

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Real Organics & Naturals House Ltd. v.  
Canadian Phytopharmaceuticals  
Corporation,*  
2026 BCCA 94

Date: 20260305  
Docket: CA50078

Between:

**Real Organics & Naturals House Ltd.  
and Ivy Liou**

Appellants/  
Respondents on Cross Appeal  
(Plaintiffs)

And

**Canadian Phytopharmaceuticals Corporation, Kok-Sing Lim,  
Daniel Wang and Carina Cai**

Respondents/  
Appellants on Cross Appeal  
(Defendants)

Before: The Honourable Madam Justice Fenlon  
The Honourable Justice Dickson  
The Honourable Justice Iyer

On appeal from: Orders of the Supreme Court of British Columbia, dated  
July 19, 2024 and January 2, 2025 (*Real Organics & Naturals House Ltd. v.  
Canadian Phytopharmaceuticals Corporation*, 2024 BCSC 1303, 2025 BCSC 1,  
Vancouver Docket S177788).

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Place and Date of Hearing:

Vancouver, British Columbia  
November 5–6, 2025

Place and Date of Judgment:

Vancouver, British Columbia  
March 5, 2026

**Written Reasons by:**

The Honourable Madam Justice Fenlon

**Concurred in by:**

The Honourable Justice Dickson

The Honourable Justice Iyer

**Summary:**

*At trial, the appellants proved that the respondent product manufacturer breached two contracts related to the production of certain natural health products. The trial judge awarded the appellants damages in relation to those breaches, as well as damages for breach of the duty of honest performance. The judge dismissed the appellants' claims for civil fraud. On appeal, the appellants contend the judge ignored evidence that should have entitled them to a greater award of damages and a finding of liability in relation to their civil fraud claims. On the cross appeal, the respondent argues the award of damages should have been lower, in particular because the appellants failed to mitigate their losses and never pleaded breach of the duty of honest performance.*

*Held: Appeal dismissed; cross appeal allowed in part. The trial judge's conclusions on the breach of contract and civil fraud claims are amply supported by the evidence he accepted. In the circumstances, the appellants did not fail to mitigate their losses. However, the cross appeal must be allowed to the extent of setting aside the award of damages for breach of the duty of honest performance, as that claim was neither pleaded nor argued at trial.*

**Reasons for Judgment of the Honourable Madam Justice Fenlon:**

[1] The appellant Real Organics & Naturals House Ltd. ("Real Organics") proved at trial that the respondent Canadian Phytopharmaceuticals Corporation ("CPC") breached contracts they had entered into for the manufacture of two natural health products. On appeal, Real Organics seeks an increase in the award of damages for those breaches. CPC cross appeals, contending that the award of damages should have been lower.

**Background**

[2] Real Organics is a company controlled by the appellant Ivy Liou. In 2015, Ms. Liou identified the sale of health and beauty products containing Canadian chaga as the basis for a new business to be conducted through Real Organics. Chaga is a fungus found on birch trees which contains polysaccharides said to have health benefits. Ms. Liou's plan was to purchase chaga from a Québec supplier, then use a dual extraction method common in Chinese natural product manufacturing to extract the polysaccharides from the chaga.

[3] On April 15, 2016, Ms. Liou met with Dr. Yuan Ma, the founder of CPC, to discuss the possibility of CPC manufacturing the chaga products Real Organics intended to develop. CPC is a Richmond, BC-based contract manufacturer and private labeler of natural health products. The individual respondents, Dr. Carina Cai, Kok-Sing Lim and Daniel Wang, were either directors or employees of CPC who dealt with Ms. Liou. At the initial meeting, Dr. Ma suggested that they begin by extracting the polysaccharides from a test batch of chaga, and if Ms. Liou was satisfied with the results, they could then move forward with full commercial production of Real Organics' health and beauty products.

