CITATION: Duad Inc. v. Shi**,** 2025 ONSC 5258
COURT FILE NO.: CV-18-58
DATE: 2025/09/15

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
DUAD INC.	
Plaintiff	Greg Murdoch, Counsel for the Plaintiff
– and –	
LING SHI, SIOFRESH INC. and RIGHT AT HOME REALTY INC. BROKERAGE	
Defendants	Ling Shi, Self-Represented Defendant
	Hans Engell, Counsel for the Defendant Right at Home Realty Inc. Brokerage
AND BETWEEN:	
LING SHI and SIOFRESH INC.	
Plaintiffs by Counterclaim	Ling Shi, Self-Represented Plaintiff by Counterclaim
– and –	
DUAD INC., RIGHT AT HOME REALTY INC. and YOUMING ZHAO	
Defendants by Counterclaim	Greg Murdoch, Counsel for Defendant by Counterclaim Duad Inc.
	Hans Engell, Counsel for Defendants by Counterclaim Youming Zhao and Right At Home Realty Inc.
	HEARD: June 9, 10, 11, 12, 16, 17, 18 and 19, 2025
	Written submissions: July 4, July 14, July 16, and July 21, 2025

GIBSON J.

REASONS FOR DECISION

Overview

[1] This action concerns the failed sale of the farm property located at 5299 Chippewa Road East, Hamilton, Ontario ("the Property") in 2017. The Plaintiff, Duad Inc. ("Duad"), which is a corporation run by Henry Du ("Du") and which was the seller of the Property, asks for a declaration that the deposit of $250,000 is forfeited and for consequential damages flowing from the buyer's breach. The deposit is now being held by the Real Estate Council of Ontario ("RECO") in trust pending the outcome of this trial.

[2] The buyer, Ling Shi ("Shi") and his company Siofresh Inc. ("Siofresh"), intended to use the Property as a mushroom farm. Mr. Shi planned to run the farm together with his brothers. They agreed to pay $1.8 million for a 120-acre property with a barn, outbuildings, farmhouse, and two natural gas wells. The significance of the gas wells was one of the most contentious issues at trial.

[3] The sale did not close. Shi says he refused to close because Duad had breached an environmental warranty (the "Environmental Warranty") contained in the Agreement of Purchase and Sale ("APS"). Shi says the Environmental Warranty covered the status of the gas wells, which Shi claims were not licenced and could not be legally operated. Duad says that the Environmental Warranty was not intended to and does not cover the gas wells. If the Environmental Warranty does, in fact, cover gas wells Duad says that it is a warranty and not a condition, that Duad did not breach the warranty, and if it did, the buyer was obliged to close the deal and seek compensation for the breach.

[4] Duad submits that pursuant to Rule 51.05 of the *Rules of Civil Procedure*, Shi is deemed to admit, by virtue of the plaintiff's Request to Admit, that he was unable or unwilling to close the transaction. Shi did not seek leave to withdraw this admission.

[5] Following Shi's default, Duad offered to repair any deficiencies identified with the wells in order to revive the deal. Du, Shi and Zhao met in December 2017 in an effort to salvage the deal. Shi refused Duad's offer.

[6] Following Shi's purported breach Duad says it made its best efforts to mitigate its damages by selling the farm property for the best price obtainable. Duad was able to later sell the Property in a series of transactions. The Property had to be maintained and had carrying costs while the portions of it were being marketed and sold. There were legal costs incurred to obtain vacant possession of the farmhouse in order to allow for a sale of a portion of the land. In addition, there were costs associated with repairing the farmhouse after it was significantly damaged in a fire. These, Duad submits, were necessary costs incurred in order to sell the property and meet Duad's duty to mitigate.

[7] Shi seeks relief against forfeiture, in the event he is found to have breached the agreement. Duad maintains that none of the factors which would entitle Shi to relief against forfeiture are present in this case.

[8] In the counterclaim brought by the defendants Shi and Siofresh, they have named Right At Home Realty Brokerage ("the Brokerage") and Youming Zhao ("Zhao"), the real estate agent involved in the transaction, along with Duad, as defendants to the counterclaim. Duad has crossclaimed in the counterclaim against the Brokerage and Zhao, seeking contribution and indemnity, and the $250,000 representing Shi's deposit, in the event that the Court finds that Shi did not breach his contract with Duad, and is entitled to the return of the deposit.

[9] Shi and Siofresh alleged that Zhao breached his duties as a realtor to them by failing to follow their instructions in respect of the wording of the agreement and failing to disclose that he was also the agent for Duad. They also allege that Zhao preferred the interest of Duad over their interest.

Positions of the Parties

The position of the plaintiff Duad

[10] The position of the plaintiff Duad may be summarized as follows. This action involves the failed sale of a farm property comprised of 120 acres, a barn, outbuildings and a farmhouse along with two natural gas wells. The natural gas wells were of secondary importance to the sale of the farm. The Agreement of Purchase and Sale contained an Environmental Warranty. The seller Duad says the warranty did not apply to the gas wells, but that if the Environmental

Warranty covers the gas wells it is a warranty and not a condition. The Environmental Warranty, it contends, was accurate. No compliance issues were identified pre-closing, and the licences were in force. If the Environmental Warranty was breached the Buyer was obliged to close and seek damages for the breach, which Shi did not.

[11] The gas wells were covered under the "as it is, where it is" clause in the APS, Duad contends. The buyer Shi's counsel did not request information regarding the gas well licences as part of its requisition. The real estate agent did receive a request for information concerning the gas well licences from the buyer's counsel, which was not relayed to the seller. The buyer's counsel did not request information about the gas well licences from the seller's counsel until the date of closing. The seller, through Duad's counsel, provided accurate information regarding the buyer's obligation to make an application to transfer the licences after closing. The buyer was unable or unwilling to close. The seller offered to address any issues with the gas wells but the buyer refused to revive the deal.

[12] Duads submits that it made reasonable efforts to mitigate its damages and sell the Property following the breach. The deposit should be forfeited, it maintains, and there are no facts justifying relief against forfeiture. The seller is entitled to its costs of the failed transaction, the costs associated with reselling the land and the carrying costs of the Property.

[13] In the event that the buyer is entitled to return of the deposit or any damages arising from the failed sale of the property, Duad contends, the real estate agent should compensate the seller so that the seller is in the position it would have been if the transaction did not close due to no fault of the seller.

The position of the Defendant Shi

[14] The defendant Shi resists the claim of the plaintiff and submits that he relied on Zhao's representation that the two gas wells had licences which were registered under the name of the seller Duad when he signed the APS. He contends that Zhao's representation was false and that as Duad failed to produce the gas well licences before closing, he was entitled not to close. He contends that the clause "to the best of the Seller's knowledge and belief" cannot override its

obligation to meet legal requirements. He asserts that he and his company Siofresh were willing and ready to complete the transaction with sufficient funds. Shi requests an order that the total deposit of $250,000 currently held in trust by RECO be released and returned to him, together with interest; damages against Duad and Zhao, jointly and severally, in the amount of $170,049.20; recompense for lost opportunities and income; contribution, indemnity and relief over against Zhao for any damages for which Shi and Siofresh may be found liable to Duad; pre-judgment and post-judgment interest; and costs.

[15] Shi submits that s.10 of the *Oil, Gas and Salt Resources Act*, R.S.O. 1990, c. P.12, precluded the operation of the two gas wells without a licence, or the transfer of the licence relating to the wells. He says that Duad made false representations that the gas well licences were in place and would be provided to him on closing. He submits that Duad breached the duty of good faith and was unjustly enriched, and that Zhao breached a fiduciary duty owed to him because he did not disclose that he was also acting for the seller. He disputes the interpretation of the "as it is, where it is" clause in the APS, and submits that the plaintiff's Request to Admit was "a trick" and does not bind him.

