's purchase of Mr. Bouchard's business proceeded without incident, but 21 months later the working relationship between the parties broke down. FCAPX terminated Mr. Bouchard's employment, providing him with the minimum statutory severance pay and benefits, and refused to pay him the final installment of the asset purchase price. Thereafter, Mr. Bouchard performed work for former FCAPX clients. Mr. Bouchard sued FCAPX for breach of contract, alleging that the agreement between the parties included a minimum contractual guarantee of employment for three years. FCAPX countersued, claiming damages for Mr. Bouchard's alleged breach of his non-competition agreement. The trial judge allowed both claims in part, finding that the parties had agreed to a three year fixed term employment contract such that Mr. Bouchard was entitled to his salary for the balance of the term and the final installment of the asset purchase price, and that Mr. Bouchard breached his non-competition agreement such that FCAPX was entitled to damages for lost profits from three former clients. Both parties appealed.

HELD: Appeals dismissed. The judge did not err in finding that the agreement between the parties included a three year fixed term employment contract, or in finding, on the basis of Ontario law, that Mr. Bouchard was entitled to payment of his salary for the balance of the fixed term, without any deduction for amounts earned from other sources in the nature of mitigation. Nor did the trial judge err in finding that Mr. Bouchard breached his contractual non-compete commitment, or in the assessment of contractual damages suffered by FCAPX as a result of that breach.

Reasons for Judgment of the Honourable Justice Riley:

Introduction

[1] Both parties appeal from a judgment on claims arising out of a dispute between two engineering firms. The appellant, Facility Condition Assessment Portfolio Experts Ontario Ltd. ("FCAPX"), agreed to purchase the business of the cross-appellant, 0935079 BC Ltd., formerly Ally Engineering Ltd. ("Ally"), after which Ally's principal, Mr. Bouchard was to work as an FCAPX employee. To achieve this outcome, the parties executed multiple related written contracts, including an Asset Purchase Agreement and an Employment Contract.

[2] FCAPX's purchase of Ally's business proceeded without incident, but 21 months into the Employment Contract, the working relationship between the parties broke down. FCAPX terminated Mr. Bouchard's employment, without cause, giving him the minimum statutorily prescribed severance pay. FCAPX also withheld the final installment of the purchase price in the Asset Purchase Agreement, because Mr. Bouchard failed to provide certain documents that FCAPX claimed to have acquired as part of the asset purchase. After his termination, Mr. Bouchard continued to do work for some former FCAPX clients, despite a contractual commitment not to compete with FCAPX within a particular geographic region.

[3] Mr. Bouchard brought a claim for damages associated with the termination of his employment, and FCAPX counterclaimed for damages arising out of Mr. Bouchard's breach of his non-compete covenants. Following a three-day trial, the trial judge granted damages on both claims.

[4] Both parties now appeal. There are three issues raised in FCAPX's appeal, and three further issues raised in Mr. Bouchard's appeal.

[5] On FCAPX's appeal, the company argues that the trial judge erred: (i) in finding that the contractual arrangements involved a three-year fixed-term contract, under which FCAPX was required to pay Mr. Bouchard for the balance of the term after his termination, (ii) in the alternative, in declining to deduct amounts Mr. Bouchard earned from other sources during the balance of the employment term, as a form of mitigation of damages, and (iii) in requiring FCAPX to pay contractual interest on the final installment of the asset purchase price, when FCAPX had paid the disputed amount into trust.

[6] On Mr. Bouchard's appeal, he argues that the trial judge erred (i) in finding that Mr. Bouchard breached his contractual obligation not to compete with FCAPX, (ii) in finding that FCAPX had proven its damages for breach of the non-compete covenant, and (iii) in awarding damages despite FCAPX's alleged failure to mitigate its loss.

[7] For the reasons that follow, I would dismiss both appeals.

Facts

Mr. Bouchard's Background

[8] Mr. Bouchard is a registered professional engineer, and the principal of Ally. At all material times he resided in Chilliwack.

[9] In the period preceding his contractual arrangements with FCAPX, Mr. Bouchard, through Ally, provided engineering services to clients in the Fraser Valley and Lower Mainland of British Columbia.

FCAPX's Background

[10] FCAPX is a federally incorporated company that provides engineering and consulting services. It is an Ontario-based entity, registered as an extra-provincial company under the laws of British Columbia. FCAPX's president is Mr. Roth.

[11] In 2018, FCAPX secured a large contract to provide engineering services to the City of Vancouver and thereafter sought to assemble a local team to carry out the work.