[4] Two days after the initial meeting, Ms. Liou sent Dr. Ma an email asking CPC to apply to Health Canada for a natural product number ("NPN") for Chaga Capsules, one of the products Real Organics intended to develop, and directing him to use a small amount of chaga supplied by Real Organics to process a test batch of that product. Her email also referred to five other products that Real Organics expected to produce with CPC in future. Of particular importance to this appeal is the portion of the email specifying the manufacturing process to be followed by CPC in the production of Chaga Capsules:

Dear Dr. Ma,

As per our meeting on last Friday, please proceed [on] our agreed schedule as below:

1. Applying NPN at the price of \$400 CAD for my company Pure Chaga Capsules using the following outlined procedure:

The First Process: Hot water extraction – Performed under high pressure (480 psi / 4.0 MPa) at 80-90 degree C to. Using around 40 L of water to retrieve bioactive constituents such as beta-glucans polysaccharides, melanin etc. The products are concentrated of 5:1 ratio in liquid.

The Second Process: Alcohol [Ethnol] precipitation for water-insoluble components, such as phytosterols, betulinic acid and betulin. The products are concentrated of 5:1 ratio in liquid.

The Final Process: Combined and powdered the above 2 products plus the residue fiber [dietary fiber and trace elements] into capsule of size 1 or 2. The ratio for the final product: 1 [water extraction]: 1 [ethnol precipitation]: 2 [residue fiber].

[5] The test batch was processed in late May 2016. Ms. Liou sent a bottle of the resulting powder to Silliker JR Laboratories, ULC (“Silliker”) for testing. The certificate of analysis (“COA”) showed a polysaccharide content per weight of 50.2%—a level Ms. Liou considered key to ensuring the marketability of the Chaga Capsules as Real Organics’ flagship product.

[6] In light of these positive results, the parties turned to processing commercial-sized batches of chaga. Ms. Liou sent CPC the following slightly modified processing specifications, reflecting what she understood to be the process followed by CPC in the production of the successful test batch:

1. The First Process: Hot water extraction – Performed under high pressure (480 psi / 4.0 MPa) at 80-90 degree C to. The volume of water being used is 8-10 times of raw materials. The extract process takes 8-10 hours long for retrieving bioactive constituents. The products are concentrated by 5:1 ratio in liquid.

2. The Second Process: 95% Alcohol [Ethanol] precipitation for water-insoluble components / The volume of 95% Alcohol being used is 8 times of raw materials and the extract process takes 8-10 hours long. The products are concentrated of 5:1 ratio in liquid.

3. The Final Process: Combined and powdered the above 2 products into capsule of 300 mg each. The ratio of the final product: 1 [water extraction]: 1 [ethanol precipitation]

Each bottle contains 90 capsules in amber bottle with “Green” Cap and put in each [carton].

We will provide raw materials as well as labels and [cartons] for each bottle.

These specifications were found to constitute a central term of the parties’ agreement governing the production of Chaga Capsules (the “Second Batch” Contract).

[7] CPC received two 500 kg batches of chaga from Real Organics’ Québec supplier on August 10 and 23, respectively. At the same time, CPC and Real Organics continued to work on details of the production and pricing of other health products. For the purposes of this appeal, the only other product of relevance is Beauty Secret Slimming and Nourishing Powder (“Beauty Secret Powder”). This product was to be made from the chaga residue left after the processing of raw

chaga into Chaga Capsules. The judge found that the parties entered into a separate contract for the manufacture of Beauty Secret Powder (the “Beauty Secret Powder Contract”).

[8] Just as production of the Chaga Capsules ramped up in mid-September 2016, a shareholders’ dispute within CPC led to the ouster of Dr. Ma and the departure of his daughter, Jie Ma, who had been CPC’s Production Manager. CPC was without a Production Manager until mid-November 2016, when the respondent Dr. Cai was appointed as the Manager for Quality Control, and Alice Chen was appointed as Production Manager. The respondent Dr. Wang joined CPC in October 2016, assuming the role of Chief Scientist and, shortly thereafter, the additional role of VP of Production.