Position of the Defendants Zhao and Right at Home Realty to the Counterclaim

[16] Zhao and Right At Home Realty Inc. ("the Brokerage") agree with and adopt the submissions of Duad that Shi breached his contract with Duad by failing to close on December 18, 2017. Zhao also agrees that Duad did not breach the environmental warranty, submitting that no evidence was tendered at trial that there was any environmental contamination at the Property. Zhao submits that the issue of the gas well licences was only raised by Shi for the first time at closing either because Shi did not have the funds to close or because he had a change of heart about the purchase. Although Shi denies this, they submit that there is no other rational explanation.

[17] They submit there was no expert evidence that Zhao fell below the standard of care required of a realtor, and that the only expert evidence submitted was that of their expert William Johnston, who opined that Zhao fulfilled his duty to his respective clients. There is no indication that Shi was misled by Zhao's role, as it was manifestly evident in both the Confirmation and

Co-operation forms and the Agreement of Purchase and Sale that the brokerage was representing both parties to the transaction prior to the original closing date in July 2017. With regard to Duad's damages, Zhao submits that Duad did successfully mitigate its damages by selling off parts of the Property after Shi's failure to close, and that some of Duad's claimed damages are too remote. Zhao, they contend, tried to make the deal work for both parties, preparing four amendments to the original Agreement of Purchase and Sale.

Issues

[18] The Issues to be determined on this trial include:

1. Whether the Environmental Warranty applied to the gas wells;
2. If the Environmental Warranty applied to the gas wells, did Duad breach the warranty;
3. Was the Environmental Warranty a warranty or a condition;
4. The effect of the "as it is, where it is" clause;
5. The forfeiture of the deposit, and the conditions for relief against forfeiture;
6. Damages for breach of the contract; and,
7. The counterclaim and crossclaim.

Evidence

[19] Five witnesses gave evidence at the trial. In addition, a large number of documents were made exhibits in evidence. The plaintiff called Henry Du, the President and Director of the plaintiff Duad Inc., and Jim McIntosh, an engineer who gave evidence as a participant expert regarding his activities in remediating problems with the two gas wells, as well as the standards applied by the Ministry of Natural Resources to the licencing of gas wells. The defendants called Ling Shi, the defendant, who qualified as a civil engineer in China prior to moving to Canada. He sought to purchase the Property to operate it, together with his brothers, as a mushroom farm. The defendants to the counterclaim called Youming Zhao, who is the real estate agent who acted for both Duad and Shi regarding the proposed sale/purchase of the Property, and William

Johnston, a lawyer and real estate agent and former Director of RECO who was qualified by the Court to give expert opinion evidence regarding the professional standard of care of real estate agents. Du, Shi and Zhao gave their evidence at trial through a Mandarin language interpreter. All of the final written submissions were in English.

Analysis

The Environmental Warranty

[20] The first issue to be determined in this action is whether the Environmental Warranty applies to the gas wells. A review of the law applicable to contractual interpretation is a useful starting point in this regard.

[21] In interpreting contracts, the main concern is to determine the intention of the parties. As declared by the Supreme Court of Canada in *Sattva Capital Corp. v. Creston Moly Corp*, 2014 SCC 53, at para. 47, the primary object of contract interpretation is to give effect to the intention of the parties at the time of contract formation:

> 47 Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744 (S.C.C.), at para. 27 per LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 (S.C.C.), at paras. 64-65 per Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

> No contracts are made in a vacuum: there is always a setting in which they have to be placed.... In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

When interpreting any contract, the "overriding concern is to determine the intent of the parties and the scope of their understanding": by reading "the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract."

[22] While the court considers the surrounding circumstances in interpretation of contracts, the consideration of surrounding circumstances is limited by the parol evidence rule to the effect that the surrounding circumstances cannot be used to deviate from the wording of the agreement. “Surrounding circumstances” is also limited to “objective evidence of the background facts at the time of the execution of the contract” (para. 58) as opposed to the subjective intentions of the parties.

[23] The Supreme Court of Canada in *Sattva* addressed the role and nature of “surrounding circumstances”:

> 56 I now turn to the role of the surrounding circumstances in contractual interpretation and the nature of the evidence that can be considered. The discussion here is limited to the common law approach to contractual interpretation; it does not seek to apply to or alter the law of contractual interpretation governed by the Civil Code of Québec.
>
> 57 While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement (*Hayes Forest Services*, at para. 14; and Hall, at p. 30). The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the

> contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract (Hall, at pp. 15 and 30-32). While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement (*Glaswegian Enterprises Inc. v. BC Tel Mobility Cellular Inc*. (1997), 101 B.C.A.C. 62 (B.C. C.A.))…
>
> 60 The parol evidence rule does not apply to preclude evidence of the surrounding circumstances. Such evidence is consistent with the objectives of finality and certainty because it is used as an interpretive aid for determining the meaning of the written words chosen by the parties, not to change or overrule the meaning of those words. The surrounding circumstances are facts known or facts that reasonably ought to have been known to both parties at or before the date of contracting; therefore, the concern of unreliability does not arise.

[24] In the present case, one must examine the circumstances surrounding the negotiation and inclusion of the Environmental Warranty. Zhao showed the Property to Shi and told him about the gas wells. Zhao explained that the property was being sold "as it is, where it is" and emphasized this point. The "as it is, where it is" condition applied to the gas wells. Zhao inserted what he describes as a standard clause dealing with environmental contamination into the APS (the Environmental Warranty). This warranty was intended to address Shi's specific concerns about environmental contaminants. The reference to applicable licences did not cover gas wells but rather matters such as water extraction. Zhao said that "I've Sold a lot of the gas wells, in the Hamilton Region, and half of those gas wells do not have licenses. So, it's the usual practice in this region that when you sell the gas wells, they are sold as is." (Ex. 84 Q. 557).

[25] Zhao discussed the Environmental Warranty with Du and Duad relied on the explanation of the warranty when agreeing to provide it. Immediately below the Environmental Warranty is a clause obliging the seller, "To terminate all free use of well gas for neighbor houses". Below this clause the APS indicates that both sides agree that the property will be sold "as it is, where it is".

[26] Duad says, and I find, that the ordinary grammatical wording of the Environmental Warranty indicates that the warranty deals with environmental matters and not the gas wells. The repeated use of the word environment, environmental matters, environmental orders and the specific reference to prior use as a waste disposal site leads to the reasonable conclusion that the warranty is not intended to cover the gas wells. The fact that the APS has a specific clause dealing with disconnecting gas to neighbouring properties shows that when the parties considered the gas wells, and what conditions would apply to them, a clause was incorporated using clear language specifically referencing the gas wells. There is no reference anywhere in the Environmental Warranty to gas wells.

[27] The surrounding circumstances are relevant and can assist in interpreting the Environmental Warranty without deviating from the wording of the warranty. Shi emphasizes the importance of the condition of the gas wells as an after-the-fact justification for refusing to close the sale. Shi's lack of any significant interest in the output of the gas wells may be considered to reflect that the gas wells were of minor importance to the deal. While Shi says that he intended to use the gas in the mushroom farming operation, he made no inquiries into what the output of wells were and whether they were sufficient for use in the operation. The business plan for the mushroom farm makes no mention of using the available gas. Shi claimed to be uncertain about whether there was a type of engineer who could measure the output of the gas wells, if that was a matter of importance. I agree with the plaintiff that this was not credible given that Shi is himself an engineer. Shi admitted that he did not know what gas reserves existed and that they could very well be depleted at some future point.