The Negotiations

[12] In mid-2018, Mr. Roth, who had worked with Mr. Bouchard in the past, entered into negotiations for FCAPX to purchase Ally, and to hire Mr. Bouchard as an FCAPX employee.

[13] The trial judge heard evidence from both Mr. Bouchard and Mr. Roth about the commercial interests informing each party's objectives going into these contract negotiations.

[14] Mr. Bouchard was interested in securing a commitment for FCAPX to cover payments for Ally's outstanding business loan of $150,000. He was also interested in a working arrangement involving fewer administrative responsibilities and more engineering functions.

[15] Mr. Roth, on behalf of FCAPX, was interested in acquiring Ally and taking on Mr. Bouchard in order to expand FCAPX's footprint in British Columbia, with the more immediate goal of building a team to handle the City of Vancouver contract.

[16] The negotiations produced three inter-related written contracts: (i) an Asset Purchase Agreement, (ii) a Non-Solicitation and Confidentiality Agreement, and (iii) an Employment Contract. All three contracts were drafted by FCAPX's counsel and reviewed by Mr. Bouchard's counsel prior to their execution, on dates between 17 August and 4 September 2018.

The Asset Purchase Agreement

[17] The Asset Purchase Agreement provided that FCAPX would purchase Ally's "intellectual property", and its "goodwill and the right to operate the business". The purchase: (i) expressly included all of Ally's outstanding contracts, future potential business, and existing inventory and equipment, and (ii) expressly excluded Ally's business loan with an estimated outstanding balance of $150,000. The purchase price was $120,000, consisting of a $5,000 deposit payable at closing, followed by 23 monthly installments of $5,000.

[18] The Asset Purchase Agreement also included a three-year consulting agreement clause, and a three-year "restrictive covenant" barring Mr. Bouchard from competing with FCAPX or carrying on a comparable business within a 100-kilometer radius of the location where FCAPX carries on business.

The Non-Solicitation and Confidentiality Agreement

[19] The Non-Solicitation and Confidentiality Agreement provided that "to the full extent permitted by law", Mr. Bouchard would not "directly or indirectly solicit, interfere with or endeavour to entice away" any of FCAPX's current or prospective customers or clients within a 100-kilometer radius of Chilliwack.

The Employment Contract

[20] The Employment Contract consisted of a letter and two schedules. The letter confirmed Mr. Bouchard's employment as a "Project Engineer", on a permanent, full-time basis, at a salary of $91,000 per year, commencing on 4 September 2018.

[21] The Employment Contract included resignation and termination provisions. The resignation provision required Mr. Bouchard to give four weeks written notice. The termination provisions stated that FCAPX could terminate Mr. Bouchard's employment: (i) at any time, for cause, or (ii) at any time, without cause, "with notice, or pay in lieu of such notice, and any severance pay required by the *Employment Standards Act*".

[22] Schedule A provided that any conditions in the Asset Purchase Agreement were to "supersede" any "related/relevant clause" within the Employment Contract. Schedule A also included a non-compete clause providing that Mr. Bouchard would not "directly or indirectly solicit, attempt to solicit, canvass or interfere with any customer or supplier of FCAPX in a manner that conflicts with or interferes in the business of FCAPX" for the duration of his employment and for one year following any termination.

The Governing Law

[23] At trial, the parties agreed that these contracts were governed by Ontario law.

The Working Relationship and its Breakdown

[24] Mr. Bouchard's employment with FCAPX commenced on 4 September 2018.

[25] By September of 2019, the working relationship between Mr. Bouchard and FCAPX had begun to sour. As the trial judge put it, FCAPX was "unhappy with the work that Mr. Bouchard was doing", at least in part because he was not prioritizing the City of Vancouver contract, and was late in filing reports. Several projects were over budget. Mr. Bouchard was "equally unhappy with the direction and content of the work that he was doing", in part because he did not like spending so much of his

time on reporting and other administrative duties. FCAPX documented its concerns about Mr. Bouchard's work in a "performance letter" dated 18 September 2019.

[26] The strain in the working relationship came to a head in July 2020, when Mr. Bouchard proposed a change in his working conditions. On 13 July 2020, Mr. Roth replied with a letter entitled "Offer for Release of Asset Purchase Agreement Clause", proposing various terms for a "mutually agreeable split". Mr. Bouchard did not accept the offer, responding with several emails dated 14 July 2020 stating that he wanted to continue working with FCAPX, with changes to some of his conditions of employment.