[9] After the processing of the large-scale, commercial-sized batch of chaga (the “Second Batch”), CPC provided Ms. Liou with a bottle of the extracted powder, which she again took to Silliker for testing. The COA revealed a polysaccharide concentration of only 6%—a level Ms. Liou considered far too low to be marketable. CPC agreed to do further testing and to conduct an investigation into the result.

[10] During the investigation phase, CPC learned that the production records for the Second Batch were missing, and that it could not even access electronic copies of the documents given to the production staff. The technicians involved in the processing were interviewed and replacement production sheets were created that did not align entirely with the technicians’ conflicting recollections. (The judge found that CPC recreated the production records to make it appear that the process roughly complied with the extraction process outlined in the Second Batch Contract.)

[11] By early May 2017, Ms. Liou was growing frustrated with the lack of progress in addressing the disappointing test results for the Second Batch. She wrote to Dr. Cai and other CPC employees advising that the grand opening of Real Organics’ retail store was to take place soon, and expressing concern that the chaga powder had not yet been put into capsules.

[12] CPC processed the Beauty Secret Powder from the chaga residue in June 2017. At this time, the technicians discovered that the chaga residue, which had been stored in plastic bags, was wet. The technicians say that Dr. Cai told them to spread the chaga residue out and place it in a hot air-drying machine in batches over two to three days.

[13] CPC conducted an analysis of the resulting product, which showed there were no unacceptable levels of mould. CPC then encapsulated and delivered 991 bottles of the Beauty Secret Powder to Ms. Liou on July 19, 2017, samples of which Ms. Liou sent to Silliker for testing.

[14] By early July 2017, Ms. Liou's frustration with CPC's lack of answers on the status of the Second Batch of chaga had increased. It had been approximately six months since her initial discussion with Dr. Cai about the disappointing test result. At some point in July, she told Dr. Cai that she wanted to look at CPC's production records. CPC's response was to send a batch summary and two COAs, telling Real Organics that production records could only be viewed at CPC's offices. When Ms. Liou and three Real Organics employees went to CPC to inspect the production records on July 26, 2017, CPC did not disclose that the documents it provided were reconstructions, not the original records. Although CPC told Ms. Liou that Real Organics could not take copies of the production records, one member of her party took photographs of the documents on his cell phone. Ms. Liou found it suspicious that the production records were in such pristine condition—something one would not expect if the pages had been filled out on the factory floor as the work progressed.

[15] The parties engaged in negotiations about how to proceed with the Chaga Capsules project. On July 28, 2017, Mr. Lim, one of CPC's directors, offered Ms. Liou two options: first, CPC would stop any further production and provide Real Organics with the same grade and same amount of chaga to replace the product provided to CPC; or second, CPC would process 1,000 kg of replacement chaga for Real Organics at a higher price, with CPC to supply the chaga.

[16] Ms. Liou did not accept either option—the first because she did not trust CPC to buy the raw material; the second because it involved a significant increase in price. Meanwhile, on July 31, Silliker’s analysis of the bottled Beauty Secret Powder revealed a mould content far beyond acceptable levels.

[17] Mr. Lim presented a third option to Ms. Liou on August 3, 2017: CPC would perform the processing of raw materials provided by Real Organics without charge. Ms. Liou did not accept that offer, apparently because she wanted CPC to also cover the cost of the raw materials. On August 8, after Mr. Lim learned that Ms. Liou had filed a complaint about CPC to Health Canada, triggering a “compliance verification”, he emailed Ms. Liou to inform her that CPC was no longer willing to engage in negotiations and was prepared to address the issue through the courts.

[18] On August 18, Real Organics filed a notice of civil claim seeking specific performance of the Second Batch Contract and the Beauty Secret Powder Contract and, in the alternative, damages for lost profits, as well as punitive and aggravated damages and “possible criminal sanctions”.