[28] I agree with the plaintiff's submission that Shi's emphasis on the importance of the status of the gas wells is inconsistent with his attitude toward other conditions identified with the property. With respect to a potential E. coli problem Shi said he would close the deal and address the problem later. With respect to the barn, he said he would bulldoze it if it was unsafe. With respect to the septic system, he did not have an inspection and said if a problem presented itself, he would come up with funds to have it addressed. Shi was not aware of whether the water supply from wells would be sufficient for the intended mushroom farm. At one point he said he would have water brought in and later said he could take water from the lake, despite not knowing what

regulations applied to taking water. It is not credible that Shi would place so much importance on the gas wells, which he admits may have limited reserves, while having a very relaxed attitude to the supply of water which is essential to any farming operation.

[29] I find on the evidence at this trial that the Environmental Warranty did not apply to the gas wells. In the event that I am mistaken in this, I will go on to consider whether, if the environmental warranty did apply, did Duad breach the warranty, and whether the environmental warranty was a warranty or a condition.

No Breach of the Environmental Warranty

[30] If the environmental warranty is found to cover the gas wells Duad says that it did not breach the warranty. It is significant that the warranty is restricted to the seller's knowledge and belief. The warranty covers four main areas: 1) environmental laws and regulations have been complied with; 2) no hazardous conditions or substances exist; 3) no pending litigation respecting environmental matters; and 4) all applicable licences are in force.

The Relevant law on a Warranty "to the best of the seller's knowledge and belief"

[31] In *Melko v. Lloyd Estate*, 2002 CanLII 13191 (ON SC), the vendors of a property made warranties regarding a sewage system in the APS which survived completion of the transaction:

> 13 […] (1) All sewage systems serving the property are wholly within the limits of the said property and have received all required certificates of installation and approval pursuant to the *Environmental Protection Act*;
>
> (2) All sewage systems serving the property have been constructed in accordance with the said Certificate of Installation and Approval, and
>
> (3) All sewage systems serving the property have received all required use permits under the said Act or any other legislation;

B The parties agree that these representations and warranties shall survive and not merge on completion of this transaction but apply only to the state of the property existing at the completion of this transaction.

C The Vendor represents and warrants to the best of his knowledge and belief that during the period of his ownership of the property, that all environmental laws and regulations have been complied with, no hazardous conditions or substances exist on the land, no limitations or restrictions effecting the continued use of the property exist other than those specifically provided for herein, no pending litigation respecting environmental matters; no outstanding Ministry of Environment and Energy Order, investigations, charges or prosecutions regarding environmental matters exist; there has been no prior use as a waste disposal site, all applicable licences are in force. The Vendor agrees to provide to the Purchaser upon request, all documents, records, and reports relating to environmental matters that are in the possession of the Vendor. The Vendor further authorizes (Ministry of Environment) to release to the Purchaser, his agent or solicitor, any and all information that may be on record in the Ministry office with respect to the said property.

D The parties agree that this representation warranty shall form an integral part of this Agreement and survive the completion of this transaction but apply only to circumstances existing at completion of this transaction.

14 After taking possession of the premises, the Plaintiffs found that the septic bed serving their residence was not located on their lands, but on the lot which had been previously severed.

15 The Plaintiffs were required by the City of Hamilton-Wentworth to replace the existing septic system in accordance with new provincial environmental standards. The Plaintiffs now claim $16,350.15 as the amount they were required to pay to install the new septic system.

[32] In determining the enforceability of the warranty in the APS, the court in *Melko* held that the phrase — "to the best of a seller's knowledge and belief" ("knowledge qualifier clause") — did not warrant the absolute truth of a statement in the warranty clause but only represented a reasonably fair and truthful statement to the best of the seller's knowledge (paras. 46). According to the Court, "the wording of the warranty was starkly qualified by the words 'to the best of his knowledge and belief'". The Court, therefore, concluded:

> This warranty has been complied with by the defendants. The defendants honestly believed, to the best of their knowledge and belief that all "sewage systems serving the property are wholly within the limits of the said property and have received all required certificates of installation and approval pursuant to the *Environmental Protection Act*", and also honestly believed to the best of their knowledge and belief in the two warranties following [i.e. clauses C & D].

[33] The effect of the knowledge qualifier clause as set out in *Melko* was more recently restated in *Gebre-Hiwet et al v. McPherson*, 2022 ONSC 1421, at para. 76:

> 76 A Warranty, if express, is an exception to caveat emptor. In this case, the warranty as stated in the schedule to the Agreement of Purchase and Sale is qualified by the phrase "to the best of his knowledge and belief." The warranty is dependent upon being "reasonably fair and truthful to the best of his knowledge and belief". See: *John Levy Holdings Inc. v. Cameron & Johnstone Ltd.*, 1992 26 R.P.R. (2d) 130 (Ont. Gen. Div.); *Vokey v. Edwards*, [1999] O.J. No. 1706 (ONT. S.C.J.); and *Melko v. Lloyd Estate*, [2002] O.J. No. 3822 (Ont. S.C.J.).

[34] Schedule A of the APS in this case contains a knowledge qualifier clause similarly worded to Clauses "C" and "D" in *Melko*. During trial, Du testified that he was not aware of any non-compliance with environmental laws and regulations, hazardous conditions or harmful substances, restrictions on continued use, pending environmental litigation, and outstanding Ministry of the Environment orders or charges with respect to the property. Du also confirmed that the Property had never been previously used as a waste disposal site and that all applicable licences were in force.

[35] A review of the history of the gas wells support the accuracy of Duad's Environmental Warranty. The gas wells pre-date Duad's purchase of the property and were originally licenced by Mr. Hyslop, the person who sold the farm to Duad. Pursuant to the Ministry of Natural Resources and Forestry naming convention the wells are referred to as Hyslop 4 (T003122) and Hyslop 6 (T004610).

[36] The condition of the wells was not made part of original sale to Duad. According to Zhao the condition of gas wells, in his experience, is always dealt with on 'an as is, where is' basis. Duad relied on Zhao as the farm manager to oversee any necessary repairs including repairs to the gas wells. Zhao gave evidence that Du was conscientious about repairs and would authorize any necessary repairs and have them dealt with promptly.

[37] After Duad purchased the property, it began investigations to determine if the gas wells were suitable for commercial use in connection with transferring the licences to Duad. On November 17, 2015, the MNRF sent an e-mail to Zhao indicating that paperwork was being circulated to transfer the wells to Duad Inc. and that once that process had been completed the Ministry would be in touch with Zhao about "other items about the wells" (Ex. 130). This communication is in response to Zhao's inquiry about necessary repairs. There is no evidence of any further communication between the MNRF and Zhao or Duad regarding deficiencies with the gas wells, until the Inspector's Orders were sent on December 27, 2017. This is significant in that the MNRF delayed specifying any specific repairs to the wells until the December 27, 2017 Inspector's Orders.

[38] On August 25, 2016, Duad had a flow test report performed by Jim McIntosh ("McIntosh") that concluded the output of the wells was insufficient for commercial use. When McIntosh inspected the gas wells for the flow test report, he assumed that small leaks, which were later identified, would have been present. He did not, however, do the spray bottle test at the time and says they were so minor that he did not mention them in his report. This means that as of the date of the Environmental Warranty on April 6, 2017, there was no information provided to Duad that the gas wells required repairs or were non-compliant in any way. Duad's representation, to the best of its knowledge and belief, is therefore accurate if the warranty does apply to the gas wells.

[39] McIntosh provided a report dated July 20, 2017, dealing with cutting off the supply of gas to neighbouring properties. There is no mention in this report of any deficiencies or compliance issues.