[27] Later in the day on 14 July 2020, FCAPX notified Mr. Bouchard by email that his employment was terminated, without cause. FCAPX paid Mr. Bouchard two weeks salary — the minimum required under the *Employment Standards Act, 2000*, S.O. 2000, c. 41 [*ESA*] — as provided for in the termination clause in the Employment Contract. FCAPX also withheld payment of the final $5,000 installment on the asset purchase price, taking the position that it would not be released to Mr. Bouchard until he transferred certain documents FCAPX purchased as part of its acquisition of Ally's business.

[28] At trial, Mr. Bouchard relied upon evidence that he made electronic copies of the documents available by placing them in a drop box and mailing a link to Mr. Roth and FCAPX's counsel, but no one downloaded the documents within the two-week window for doing so. Mr. Bouchard testified that he kept the hard copies of the documents at his home office, where they were available for pickup whenever FCAPX wished to retrieve them. For its part, FCAPX pointed to correspondence stating that an employee attended Mr. Bouchard's home on two occasions to collect the documents, but no one answered the door. Mr. Roth also gave evidence that Mr. Bouchard refused to sign an agreement setting out limitations on his use of the documents.

The Litigation

[29] Mr. Bouchard commenced an action in the Supreme Court of British Columbia, seeking damages for wrongful termination of employment, breach of contract in relation to FCAPX's failure to make the final installment payment under the Asset Purchase Agreement, and interest on the unpaid amount.

[30] FCAPX filed a response to civil claim, denying that Mr. Bouchard's employment was "terminated", and asserting that he was lawfully "dismissed" upon payment of the amounts mandated under the *ESA,* "in lieu of notice and severance pay" as provided for under the terms of the Employment Contract. FCAPX also asserted that Mr. Bouchard failed to mitigate his damages. With respect to the final asset purchase payment, FCAPX asserted that the payment had been offered to Mr. Bouchard, but he refused to accept it.

[31] FCAPX also filed a counterclaim, pleading (i) breach of contract for Mr. Bouchard's alleged violation of the non-compete terms in all three agreements, and (ii) conversion in relation to Mr. Bouchard's alleged retention of the disputed documents.

[32] In his response to the counterclaim, Mr. Bouchard denied any breach of the non-compete provisions and pleaded in the alternative that they were overbroad and ambiguous and therefore unenforceable. Mr. Bouchard also disputed the conversion claim, pleading that he had provided the bulk of the documents, and that FCAPX had rebuffed his attempts to facilitate collection of the remainder.

The Trial Judge's Decision

[33] Following a three-day trial, during which the trial judge heard evidence from two witnesses (Mr. Bouchard and Mr. Roth), she gave reasons for judgment partially allowing both the claim and counterclaim.

[34] With regard to Mr. Bouchard's claim for damages based on breach of the Employment Contract, the first issue the judge grappled with was whether he was employed under a three-year fixed-term contract. On this issue, the judge

acknowledged the apparent conflict between the terms of the two written contracts. On the one hand, the Asset Purchase Agreement provided that Mr. Bouchard "agrees to enter into an employment contract which shall be for no less than 3 years on terms agreeable to both the parties". On the other hand, the Employment Contract provided for termination without cause with notice or pay in lieu under the *ESA*.

[35] Reading the two contracts together, the judge found that the parties had agreed to a fixed-term employment contract. The judge relied on the term in the Asset Purchase Agreement stating that its provisions would prevail in the event of any inconsistency with related terms in the Employment Contract to conclude that the parties had reached an agreement under which Mr. Bouchard was to be employed under a "minimum three-year" contract.

[36] The judge found this interpretation to be in line with the factual matrix at the time the contracts were executed. FCAPX was seeking to build a team to service its City of Vancouver contract, and Mr. Bouchard was seeking stability through a "guarantee of employment for a fixed-term", that would allow him to pay off the remainder of his business loan, while continuing to work as an engineer to meet his ongoing financial obligations. The judge reasoned that in these circumstances, it would not have been in Mr. Bouchard's interests to commit to a three-year restrictive covenant in the Asset Purchase Agreement without a contractual guarantee of fixed-term employment for that same duration of time.