[19] It was not until November 10, 2017 that CPC, in its response to civil claim, acknowledged that it had prepared new production records “based on information provided by employees involved with the processing”—although it denied any allegation that such documents constituted forgery.

[20] In 2018, Ms. Liou considered but decided against retaining other manufacturers to produce the two products. She also applied unsuccessfully on three occasions to patent her extraction process. By early 2019, Real Organics had laid off its remaining employees and negotiated the termination of the lease for its retail space.

**At trial**

[21] The parties attempted to resolve their dispute through a summary trial in February 2019, but the matter was found to be unsuitable for that form of proceeding. The action proceeded to a full trial over 22 days between November 21,

2022, and September 1, 2023. Ms. Liou and Real Organics were self-represented at trial.

[22] Real Organics pleaded breach of contract in relation to both the Second Batch Contract and the Beauty Secret Powder Contract. They identified the former breach as CPC's failure to follow the specified dual extraction method for processing the raw chaga, and the latter as production of Beauty Secret Powder containing unacceptable levels of mould. Real Organics also pleaded breach of fiduciary duty, conspiracy, and fraud. Before trial, it abandoned its claim for specific performance, seeking instead damages of over \$1.7 million for lost profits, as well as punitive, exemplary and aggravated damages.

[23] CPC took the position that it had complied with its contractual obligations under both contracts. It acknowledged that the Second Batch Contract set out a specific protocol for processing the chaga, but contended that CPC could exercise its judgment to modify that protocol as it deemed appropriate. Among other arguments, CPC also submitted that Real Organics could not establish a causal connection between the extraction process used by CPC, and Real Organics' inability to market the Chaga Capsules. Relying on expert evidence, CPC argued that, even if Real Organics' specified process had been followed exactly, the product would not have had the desired polysaccharide concentration.

[24] The trial judge found that CPC breached the Second Batch Contract because it did not follow the specified dual extraction process. He also found that CPC breached the Beauty Secret Powder Contract when it produced powder which contained unacceptably high levels of mould. Finally, the judge concluded that CPC breached its duty of honest performance when it provided Ms. Liou with recreated production records without advising her of the significant uncertainty about their accuracy.

[25] Regarding causation and damages, the judge held that he could not say with certainty what would have happened if CPC had properly performed the contract for the production of the Second Batch by following the specified dual extraction

process. However, he found that Real Organics would have at least had an opportunity to perform further development with the benefit of what had been learned from the Second Batch. Accordingly, instead of awarding lost profits in relation to the Second Batch, the judge compensated Real Organics for the wasted raw material. In relation to the Beauty Secret Powder, however, he awarded Real Organics loss of anticipated profit. As for the good faith claim, the judge awarded what he described as “nominal damages”, given that Real Organics had not relied on the false production records.

[26] At trial, Real Organics withdrew its claim for breach of fiduciary duty. The judge dismissed Real Organics’ claims in civil fraud and conspiracy. He also dismissed all claims brought by Ms. Liou personally, and all claims against the individual defendants.

[27] Real Organics was ultimately awarded \$84,420, comprised of:

- a) \$30,000 for loss of anticipated profit from the Beauty Secret Powder;
- b) \$950 for the cost of testing the Beauty Secret Powder for mould;
- c) \$39,600 (the cost of acquiring the raw chaga) for breach of the Second Batch contract;
- d) \$3,870 as a refund of deposits paid; and
- e) \$10,000 in “nominal damages” for breach of the duty of honest performance.

[28] Of significance to the cross appeal, the judge did not substantively engage with CPC’s submission that Real Organics had failed to mitigate its losses. Instead, the judge held that, given the limited damages award, it would have cost CPC more if Real Organics had mitigated its losses by accepting CPC’s offer to reprocess a new batch of chaga.