[40] With respect to gas well licences being in force McIntosh gave evidence that the gas well licences have always been valid and in force. The fact that Duad purchased the property from Hyslop did not invalidate the licences. Similarly, if Shi had purchased the property the licences would have remained in force. McIntosh's evidence is supported by the Inspector's Orders dated December 27, 2017 (Ex. 9, 11, 12, 13 and 14) which set out repairs to be performed and state that "Noncompliance with this order may lead to further enforcement action under the OGSRA." Significantly, there is no indication from the MNRF that the wells are not licenced or cannot continue to be operated. Whether the licences were in Duad's name or Hyslop's name was not consequential. Shi admitted in his evidence that he was aware that he would have to apply to have the licences transferred after closing. The licences were in force and were capable of being transferred to Shi/Siofresh without first having to be transferred to Duad.

[41] It is clear that the MNRF considered the deficiencies as being minor when it allowed an extension of time to conduct repairs in the spring, so that the tenant would not have any interrupted supply in the winter.

[42] Jim McIntosh also gave evidence that as long as the gas was used solely for the property, i.e., not beyond the boundaries of the property, Duad was in compliance with the applicable regulations. He also stated that there would not be contamination issues with these wells because the reservoir from where the gas is produced does not have any hydrogen sulphide in it.

[43] Shi did not lead evidence to show non-compliance with environmental laws, existence of hazardous conditions or harmful substances, restrictions on continued use, pending environmental litigation, or outstanding Ministry of the Environment orders or prior use of the Property as a waste disposal site.

[44] During the trial Shi focused on section 10 of the *Oil, Gas and Salt Resources Act* R.S.O. 1990, c. P.12 which states: "No person shall drill, operate, deepen, alter or enter a well, or engage in any other activity on or in a well, except in accordance with a licence."

[45] McIntosh is intimately familiar with the law and regulations governing the licencing and use of gas wells. As noted by the plaintiff, Shi also did not address Section 4.3 of the MNR Internal Operating Policy Directive which states: "A well drilled between 1960 and 1997 under a valid "permit to bore" is deemed licenced under the Act. If the well continues to be owned by the person named on the "permit to bore", then the licence is considered active. If the current well operator is not the person named on the "permit to bore", the well operator is required to apply to the Ministry of Natural Resources for a licence transfer."

[46] Hyslop 4 was originally licenced on October 27, 1970 (Ex. 79) and Hyslop 6 was originally licenced on December 12, 1977 (Ex. 80). The Ministry's policy directive makes clear that the wells are deemed to be licenced. The only obligation on a new operator is to apply for a transfer of the licence.

[47] I find that the Environmental Warranty was not breached.

Environmental Warranty is a Warranty Not a Condition

[48] If I am incorrect in my finding that the Environmental Warranty was not breached, it would then be necessary to determine whether the clause is a warranty or a condition. The consequences of breaching a warranty and a condition are different. In the event a warranty is breached the non-defaulting party is obliged to close the deal and seek to recover damages flowing from the breach. If a condition is breached by the seller the buyer has a right to rescind the agreement, the return of the deposit and a claim for any damages flowing from the breach.

[49] The plaintiff submits, and I agree, that the law supports the conclusion that the Environmental Warranty is in fact a warranty and Shi was obliged to close the deal and sue for the costs to repair the wells.

[50] In *Fraser-Reid v. Droumtsekas*, [1980] 1 S.C.R. 720, pp. 724, 731-732, the Supreme Court of Canada held that a clause requiring a vendor to disclose to the purchaser any regulatory infractions or pending remediation orders was a warranty.

[51] In *Mortgage Time Inc. v. Hectares Properties Inc*., 2007 CanLII 4582 (ON SC) at paras. 42 - 44, 50 - 51, the Vendor warranted a property was not used as waste disposal site. The purchaser accepted property "as is" with respect to soil and subsurface. Prior to closing, the purchaser discovered there were used fuel storage tanks under property and refused to close. The vendor refused to return deposit. The court held that the vendor was entitled to retain the deposit as there was no evidence of breach of regulatory standards. The Court also found that the law and regulations only created an offence for non-compliance and did not render the contract invalid or unenforceable.

The Effect of the "as it is, where it is" Clause

[52] In *First Gulf Development Corp. v. Alfa Laval Inc.*, (ON SC), 2006 CarswellOnt 2528, at paras. 1, 2, 23 and 24, the Court addressed the implication of the "as is" clause in a negligent misrepresentation and breach of contract claim by a purchaser as follows:

> 1 If a purchaser of land buys the property on an "as is" basis, knowing of the probability but not the extent of environmental contamination, is an action against the seller for breach of contract and negligent misrepresentation available in law?
>
> 2 The applicants First Gulf bought property that they came to know was environmentally contaminated, from the defendant Tri-Lad Inc., now Alpha Laval. After the Agreement of Purchase and Sale (APS) was signed, and as a result of due diligence investigations, First Gulf became aware of some aspects of environmental contamination on the land. Following negotiations between the parties, the APS was amended by way of an "as is" clause. Subsequently, more extensive environmental contamination became known to First Gulf, and they have brought a claim against the defendants, essentially alleging fraud, but also based on breach of contract and negligent misrepresentation… The court made it clear that while

the “as is” clause does not bar a breach of contract claim, it bars a negligent misrepresentation claim.

At paras. 23 - 24, the court continued:

> 23 That the "as is" clause in the contract can have the effect of negating the action in tort cannot be disputed. See *Corfax, supra* at paragraph 26 and *Sugar v. Peat Marwick Ltd*. (1988), 66 O.R. (2d) 766 (Ont. H.C.) at paragraph 53: The "as is, where is" clause would probably have provided a complete answer to a claim in contract... It might also have been relevant to a claim for negligent misrepresentation...because it could be taken as a disclaimer of responsibility. But, the "as is, where is" clause has no application...to a claim in fraud. Per Southey J., at paragraph 53. See also *Taggert v. Brancato Construction Company*, [1998] 16 R.P.R. (3d) 22 (Ont. C.A.) where it was noted that the "entire agreement" provision in the Agreement of Purchase and Sale is a complete answer to the allegation of misrepresentation. Accordingly, it is plain and obvious that the action for negligent misrepresentation cannot stand.

[53] Shi’s claim on the basis of “misrepresentation” *simpliciter* is not a valid cause of action in law as indicated by the Court in *First Gulf Development Corp. v. Alfa Laval Inc*., 2006 CarswellOnt 2528 (ON SC) at para. 24:

> The plaintiffs have also pleaded a cause of action termed 'misrepresentation'. It is not disputed that absent fraud or negligence, there is no such bald cause of action in law known as 'misrepresentation' standing on its own. Accordingly, that word should be struck out to the extent that it is pleaded as a separate cause of action, because it simply does not exist as a separate basis for the claim.

[54] The APS does provide for a requisition period to allow the buyer to satisfy itself that there are no outstanding work orders or deficiency notices affecting the property (para. 8 of Ex. 2). Counsel for Shi did serve a requisition letter on counsel for Duad on July 25, 2017 (Ex. 93). That requisition requested evidence that there were no work orders outstanding and that the structures comply with all bylaws and standards (item 7). Counsel for Duad responded to the

requisition and indicated that the Shi must satisfy himself, (Ex. 126) which is consistent with para. 8 of the APS.

[55] The requisition letter makes no references to gas well licences. The only request by Shi's counsel to Duad's counsel concerning gas well licences came on the day of closing December 18, 2017 (Ex. 99 and 100). Duad's counsel responded that it was the buyer's responsibility at its own expense to file the necessary application to transfer the licence after closing (Ex. 127). This was an accurate statement concerning the licences. As indicated, there is no evidence that Shi's counsel made any request to Duad's counsel for information about the gas well licences until the day of closing.