[37] The judge then turned to the question of whether, even though the parties had agreed to a fixed-term contract, it nonetheless included a clear, unequivocal, and enforceable "without cause early termination" provision. She considered FCAPX's reliance on a series of Ontario cases discussing the enforceability of without cause early termination provisions. The judge did not find this line of cases "particularly analogous" because none of them involved "superseding clauses or multiple separate agreements". She found that, "in the present case", the contract

agreed upon between the parties "did not provide for without cause early termination of the three-year fixed-term".

[38] On the question of damages, the judge noted the agreement at trial that the contractual arrangement was governed by Ontario law. She cited *Howard v. Benson Group Inc.*, 2016 ONCA 256, in support of the proposition that the appropriate damage award for breach of a fixed-term contract "is a pay out of the remainder of the fixed term, with no obligation on the employee to mitigate their damages". She concluded that Mr. Bouchard was entitled to damages equal to his pay for "the remainder of the three-year employment contract", less the two weeks pay FCAPX provided at the time of termination.

[39] The trial judge also found that FCAPX's failure to make timely payment of the final $5,000 installment was a breach of the Asset Purchase Agreement. She found that the dispute about return of documents was "easily resolvable" between the parties, affording no basis for FCAPX to withhold the final payment under the Asset Purchase Agreement. The trial judge ordered FCAPX to pay Mr. Bouchard $5,000, plus contractual interest of 6.5% from the date of the default.

[40] On the counterclaim, the judge first considered Mr. Bouchard's arguments that the various non-compete provisions were vague or otherwise unenforceable on public policy grounds related to restraint of trade.

[41] Although all three contracts contained non-compete provisions, the parties agreed the most relevant non-compete term was the one found in the Asset Purchase Agreement, since it was to prevail in the event of any inconsistency with the others.

[42] In the judge's view, the non-compete term in the Asset Purchase Agreement was properly assessed as a covenant within a commercial contract for the sale of a business, such that it did not involve the same concerns about "power imbalance" that may arise in the context of an "employment contract simpliciter". In the context

of a commercial agreement for the sale of assets, "the restriction or agreement to not compete is itself part of what is being sold".

[43] The judge went on to assess the time period, geographic area, and scope of activity covered by the covenant, to determine whether the restraints imposed on Mr. Bouchard were "reasonable to protect [FCAPX's] business". She concluded:

> [83] I find, on a balance of probabilities, given the context of this case, with a commercial agreement in which goodwill and potential business was bargained and paid for, and which included a contract for Mr. Bouchard to be employed for three years, three concurrent years of non-competition and restraint of Mr. Bouchard's business activities within the same sector was the objective intention of the parties, and is reasonable under all of the circumstances. The geographic area was to be the radius of 100 kilometres from where Mr. Bouchard performed his work for the company.

[44] The judge then considered whether FCAPX had proven that Mr. Bouchard's post-employment revenues were generated in breach of the non-compete covenant. She was satisfied that Mr. Bouchard was in breach of the covenant to the extent that his post-employment work deprived FCAPX of revenues from three specific clients, but she also found that some aspects of Mr. Bouchard's work, "such as carpet cleaning and other services that were not in competition with the work of [FCAPX]", did not contravene the covenant.

[45] The judge went on to assess damages for Mr. Bouchard's breach of the non-compete covenant. She did not accept that FCAPX was entitled to all of Mr. Bouchard's post-employment earnings. She reasoned that the "correct measure of damages" was the earnings from the three clients in respect of whom Mr. Bouchard had diverted work, minus an accounting of the expenses FCAPX would have incurred to generate those revenues. In the absence of evidence with respect to FCAPX's "profit margin", and to achieve a "timely and expedient resolution of this issue", the judge considered "a deduction for expenses of 30% to be a reasonable estimate of expenses margin for determining damages". The judge concluded that FCAPX was entitled to damages of $20,692.18 on account of Mr. Bouchard's breach of the non-compete covenant. She invited the further written

submissions within 30 days of the judgment if either party took the position that "a different expense ratio should be applied".

FCAPX's Appeal

Did the Trial Judge Err in Holding that Mr. Bouchard's Employment was Governed by a Fixed-Term Contract?

[46] The trial judge's decision on this question is a matter of contract interpretation, subject to review on a standard of palpable and overriding error: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 50.

[47] The parties entered into three interrelated contracts. Where "more than one contract is entered into as part of an overall transaction, the contracts must be read in light of each other" to achieve "interpretive accuracy": *Ottawa (City) v. ClubLink Corporation ULC*, 2021 ONCA 847 at para. 54. In other words, related contracts must be interpreted "harmoniously" in a manner that reflects the "overall intention" of the parties: *Argo Mezzanine Financing No. 1 Ltd. v. Plaza 88 Development Ltd.*, 2025 BCCA 73 at para. 51, citing *Samson Cree Nation v. O'Reilly & Associés*, 2014 ABCA 268 at para. 82.