[29] The judge ordered each party to bear their own trial costs, finding that Real Organics should have accepted formal settlement offers from CPC in November 2022, which included a \$150,000 payment in exchange for the waiver of all claims against CPC, and consent dismissal of the claims against the individual defendants. The judge noted that the letters accompanying the offers to settle highlighted issues with Real Organics' claims—in particular, the lack of evidence that the specified dual extraction process would have produced a marketable product with the required polysaccharide concentration.

**On appeal**

[30] Real Organics raises four grounds of appeal, claiming the judge misapprehended or ignored evidence, which led him to:

- a) Dismiss Real Organics' claim for lost profits in relation to the Chaga Capsules;
- b) Award only nominal damages for breach of the duty of honest performance;
- c) Fail to find CPC and Dr. Cai liable for civil fraud; and
- d) Deny Real Organics full costs of the trial proceedings.

[31] CPC cross appeals on the basis that the judge erred in law by:

- a) Awarding damages for breach of the duty of honest performance when that claim had not been pleaded;
- b) Declining to consider whether Real Organics failed to mitigate its contractual losses; and
- c) Even if Real Organics did not fail to mitigate its losses, awarding speculative damages for lost profits for the Beauty Secret Powder, which were, in any event, precluded by a limitation of liability clause.

[32] Real Organics' grounds of appeal challenge the judge's findings of fact and exercise of discretion and are reviewable on a deferential standard of palpable and overriding error. CPC's cross appeal raises questions of law reviewable on a standard of correctness.

[33] I turn now to Real Organics' first ground of appeal.

**1. Real Organics' claim for lost profits in relation to the Chaga Capsules**

[34] The judge denied Real Organics' claim for lost profits in relation to the Chaga Capsules because the company failed to establish that the product would have contained a polysaccharide concentration close to 50% had CPC followed Ms. Liou's processing instructions. Real Organics claims that, in coming to this conclusion, the trial judge "forgot, ignored or misconceived" critical evidence.

[35] I begin with two general observations. First, this ground of appeal largely amounts to a disagreement with the weight the judge gave to the evidence before him. Second, I cannot agree that the judge ignored the evidence. To the contrary, he reviewed it in painstaking detail over 87 pages. In any event, a judge is not required to refer in his reasons to every piece of evidence that could support a party's position: *R. v. J.M.H.*, 2011 SCC 45 at para. 32.

[36] Before turning to the particular pieces of evidence in issue, I further observe that the judge's conclusion about the lost profits claim is amply supported by the evidence he accepted. He was satisfied that variations in the liquid-to-chaga ratio, processing temperature, pressure, and alcohol concentration can all affect the composition of the processed product. However, he was not satisfied that CPC's departure from the prescribed process caused the lower polysaccharide concentrations. CPC's expert, Dr. Fatehi, is a chemical engineer specializing in biomass extraction and testing. He tested four batches of chaga using the appellant's prescribed method and obtained polysaccharide concentrations of only 18.85%—far below the approximately 50% required by Real Organics.

[37] Dr. Fatehi opined that the concentration of polysaccharides in raw chaga depends on the quality of the chaga itself, as well as the method and duration of storage. The quality of the chaga in turn depends on the environment in which it grows, including the nutrition in the soil, the amount of sun and water, the growing temperatures and other environmental factors—even the same harvesting plant may provide samples of different quality over time depending on these factors.

[38] Further, Ms. Liou’s own research, as reflected in the various patent applications she made, demonstrated that the extraction process she instructed CPC to use might not have been an ideal one. The applications varied as to the ratios and sequencing they identified for alcohol and water extraction.

[39] I turn now to the four pieces of evidence the appellants say the judge “forgot, ignored or misconceived”. First, the appellants say the judge ignored evidence of the consistency or stability of the concentration of polysaccharides in raw chaga—evidence which contradicted Dr. Fatehi’s opinion on its variability. Ms. Liou testified that she tested three batches of chaga from her Québec supplier over three different years. Those raw samples, when tested by Silliker, showed polysaccharide concentrations falling within a narrow range of 8.5% to 10.2%. It was also Ms. Liou’s evidence that polysaccharides in chaga remain very stable, even if stored for a few years.