[56] There is evidence that Zhao received a request from Richard Wellenreiter, the Buyer's original lawyer, on April 10 2017, requesting certificates, licenses or authorizations relating to the gas wells (Ex. 92). Zhao responded that he would ask the owner to supply the information (Ex. 91). It is fair to say that if the information requested from Wellenreiter had been relayed to Duad there would have been a response from Duad that would have put Shi on notice of the Seller's position regarding the gas well licences.

[57] The "as it is, where it is" clause in the APS were clear in its import, and binding on the buyer.

Forfeiture of Deposit

[58] It is well established that if a buyer repudiates the agreement and fails to close the deposit is forfeited. The seller is entitled to retain the deposit even if it has suffered no loss or has resold the property at a higher price. The right to retain the deposit is subject to relief against forfeiture if the buyer can establish that it would be unconscionable for the seller to retain the deposit.

[59] In *Azzarello v. Shawqi*, 2019 ONCA 820, the Court of Appeal for Ontario stated at para. 45:

> 45 It is well-established by case law that when a purchaser repudiates the agreement and fails to close the transaction, the deposit is forfeited, without proof

> of any damage suffered by the vendor: see *Tang v. Zhang*, 2013 BCCA 52, 359 D.L.R. (4th) 104 (B.C. C.A.), at para. 30, approved by this court in *Redstone Enterprises Ltd. v. Simple Technology Inc*., 2017 ONCA 282, 137 O.R. (3d) 374 (Ont. C.A.). Where the vendor suffers no loss, the vendor may nevertheless retain the deposit, subject to relief from forfeiture.

[60] In *Rahbar et al v. Parvizi et al*, 2022 ONSC 2136, at para. 3, the Court dismissed an application for relief against forfeiture despite the resale at a higher price than the breached agreement. The Court held:

> Although the respondents were able to re-sell the property at a higher price, that does not render it unconscionable for the respondents to retain the deposit. The record does not disclose any factors that make it unconscionable to apply the ordinary rule that would allow the respondents to retain the deposit of a defaulting purchaser. I therefore dismiss the application.

The Circumstances Surrounding the Deposit

[61] It is important to review the circumstances surrounding the deposit. The APS was amended three times before the Notice of Fulfillment of Conditions which was served on May 19, 2017 (Ex. 6). The APS was amended a further time on July 27, 2017. All of the amendments were at the request of Shi. The APS provides for a deposit of $80,000.00 and is conditional on Shi being able to assume the first mortgage in favour of RBC and a home and septic inspection. The conditional period is set for April 25, 2017, and the APS provides that upon waiver of conditions the deal is “Firm” and the deposit is non refundable (Ex. 2).

[62] Shi was unable to negotiate the assumption of the RBC mortgage and requested an amendment to the APS to extend the conditional period to May 10, 2017. Duad agreed to this request and by way of amending agreement dated April 18, 2017, the parties extended the conditional period to May 10, 2017 (Ex. 4).

[63] Shi remained unable to negotiate the assumption of the RBC mortgage and requested a further amendment to the APS to extend the conditional period. Duad agreed to this request and by way of amending agreement dated May 10, 2017, the conditional period was extended to May

19, 2017 (Ex. 4). Shi was ultimately unable to qualify with RBC to assume the first mortgage and asked Duad to agree to a vendor take back mortgage in the amount of $800,000. Duad agreed to this request and, by way of amending agreement dated May 17 2017, the APS was amended to provide for the vendor take back mortgage. This amendment allows Duad until the end of November 2017 to stop the supply of gas to neighbouring properties and expressly reiterates that the property is being sold "as it is, where it is" (Ex. 5).

[64] Zhao stated the Duad was hesitant about providing the vendor take back mortgage and Zhao had to work to convince Du to agree to this amendment. On May 19 2017, Shi waived all conditions and the offer became firm and binding (Ex. 6). Zhao testified that Shi understood that he did not have to waive all conditions and could have got out of the deal at this point. Shi had retained Mr. Zhu as his real estate counsel prior to serving the Notice of Fulfillment of Conditions. Mr. Zhu reviewed the APS and discussed the agreement with Shi before serving the Notice of Fulfillment of Conditions.

[65] After having waived all conditions in the APS, Shi determined that he could not obtain sufficient financing to pay the balance of the purchase price on closing and shortly before the original agreed upon closing date, Shi asked Duad to increase the principal amount of the vendor take back mortgage to $1.1 million, and to extend the closing date to December 18, 2017, to allow Shi time to arrange for financing. Du was concerned about Shi's request to increase the vendor take back mortgage and extend the closing date. Du was anxious to have the deal close and was concerned about Shi's ability to ultimately close the deal. Zhao says he had to do a lot of work to convince Du to agree to Shi's request. As a condition of agreeing to these amendments at a time when the deal was already firm Du asked for an additional non-refundable deposit. The parties' agreed to extend the closing date to December 18, 2017, and to an additional non-refundable deposit of $170,000.00.

[66] The parties' amendment stipulates that the new closing date is "FIRM" and "CAN NOT be changed. Otherwise, the buyer will lose all nonrefundable deposit plus possible other legal and financial penalties" (Ex. 8).

[67] Zhao testified that given the number of amendments, the request for a vendor take back mortgage and a subsequent increase to the vendor take back mortgage along with a request to extend the closing date, it would be normal for a seller to ask for an increased deposit. The deposit now amounted to 14% of the purchase price, which is in line with deposits for this type of transaction and not considered to be unfair. Shi agreed that it was fair for the seller to request an additional deposit since the property was being taken off the market from July to December.

Conditions for Relief against Forfeiture

[68] In *Rahbar et al v. Parvizi et al*, 2022 ONSC 2136, the Court relied on the decision of the Court of Appeal in *Redstone Enterprises Ltd. v. Simple Technology Inc*., 2017 ONCA 282, in setting out the necessities for relief against forfeiture as follows:

> 55 In *Redstone*, the Court of Appeal confirmed that to obtain relief from forfeiture, the purchaser must establish:
>
> 1. That the proposed forfeited sum is out of proportion to the damages suffered by the claimant, and
>
> 2. That it would be unconscionable for the vendor to retain the deposit.
>
> 56 With respect to the deposit being out of proportion to any damages suffered by the vendor, there is no evidence of damages suffered by the respondents. Although the evidence indicates that the respondents were intending to use the proceeds of sale of the Property to purchase other investment properties, there is no evidence of any loss of opportunity to do so before me. The only evidence before me is that the respondents were able to sell the Property for approximately $130,000 more than the applicants had agreed to pay within approximately two weeks. On that record, I can infer that the forfeited deposit was out of proportion to the damages suffered.
>
> 57 That does not, however, mean that it would be unconscionable for the respondents to retain the deposit.

58 In *Redstone*, the Court of Appeal summarized various principles on the law of deposits as follows:

> (i) The concept of a deposit is an exception to the ordinary rule that a sum forfeited on the breach of a contract is an unlawful penalty unless it represents a genuine pre-estimate of damages.
>
> (ii) Deposits are designed to motivate contracting parties to complete their bargains.
>
> (iii) It is important that parties know with certainty that the terms of their contract will be enforced, particularly where it makes provision for something to happen if the contract is breached.
>
> (iv) A finding of unconscionability must be exceptional and strongly compelled on the facts of the case.

59 While the categories of unconscionability are never closed, one common measure would be the proportionality of the deposit to the overall purchase price. Here, the deposit was 5% of the purchase price. That is a standard sized deposit for a residential real estate purchase. In many cases, a purchaser who wishes to make a strong offer will provide a larger deposit. *Redstone* refers to deposits as large as 10% and 20% being upheld.

60 Unconscionability is not governed solely by the proportionality of the deposit to the price or damages. Other relevant factors include inequality of bargaining power, a substantially unfair bargain, the relative sophistication of the parties, the existence of good faith negotiations, the nature of the relationship between the parties, the gravity of the breach, and the conduct of the parties.