[48] The trial judge considered the terms of both the Asset Purchase Agreement and the Employment Contract. She noted the apparent inconsistency between the two. In particular, the Asset Purchase Agreement provided that Mr. Bouchard's employment contract "shall be for no less than 3 years". By contrast, the termination provisions in the Employment Contract provided that FCAPX could terminate Mr. Bouchard's employment without cause, "at any time", on providing "notice", and "any severance pay required by the [*ESA*]". The judge resolved the apparent conflict by reference to Schedule A to the Employment Contract, which stipulated that the terms of the Asset Purchase Agreement would "supersede" any related terms in the Employment Contract.

[49] The judge found that this interpretation of the related contracts fit with the factual matrix. FCAPX wanted to acquire Mr. Bouchard's business without the threat

of him taking it back, and Mr. Bouchard was interested in paying down his business debt and securing stable employment. In this context, the judge reasoned that Mr. Bouchard would not have agreed to a three-year non-compete covenant without a guarantee of employment, otherwise he would have been left without employment, while still being "responsible for paying off the remainder of the business loan" that he had used to "build the company" FCAPX had acquired from him.

[50] On appeal, FCAPX contends that this conclusion is tainted by a palpable error, because the judge's assessment of the factual matrix "does not consider the financial consideration given to Mr. Bouchard", in that she "misapprehended the significance of the $120,000 payment". I do not find this argument convincing. The trial judge was aware of the $120,000 purchase price, having referred to it in summarizing the terms of the Asset Purchase Agreement: reasons at para. 13. Later in her reasons, in her analysis of the factual matrix, the judge reasoned that after the asset purchase, Mr. Bouchard would still be responsible for paying off "the remainder" of the business loan: reasons at para. 46. (The outstanding amount of the loan was $150,000; after receipt of the $120,000 payment from FCAPX, Mr. Bouchard still owed $30,000 for the "remainder" of the loan.) Thus, the judge's reasoning reflects that she took the $120,000 payment into account in her analysis of the factual matrix. FCAPX has not shown any "palpable" error in the trial judge's assessment of the factual matrix.

[51] FCAPX also says the trial judge erred in finding that the early termination provisions in the Employment Contract were "vague". FCAPX submits that this constituted an extricable error of law, reviewable on a standard of correctness.

[52] I do not agree with FCAPX's submission on the standard of review, nor do I accept the premise of FCAPX's submission, that the judge found the early termination provisions to be vague.

[53] With regard to the standard of review, FCAPX's challenge to the judge's interpretation of the Employment Contract raises a question of mixed fact and law, subject to review on a standard of palpable and overriding error.

[54] With regard to FCAPX's submission on vagueness, in my respectful view, it rests on a mischaracterization of the judge's reasons. The judge did not find the early termination provisions in the Employment Contract to be vague. Rather, she interpreted the Employment Contract and the Asset Purchase Agreement together, to conclude that the shared intention of the parties was "to have an employment arrangement which lasted at least three years". She found that the early termination provisions in the Employment Contract were "superseded" by terms of the Asset Purchase Agreement providing for a three-year term of employment.

[55] The judge accepted, relying on a collection of Ontario cases including *Howard*, that even where the parties agree to a fixed term contract, "the contract can nevertheless provide for early termination": reasons at para. 51. However, the judge went on to conclude — as a matter of contractual interpretation — that in this particular case the shared intention of the parties was to have a minimum three-year term of employment. This is evident in the following key passage of her reasons:

> [57] In this case the reasonable expectations of the parties, construed objectively and given the context of the contract, was to have an employment arrangement which lasted at least three years. The three year minimum requirement superseded the Employment Contract clause which allowed for termination without cause with notice or pay in lieu. *Joss Covenoho* (as well as *Howard* and similar lines of cases) are not particularly analogous as there were no superseding clauses or multiple separate agreements in those cases. Furthermore, in *Joss Covenoho*, there was a level of specificity in the early termination provision—outlining a specific event which would trigger early termination and which did end up occurring—which also is not present here.
>
> [58] I find that in the present case, the contract between the parties did not provide for without cause early termination of the three-year fixed-term.

[56] I would not give effect to FCAPX's submission that the trial judge erred in law by holding the early termination provisions of the Employment Contract to be vague. This submission does not accord with the trial judge's actual reasoning.

Did the Trial Judge Err in Failing to Deduct Post-Termination Income Earned by Mr. Bouchard, as a Form of Mitigation of Damages?

[57] At trial, FCAPX's alternative argument was that if the judge found Mr. Bouchard's employment was governed by a fixed-term contract, then his damages should be reduced by what he earned from other sources during the balance of the employment period, in keeping with his duty to mitigate. The trial judge did not give effect to this argument.

[58] On appeal, FCAPX submits that the trial judge's reasons were insufficient to explain her basis for rejecting FCAPX's argument on mitigation. FCAPX relies on *Zhao v. Fang*, 2022 BCCA 227 at para. 22, where the Court explained that while insufficiency of reasons will not afford a "free-standing right of appeal", appellate intervention may be justified "where the reasons, when considered along with the record, do not permit meaningful appellate review".

[59] I do not agree with FCAPX's submission that the judge's reasons fail to explain the basis on which she rejected the mitigation argument. In laying out the issues she had to decide, the judge explained that "[i]f early termination without cause was not permitted by the contract, then a proper measure of damages is a payout of the remainder of the fixed term, without a duty on the employee to mitigate" [emphasis added]: reasons at para. 38. The support for this conclusion can be found in the judge's subsequent analysis, where she cited *Howard* at paras. 28–30 and 44 for the proposition that "appropriate damages for breach of a fixed term contract is a pay out of the remainder of the fixed term, with no obligation on the employee to mitigate their damages" [emphasis added]: reasons at para. 59. Although the reasons on this point are brief, they provide an explanation for the judge's conclusion, sufficient to permit meaningful appellate review.

[60] FCAPX also argues that the trial judge's failure to deduct "mitigation earnings" amounted to an error in law, because it left Mr. Bouchard with "double compensation". This submission rests on differing approaches in British Columbia and Ontario to mitigation of damages in the context of employment contracts.

[61] In British Columbia, the leading authority is *Neilson v. Vancouver Hockey Club Ltd.* (1988), 51 D.L.R. (4th) 40 (B.C.C.A.). In that case, the Court drew a distinction between a fixed-term contract without a termination clause and a contract with a termination clause providing for payment of a fixed amount. Without resolving the question of whether there was a positive duty to mitigate, the Court held that unless the contract provides "otherwise", the employer would derive the benefit of mitigation even in the context of a fixed-term contract. Thus, regardless of whether the plaintiff "was bound to mitigate", he could not "recover for avoided loss in any case": *Neilson* at para. 14.

[62] In Ontario, the leading case is *Howard*. The parties in *Howard* agreed to a fixed-term employment contract with early termination and notice provisions that were found at trial to be unenforceable due to ambiguity. The Court of Appeal held that "if the parties to a fixed-term employment contract do not specify a predetermined notice period, an employee is entitled on early termination to the wages the employee would have received to the end of the term": *Howard* at para. 22. The Court went on to find that in such circumstances, the employer's obligation to pay the employee to the end of the term is not subject to mitigation by the employee: *Howard* at para. 44.

[63] In *Howard*, the Ontario Court of Appeal made no reference to this Court's decision in *Neilson*, or any other British Columbia cases. However, the divergence between these two lines of cases was discussed more recently in *Quach v. Mitrux Services Ltd.*, 2020 BCCA 25.

[64] In *Quach*, the parties agreed to a fixed-term contract expressly providing that in the event of early termination, the entire balance of the employee's remuneration for the remainder of the term would be "due and payable" by the employer: *Quach* at para. 34. Relying on the reasoning in *Neilson* that mitigation principles can apply to a fixed-term contract unless the contract may provide "otherwise", the Court affirmed the trial judge's decision that the employee was entitled to the full amount, without any deduction for income from other sources: *Quach* at paras. 37, 41. Justice

Saunders, writing for the Court, made a point of explaining that "in British Columbia, on the authority of *Neilson*, the fixed-term nature of a contract does not entitle the employee to damages in the full amount of unpaid wages for the balance of the term without deduction of monies earned elsewhere during the term, absent a provision otherwise": *Quach* at para. 39. In this way, the state of the law in British Columbia as reflected in *Neilson* is "at odds with" the state of the law in Ontario as reflected in *Howard*: *Quach* at para. 39.