61 There is no evidence before me to suggest that any of those factors create unconscionability here. I was not directed to any evidence of inequality of bargaining power. This appears to have been a standard residential real estate purchase albeit in a heated real estate market. Simply because vendors may have more bargaining

power in a heated real estate market is not, however, the sort of inequality of bargaining power that leads to findings of unconscionability. There was no evidence before me about the relative sophistication of the parties other than the fact that the vendors had owned the house as an investment property. There was no relationship between the parties that led to any abuse of power or other factor that might lead to a finding of unconscionability.

62 The most potentially pertinent of the factors set out in *Redstone* are the gravity of the breach and the conduct of the parties. If in fact the purchasers were able to close on December 16, their breach would have been relatively minor in that the delay would have been less than 24 hours.

63 With reference to the conduct of the parties, the applicants focus on the respondents' refusal to extend the closing by potentially as little as a day. In my view, this might, as the Court of Appeal put it in *Redstone,* be described as "hard bargaining" but it was not unconscionable. The respondents were doing what they were legally entitled to do under the contract. As noted earlier, there is no obligation on the vendor to extend closing even by as little as one day.

64 The conduct of the parties should not, however, focus solely on the respondents. The applicants' conduct must also be looked at. As noted, the applicants were told on December 14 that Scotiabank would no longer provide financing. They waited until 3:30 PM on December 15 to begin exploring the concept of an extension with the respondents and did not put that into writing until 50 minutes before the closing deadline. As noted earlier, when a large bank withdraws mortgage financing the day before closing, it is usually attributable to some problem on the side of the purchaser over which the purchaser had control.

65 In the circumstances, I can see no unconscionability in allowing the vendor to retain the deposit. While this might seem harsh in circumstances where the vendor has resold the Property at a higher price, cases of that nature were also referred to by the Court of Appeal in *Redstone* as not justifying relief from forfeiture. As sympathetic as I may be to the misfortune of the purchasers, there are also larger

> systemic issues to consider. If purchasers were allowed to reclaim their deposits in a rising real estate market simply because the vendors resold the Property at a higher price, it would eviscerate the legal concept of a deposit, render contractual terms relating to the deposit meaningless and would remove any incentive that a deposit gives a purchaser to close the transaction. All that would inject considerable uncertainty into the residential real estate market. That is a market that benefits more from relatively clear rules that are well known in advance so parties can plan around them than it would benefit from highly individualized rules tailored on a case-by-case basis based on the sympathies of a particular judge. That is not to say that courts should not apply an individualized analysis tailored to the individual case when the facts warrant but, as the Court of Appeal noted in *Redstone*, those circumstances must be exceptional and strongly compelling.

[69] With respect to application of the deposit, the deposit is credited towards satisfying the damages incurred by the vendor: *Goldstein v. Goldar*, 2018 ONSC 608, at para. 25.

[70] As set out in *Rahbar* a finding of unconscionable conduct which would justify granting relief from forfeiture is an exception to the norm. There is nothing to suggest it would be unconscionable for Duad to keep the deposit following Shi's breach.

[71] The transaction was a commercial transaction. Shi is an intelligent and sophisticated individual who had a Mandarin-speaking real estate agent to ensure that he understood all aspects of the agreement. The terms of the APS were understood by Shi. It was Shi who sought amendments to the APS extending the conditional period. Shi requested the vendor take back mortgage when it became clear that he would not qualify to take over the RBC mortgage. Shi was represented by counsel when the Notice of Fulfillment of Conditions was served, and he understood that he did not have to proceed with the deal and could elect to cancel the transaction and have his deposit returned. It was Shi who asked to have the vendor take back mortgage increased to $1.1 million and to have the closing date extended from July 31, 2017 to December 18, 2017. This request was made after the Notice of Fulfillment of Conditions had been served. It is not unusual for a vendor to request an additional deposit as a condition for extending a closing date. Shi himself admits that this is fair.

[72] As set out in *Rahbar* when considering the proportionality of the deposit, deposits 10% - 20% have been considered appropriate. The deposit in this case was approximately 14%.

[73] There is nothing unconscionable or unfair about a seller insisting on strict compliance with terms of the APS. Duad was ready, willing, and able to close and had provided all closing deliverables to Shi's counsel before closing. Duad accommodated a last-minute request on the closing date to amend the closing documents to show Siofresh Inc. as the party taking title. Shi did not provide his counsel with certified funds on the closing date as was stipulated by his counsel.

[74] I agree with the submission of the plaintiff that Shi's conduct following the failure to close is telling. During the subsequent meeting between Du, Shi and Zhao, Du indicated that Duad would address any issues with the gas wells at its expense in order to facilitate the closing. Shi did not accept this offer. I agree with the submission of the plaintiff that this demonstrates that the gas wells were not the real reason for Shi's refusal to close the deal. The expense to correct the deficiencies identified in the Inspector's Orders was relatively inexpensive. Jim McIntosh charged a total of $4,410.22 for the repairs (Ex. 15, 16 and 17).

[75] I agree with the plaintiff's submission that the most likely reason Shi did not close the deal is lack of sufficient funds to operate the farm and maintain the mortgage. The business plan commissioned by Shi shows an estimate of $150,000.00 for equipment to begin operations. There is no evidence that Shi had secured the equipment or had the resources to do so. Had the transaction closed Shi would have had a mortgage obligation on a farm that was unable to generate any revenue. The vendor take back mortgage stipulates that, in addition to monthly interest payments, one half of the principal amount ($550,000.00) must be repaid on the one year anniversary and the balance on the second anniversary (Ex. 8).

[76] While Duad has not experienced a loss from having to sell the property at a lower price it incurred significant costs to carry and maintain the property while fulfilling its obligation to mitigate its damages from the breach. This is another relevant factor to consider in determining whether relief from forfeiture is available.

Request to Admit

[77] The Request to Admit (Ex. 49) was sent to Shi/Siofresh's counsel on April 29, 2024 (Ex. 50). There was no response to the Request to Admit and Shi/Siofresh are therefore deemed to admit the facts specified in the Request to Admit: Rule 51.03(1). Contrary to Shi's submission, this is not an illegitimate or unfair "trick."

Zhao's conduct

[78] Real estate agents owe their clients a duty of care to act in a manner that fulfills the standard of care expected of real estate professionals. Where an agent's conduct fails to meet this requirement, the real estate agent is liable for any damages suffered by the client as a result of the negligence. In *Charter-York Ltd v. Hurst* (1978) 2 R.P.R 272 (Ont. H.C.), the vendor's real estate agent incorrectly advised the purchaser that the acreage being sold was contiguous. The misrepresentation was a consequence of the agent's failure to make adequate inquiries about the land. The purchaser was allowed out of the transaction, and the agent was held accountable to the vendor for the loss of an opportunity to sell the lands prior to a decline in market value caused by the introduction of land speculation legislation.

[79] In this case, Zhao had been the subject of a disciplinary Warning decision of RECO dated February 27, 2020 (Ex. 128) which arose from the transaction which is the subject of this trial. The RECO Compliance Officer found that Zhao erroneously used outdated forms from a previous transaction of the subject property to produce the Offer. Zhao had forgotten to delete the name of "Peter Hogeterp" from an earlier Confirmation and Co-operation form, which he had used as a precedent. The Warning also noted that while the Brokerage was identified as both the listing and the co-operating brokerage in the APS, he failed to provide a written disclosure of the nature of his relationship to each party prior to the Offer.

[80] William Johnston was asked about this decision when he was cross-examined by Shi. His opinion was that the decision was essentially a slap on Zhao's wrist for his sloppy paperwork, and that it was not an indication that Zhao's conduct fell below the standard of care. I am prepared to accept this assessment. I find that there is no indication that Shi was misled by Zhao's role in representing both parties to the transaction. Shi continued to work with Zhao to

try to complete the deal after Shi failed to close in December 2017. Zhao's conduct, while clearly imperfect, did not fall below the relevant standard of care.

Mitigation following the Breach

[81] Where a buyer alleges that the vendor failed to mitigate its damages, the buyer bears the onus to prove on a balance of probabilities, that the plaintiff failed to make reasonable efforts to mitigate, and that mitigation was possible. The Supreme Court of Canada in *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 5, at paras 23 - 25, held that where it is alleged that the plaintiff has failed to mitigate, the burden of proof is on the defendant, who needs to prove both that the plaintiff has failed to make reasonable efforts to mitigate, and that mitigation was possible. The Supreme Court of Canada stated the following general principles on mitigation at paras 23 - 25:

> 23 This Court in *Baud Corp., N.V. v. Brook* (1978), [1979] 1 S.C.R. 633 (S.C.C.) [hereinafter *Asamera Oil Corp*.], cited (at pp. 660-61) with approval the statement of Viscount Haldane L.C. in *British Westinghouse Electric & Manufacturing Co. v. Underground Electric Railways Co. of London*, [1912] A.C. 673 (U.K. H.L.), at p. 689:
>
> > The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.
>
> 24 In *British Columbia v. Canadian Forest Products Ltd*., 2004 SCC 38, [2004] 2 S.C.R. 74 (S.C.C.), at para. 176, this Court explained that "[l]osses that could reasonably have been avoided are, in effect, caused by the plaintiff's inaction, rather than the defendant's wrong." As a general rule, a plaintiff will not be able to recover for those losses which he could have been avoided by taking reasonable steps. Where it is alleged that the plaintiff has failed to mitigate, the burden of proof is on the defendant, who needs to prove both that the plaintiff has failed to make reasonable efforts to mitigate and that mitigation was possible…

> 25 On the other hand, a plaintiff who does take reasonable steps to mitigate loss may recover, as damages, the costs and expenses incurred in taking those reasonable steps, provided that the costs and expenses are reasonable and were truly incurred in mitigation of damages (see P. Bates, "Mitigation of Damages: A Matter of Commercial Common Sense" (1991-92), 13 Advocates Q. 273). The valuation of damages is therefore a balancing process: as the Federal Court of Appeal stated in *Redpath Industries Ltd. v. "Cisco" (The)* (1993), [1994] 2 F.C. 279 (Fed. C.A.), at p. 302,: "The Court must make sure that the victim is compensated for his loss; but it must at the same time make sure that the wrongdoer is not abused." Mitigation is a doctrine based on fairness and common sense, which seeks to do justice between the parties in the particular circumstances of the case.

[82] The purchaser's onus is to satisfy the court, on a balance of probabilities and without the use of hindsight, that: the vendor failed to make reasonable efforts to mitigate, based on evidence identifying certain reasonable steps that it failed to take, or identifying some step that was taken that was not reasonable; and mitigation was possible. The Court of Appeal in *Arista Homes (Richmond Hill) Inc. v. Rahnama*, 2022 ONCA 759 at para. 9 stated the requirement for mitigation in the context of failed real estate transactions:

> [9] Where a purchaser fails to close a real estate transaction and the vendor takes reasonable steps to sell the property in an arm's length sale to a third party in mitigation of damages, and there is nothing improvident about the sale, the difference between the two sale prices will be used to calculate the damages… In such circumstances, there will be no need for expert evidence.

[83] In *Dunbar v. Helicon Properties Ltd*., 2006 CarswellOnt 4580 (ON SCDC), the transaction did not close due to the failure of the purchasers. The plaintiff was able to obtain a binding sale to another purchaser one week later, but at a reduction of approximately $7,000. The purchasers suggest that the respondent should have either "haggled" with this purchaser for a higher price or sought alternative purchasers prepared to pay a price closer to that of the appellants' offer to purchase. The Divisional Court agreed with the trial judge that mitigation is seldom perfect and that the plaintiff's efforts were reasonable in all the circumstances.

[84] In *Rosehaven Homes Limited v. Aluko*, 2022 ONCA 817, there was delay in reselling the property following the breach by the purchaser. The vendor provided an expert report with valuation at various dates. However, the purchaser failed to adduce any reliable evidence that the property would have received better offers and sold for more had the vendor conducted the resale in a certain manner. The Court, therefore, entered judgment in favour of the vendor.

[85] Duad made consistent and reasonable efforts to mitigate its losses following Shi's breach. The property was listed for sale immediately after the breach and offers to purchase were received and considered. The marketing efforts resulted in an offer from the Niagara Peninsula Conservation Authority ("NPCA") for $600,000 for 38 acres on June 27, 2019 (Ex. 27). This price was roughly comparable to the price per acre for the failed sale to Shi. That sale closed on July 31, 2019 (Ex. 28). The property was not listed with an agent between August of 2019 and April of 2021. This period coincides with difficulties Duad was having with a tenant not paying rent and the COVID-19 Pandemic. Everland Realty was retained to list the remaining property on April 30, 2021. On May 3, 2021, Everland secured an offer from Nanxi Pang to sell the remaining land and farmhouse for $2.1 million. This sale had a closing date of November 30, 2021. Duad had initiated proceedings before the Landlord and Tenant Board to evict the tenant of the farmhouse in order to give vacant possession to Pang. The tenant was particularly adept at delaying his eviction through appeals and stays of eviction orders. On November 23, 2021, Duad obtained a final eviction order from the Landlord and Tenant Board. On that same day the farmhouse was badly damaged in a fire. The sale to Pang could not proceed and the Buyer and Seller signed a mutual release on December 16, 2021 (Ex. 34). Following the fire Duad undertook the necessary repairs to the farmhouse to make it saleable. Those repairs were completed in May 2023 (Ex. 44). The property was listed with Century 21 Heritage Group on May 12, 2023 (Ex. 45). On March 31, 2025, approximately 72 acres of the property was sold to the NPCA for 1.1 million dollars, leaving a remaining parcel of approximately 10 acres where the farmhouse was situated. The remaining parcel was listed with Everland Realty on April 24, 2025 and an offer has been received to sell the last parcel of land for $1.46 million with a closing date of July 31, 2025. If the sale of the last parcel proceeds, Duad will have successfully mitigated its damages and will not suffer any loss resulting from having to sell the property at a reduced price following the breach.

Carrying Costs

[86] In *Goldstein v Godar*, 2018 ONSC 608, Morgan J. set out the framework for damages arising from a failed real estate transaction. At para. 25, Justice Morgan describes the framework as follows:

> The damages amount will be the difference between the price under the agreement and the price of the new sale of the property once it closes, plus any additional carrying cost incurred by the vendor in mitigating her loss and dealing with the purchaser's breach.

[87] Similarly, in *Bang v. Sebastian*, 2018 ONSC 6226, at para. 57 (affirmed in *Bang v. Sebastian*, 2019 ONCA 501), the Court awarded damages on account of carrying costs including utilities, property taxes, insurance, home maintenance and home staging for maintenance of the property in the time between the failed closing and the closing of the resale.

[88] Damages for breach of contract should place the plaintiff in the monetary position that the plaintiff would have been in had the purchaser defendant not breached the agreement of purchase and sale. A plaintiff is entitled to damages such as may fairly and reasonably be considered as either naturally arising from the breach of contract or such as may reasonably be supposed to have been in the contemplation of the parties when they made the contract as the probable result of the breach of it: *Bang v. Sebastian* at para. 40.

[89] Duad is entitled to those carrying costs naturally arising from the breach of contract. The assessment of costs naturally flowing from the breach must be assessed in light of Duad's duty to mitigate. The duty to mitigate includes the right to claim the costs associated with discharging that duty.