[65] FCAPX argues that the trial judge in the case at bar erred in applying *Howard* to conclude that Mr. Bouchard was entitled to full payment for the balance of the contract term, without any deduction for mitigation. However, as the trial judge correctly pointed out, the contracts in issue in this case provided that they were governed by Ontario law. Thus, in my view, the trial judge was effectively bound by *Howard* and obliged to apply it. In this Court, principles of horizontal *stare decisis* compel a similar result. I do not see any basis on which this Court should revisit a considered decision of the Ontario Court of Appeal regarding the state of employment law in Ontario.

[66] Even if *Howard* did not apply, on the unique facts of this case, the outcome would not necessarily be different under the approach articulated in *Neilson* and confirmed in *Quach*. This is not a straightforward case involving the interpretation of a fixed-term employment contract, standing on its own. It is, rather, a case involving the interpretation of related contracts that provided for the sale of a business, together with the purchaser's employment of the vendor's principal, under a three-year fixed-term contract. Critically, the arrangement included a covenant under which the vendor would not compete with or take the business of the purchaser for three years. In these circumstances, it would seem incongruous for the employer to argue that there ought to be a deduction for mitigation of damages for Mr. Bouchard's early termination, while at the same time arguing that Mr. Bouchard was not allowed to use his professional skills to earn income contrary to the terms of the non-compete covenant. It would therefore be open to conclude that this is a case

like *Quach*, where mitigation principles did not apply because the contractual arrangement between the parties "provided otherwise".

[67] For all of these reasons, I reject FCAPX's submission that the trial judge erred in law in failing to deduct post termination income from the damages payable to Mr. Bouchard for the balance of his fixed-term employment.

Did the Trial Judge Err in Requiring FCAPX to Pay Contractual Interest on the Final Installment of the Asset Purchase Price?

[68] FCAPX argues the trial judge erred in ordering it to pay contractual interest on the final $5,000 installment of the purchase price under the Asset Purchase Agreement. More specifically, FCAPX says the judge overlooked its submission that contractual interest was not payable because FCAPX "tendered payment on the amount due, prior to the due date", and the disputed amount has been in counsel's trust account ever since.

[69] There was evidently a dispute between the parties about whether Mr. Bouchard complied with FCAPX's demand for the documents to which it had become entitled as part of its purchase of Ally. The trial judge, having heard the evidence, concluded that the document dispute was a matter that "should have been easily resolvable between the parties": reasons at para. 92.

[70] On the judge's findings, the dispute over documents did not relieve FCAPX of its obligation to make the final payment to Mr. Bouchard on the date that it became due under the contract. In the result, Mr. Bouchard was deprived of funds to which he was contractually entitled. The contract provided that interest on unpaid amounts would be payable at 6.5%. The judge did not err in ordering FCAPX to make the final payment together with interest at the contractual rate from the date of the breach.

Mr. Bouchard's Appeal

Did the Trial Judge Err in Finding that Mr. Bouchard Breached the Non-Compete Covenant?

[71] Mr. Bouchard argues that the trial judge erred in "failing to clearly identify" the "specific work" he carried on in breach of the non-compete covenant. While acknowledging that the judge's factual finding is entitled to deference on appeal, Mr. Bouchard maintains that the judge committed a palpable and overriding error by failing to "properly analyze the nature of the work" he performed.

[72] While accepting that Mr. Bouchard performed certain work, "such as carpet cleaning and other services that were not in competition with" FCAPX, the judge was nonetheless satisfied that "some of the work" Mr. Bouchard did after the termination of his employment breached the non-compete covenant in the Asset Purchase Agreement. The judge concluded, on a balance of probabilities, that FCAPX "would have continued to receive the work" from three particular clients, from whom Mr. Bouchard received revenues totalling $29,560.25.

[73] On appeal, Mr. Bouchard argues that the trial judge's finding is "speculative and unsupported by the evidence". I do not agree. There was evidence adduced at trial to support the judge's finding. In his testimony in chief and again in cross-examination, Mr. Bouchard gave evidence about three FCAPX clients — referred to as Strata Corporations LMS 2816, KAS 748, and NW2142 — for whom he did engineering work after leaving FCAPX. The judge was able to determine from a review of Mr. Bouchard's invoices that he received a total of $29,560.25 in revenues from these three clients after the termination of his employment with FCAPX.

[74] Mr. Bouchard has not demonstrated any reviewable error in the judge's finding that he breached the non-compete covenant. I would dismiss this ground of appeal.

Did the Trial Judge Err in Finding that FCAPX had proven its Damages for Breach of the Non-Compete Covenant?