[90] Duad's carrying costs fall into various categories. There are the legal costs and disbursements thrown away on the failed sale to Shi of $22,901.60. (Ex. 58). Next there are the legal costs and disbursements in connection with the sale and attempted sale of the property following the breach including: a) the sale of 38 acres to the Niagara Peninsula Conservation Authority including: 1) legal fees of $17,273.09 (Ex. 28); 2) costs related to creating an easement in favour of the NPCA of $9,844.98 (Ex. 29); 3) Commission of $27,120.00 (Ex. 28); 4) Survey

Costs of $4,746.00 (Ex. 29 – A844); 5) Fees to the City of Hamilton of $3,309.00 and $220.00 (Ex. 29 -A844): 6) Legal fees in connection with transfer of licences to NPCA of $2,439.23 (Ex. 30); and 7) The sale of approximately 72 acres to the NPCA including: 1) $32,899.29 for legal fees (Ex. 46); and 2) $10,550.90 for related surveying costs (Ex. 47).

[91] These might naturally be expected to arise from the necessity to mitigate the damage arising from Shi's breach. These costs were incurred in order to meet Duad's duty to mitigate. Duad also incurred ongoing expenses associated with the property including: a) Accounting fees - $39,143.20 (Ex. 60); b) Property tax - $21,227.80 (Ex. 61); c) Hydro - $5,770.56 (Ex. 62); d) Gas - $30,020.06 (Ex. 63); and e) Maintenance - $59,830.86 (Ex. 64). Duad would not have incurred any of the costs set out above had the transaction closed. The costs therefore are considered as naturally arising from the breach.

[92] However, there are also other costs claimed by Duad. These include $6,425.19 to settle an encroachment dispute with the neighbouring landowner (Ex. 55); the sale to Pang which could not close because of the fire in the amount of $27,542.85 (Ex. 33); costs in connection with evicting the tenant of the farmhouse in order to provide vacant possession to Pang. Those costs totalled $54,481.88 (Ex. 35 - 41).

[93] The sale to Pang could not close because of the fire which badly damaged the farmhouse. Duad had to repair the farmhouse in order to make it saleable. The repair costs totalled $262,927.47 (Ex. 65).

[94] When assessing damages the Court can find that some damages cannot be recovered if they were not reasonably foreseeable: *Bradford v. Kanellos* [1974] S.C.R. 409.

[95] These costs are too remote. That Duad had a tenant who refused to pay rent and apparently was a problem tenant is not something that would be reasonably foreseeable to Shi or to Zhao. The tenant took possession in 2019, according to Du's testimony, well after Shi's breach of contract and Duad turned to another brokerage to sell the Property. The fact that the house was damaged in a fire cannot be attributed to Shi or Zhao. They did not have custody or control of the Property at the time. This was an intervening act.

[96] By my calculation, the relevant allowable costs totalled $287,296.57, which exceeds the amount of the deposit. If a seller's losses exceed the deposit, the deposit is a credit toward the damage award.

[97] The APS provides that the buyer has the right to "add partners or use their company to hold this property at close time" (Ex. 2 A94). The provision allows title to be taken by a corporation on closing. On the closing date Shi advised that title would be taken in the name of Siofresh Inc. The deal did not close. In these circumstances, Shi and Siofresh Inc. are jointly and severally liable for the forfeiture of the deposit and damages flowing from the failure to close.

Liability of Duad and Zhao to Shi

[98] Shi by way of counterclaim seeks damages from Zhao as well as Duad. Shi alleges that Zhao favoured the interests of Duad, inserted the "as it is, where it is" clause without his consent, misled him about the status of the wells and failed to deliver copies of the gas well licences despite promising to do so.

[99] Shi also alleges that Duad misled him about the status of the gas wells and breached the Environmental Warranty by not delivering copies of the gas well licences despite repeated requests.

[100] I find that the evidence does not substantiate the claims made by Shi against either Duad or Zhao. The counterclaim will be dismissed.

Liability of Zhao to Duad

[101] Duad has crossclaimed against Zhao and Right at Home Realty for contribution and indemnity for any amounts it is found liable to pay Shi or Siofresh Inc. In addition, Duad claims that in the event the deposit is ordered to be returned to Shi that it recovers damages from Zhao in the amount of the deposit plus interest. Finally, Duad seeks recovery of all costs connected with selling the property after the failed transaction.

[102] In this case, given that I have found that Duad is not liable to Shi for any amount, and that Zhao did not breach the standard of care owed to either Shi or Duad, the crossclaim against Zhao and Right at Home Realty is dismissed.

Conclusion

[103] Shi breached his contract with Duad by failing to close on December 18, 2017. Duad did not breach the Environmental Warranty. The issue of the gas well licences was only raised by Shi at closing either because Shi did not have the funds to close, or because he had a change of heart. Shi had waived all of the conditions in the APS. The deposit should be forfeited. There are no factors present justifying relief against forfeiture. Duad has properly mitigated its loss and is entitled to damages. The conduct of Zhao, while imperfect, did not fall below the requisite standard of care of a real estate agent. He is not liable to either Shi or Duad.

Order

[104] The Court Orders that:

1. The plaintiff Duad's claim against Shi and Siofresh is granted in part.

2. The defendants Ling Shi and Siofresh's deposit of $250,000 has been forfeited.

3. The plaintiff Duad's claim against the defendant Right at Home Realty Inc. is dismissed.

4. The Real Estate Council of Ontario shall release the deposit of $250,000 to Duad.
5. The defendants Ling Shi and Siofresh Inc. are jointly and severally liable to the plaintiff Duad for damages in the amount of $287,296.57. The forfeited deposit of $250,000 shall be credited against this amount.

6. The defendants Ling Shi and Siofresh Inc. shall pay prejudgment interest in accordance with s.128 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, as amended;

7. The Defendants Ling Shi and Siofresh Inc. shall pay postjudgment interest in accordance with s.129 of the *Courts of Justice Act*, R.S.O. 1990, c.C.43, as amended.

8. The counterclaim of the plaintiffs by counterclaim Ling Shi and Siofresh Inc. against the defendants by counterclaim Duad Inc., Right at Home Realty Inc. and Youming Zhao is dismissed.

9. The crossclaim of Duad against Zhao and Right at Home Realty is dismissed.

Costs

[105] The parties are encouraged to agree upon appropriate costs. If the parties are not able to agree on costs, they may make brief written submissions to me (maximum three pages double-spaced, plus a bill of costs) by email to my judicial assistant at mona.goodwin@ontario.ca and to Kitchener.SCJJA@ontario.ca. The plaintiff Duad Inc. may have 14 days from the release of this decision to provide its submissions, with a copy to the defendants; the defendants a further 14 days to respond; and the plaintiff a further 7 days for a reply, if any. If no submissions are received within this timeframe, the parties will be deemed to have settled the issue of costs as between themselves. If I have not received any response or reply submissions within the specified timeframes after the plaintiff's initial submissions, I will consider that the parties do not wish to make any further submissions, and will decide on the basis of the material that I have received.

_____

M.R. Gibson J.

Date: September 15, 2025

CITATION: Duad Inc. v. Shi**,** 2025 ONSC 5258
COURT FILE NO.: CV-18-58
DATE: 2025/09/15

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

DUAD INC.

Plaintiff

– and –

LING SHI, SIOFRESH INC. and RIGHT AT HOME REALTY INC. BROKERAGE

Defendants

AND BETWEEN:

LING SHI and SIOFRESH INC.

Plaintiffs by Counterclaim

– and –

DUAD INC., RIGHT AT HOME REALTY INC. and YOUMING ZHAO

Defendants by Counterclaim

REASONS FOR DECISION

M.R. Gibson J.

Released: September 15, 2025