[75] Mr. Bouchard submits that the trial judge erred in finding that FCAPX had proven its damages, in circumstances where FCAPX presented no evidence as to its profit margin on revenues earned from engineering services. Mr. Bouchard argues that the judge's approach of starting with lost revenues totalling $29,560.25 and reducing this figure by a 30% "expense margin" as a basis for assessing damages of $20,692.18 is "inconsistent with the principle that damages must be proven with reasonable certainty".

[76] With regard to Mr. Bouchard's submission that damages must be proven with "reasonable certainty", it is important to remember that the plaintiff's burden is no more onerous than proof on a balance of probabilities that the defendant's breach of contract resulted in a loss: *IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing*, 2017 ABCA 157 at para. 208. A party who establishes a breach of contract leading to a loss of profit is entitled to compensation, provided the loss is not too remote: *Eastwalsh Homes Ltd. v. Anatal Developments Ltd.* (1993), 100 D.L.R. (4th) 469 at 483 (Ont. C.A.).

[77] Once the loss is proven, determination of the quantum of damages is properly regarded as an assessment, not necessarily a calculation, although calculations based on figures grounded in the evidence may be a useful tool. In this regard, "[t]he purpose of calculation is not to provide a substitute for an assessment but to anchor the assessment in the evidence": *Moore International (Canada) Ltd. v. Carter* (1984), 56 B.C.L.R. 207 at 215 (C.A.).

[78] Even in cases where the assessment of damages for breach of contract is difficult, the trial court must do the best it can "with the available evidence", so long as the court is satisfied that "damage has been suffered and that the difficulty lies not in entitlement, but in its calculation": *Mellco Developments Ltd. v. Portage La Prairie (City)*, 2002 MBCA 125 at para. 107, cited with approval in *Gautam v. South Coast British Columbia Transportation Authority*, 2020 BCCA 135 at para. 119.

[79] However, the trial court's obligation to "do the best it can" with the available evidence does not relieve the plaintiff of the burden to "prove the facts upon which the damages are estimated": *Martin v. Goldfarb* (1998), 163 D.L.R. (4th) 639 at para. 75 (Ont. C.A.); see also *101100002 Saskatchewan Ltd. v. Saskatoon Co-operative Association Limited*, 2022 SKCA 12 at para. 23. Thus, where the evidence offers "no basis for assessment", the court may award only nominal damages, or even "refuse to allow any amount": *Houweling Nurseries Ltd. v. Fisons Western Corporation* (1988), 37 B.C.L.R. (2d) 2 at 5 (C.A.), citing *Williams v. Stephenson* (1903), 33 S.C.R. 323 and *Cotter v. General Petroleums Ltd.*, [1951] S.C.R. 154.

[80] Applying these principles in the case at bar, I do not agree with Mr. Bouchard's submission that the trial judge resorted to impermissible speculation. Nor was this a case where the evidence disclosed "no basis for assessment". There was clear and cogent evidence satisfying the judge that FCAPX lost revenues from three clients, totalling $29,560.25, but no direct evidence of associated expenses. The judge did her best with this evidence, using a 30% expense margin as a basis for assessing FCAPX's loss of profit. Thus, the judge's damages assessment was grounded in the evidence, though it necessarily involved some estimation. The judge's damages assessment is entitled to deference on appeal, and it cannot be said that she erred in law or in principle. Rather, she did the best she could do to quantify the loss on the basis of the available evidence.

[81] Furthermore, and in any event, the judge left it open to both parties to make further submissions on her use of a 30% expense margin as a basis for assessing FCAPX's damages. I would not be inclined to revisit the damages assessment, in circumstances where Mr. Bouchard chose not to avail himself of the opportunity to make further submissions to the trial judge on this issue.

Did the Trial Judge Err in Awarding Damages for FCAPX's Breach of the Non-Compete Covenant, Despite an Alleged Failure to Mitigate?

[82] Mr. Bouchard submits that the trial judge should not have awarded damages for his breach of the non-compete covenant, given the absence of evidence that FCAPX took reasonable steps to mitigate its loss.

[83] Mr. Bouchard did not plead failure to mitigate in his response to counterclaim, did not argue this point before the trial judge, and did not seek leave to raise a new issue on appeal. In these circumstances, I do not consider it necessary or appropriate to address the merits of this argument.

Disposition

[84] I would dismiss both appeals.

"The Honourable Justice Riley"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Justice MacNaughton"