[40] I would not accede to this submission. The judge was entitled to put no weight on Ms. Liou’s evidence about the stability of polysaccharide concentrations. Ms. Liou testified as a lay witness and was not an expert. Moreover, Dr. Fatehi was clear that polysaccharide concentration in raw chaga is only one variable among many. He noted that the accessibility of the structure to solvents is important, as a sample of raw chaga with a more porous structure will lead to a more efficient extraction of sugars, including polysaccharides. Dr. Fatehi further opined that the quality of the biomass and the transportation and storage conditions significantly impact the physiochemical properties of chaga, and thus the extraction of polysaccharides.

[41] Second, the appellants say the judge ignored evidence of a dual extraction process completed by Real Organics in 2020 that achieved a polysaccharide concentration above 65%. Ms. Liou’s assertions about this result, including that it was achieved following the dual extraction process exactly as described, were not supported by documentary evidence. The judge identified issues with Ms. Liou’s credibility and concluded that he had to exercise caution “with respect to the reliability of those aspects of her *viva voce* evidence that are not supported by the documents”: at para. 253. Further, Dr. Fatehi gave evidence that a single test from a single source is not sufficient to draw any conclusions about the results to be expected generally from that extraction process. As he put it, “[g]iven the variability involved in this naturally occurring and harvested product, even if the same procedure is followed for two chaga samples, there is no guarantee that the same results would be achieved.”

[42] Third, the appellants contend the trial judge ignored the significance of a high solvent-to-raw-material ratio. However, it is apparent that the judge did not ignore the appellants’ evidence or arguments about solvent-to-raw-material ratio. He accepted that variations in those ratios could affect the composition of the processed product, but found there was insufficient evidence to conclude that following the dual extraction process specified by Real Organics would have resulted in a marketable product with a polysaccharide concentration close to 50%.

[43] Fourth, and most significantly, the appellants submit the judge did not appreciate that Dr. Fatehi failed to follow the dual extraction process identified by Real Organics, missing the critical steps of concentration of the water and alcohol extracts. The appellants point to Dr. Fatehi’s acknowledgement in cross-examination that his extraction procedure did not include a condenser. They say this resulted in the extracted chaga not being “concentrated”.

[44] Again, I see nothing to support the appellants’ contention that the judge missed this evidence. Dr. Fatehi did not consider the use of a condenser to be material to the extraction procedure he followed. He explained that he processed

very small batches of chaga in correspondingly small amounts of liquid. Condensers are necessary to condense the vapour produced in manufacturing large commercial batches of product—here, the water or alcohol vapour that is produced as the mixture is heated. Dr. Fatehi explained that the vapour does not contain any polysaccharides, and therefore the use of a condenser would not have affected the polysaccharide content in the extracted powder. The appellants did not lead any expert evidence at trial to support their argument on appeal that the use of a condenser was critical.

[45] I note that, even if Dr. Fatehi’s report had not been in evidence, it remained the appellants’ burden to prove that the dual extraction process Real Organics instructed CPC to use would have resulted in a product with a polysaccharide content close to 50%, something the judge found they did not do.

[46] In summary, the appellants have not established that the judge erred in his assessment of their claim for recovery of lost profits due to CPC’s breach of the Second Batch contract.

## **2. Damages for breach of the duty of honest performance**

[47] The appellants argue that the judge’s “nominal” award of \$10,000 for CPC’s breach of the duty of honest performance is a manifest error. They say the judge improperly focused on one narrow aspect of the breach—CPC’s provision of inauthentic production records to Ms. Liou on July 26, 2017, without advising her of the significant uncertainty about their accuracy. This limited focus led the judge to conclude that, given the lack of reliance on those records, the breach had little impact on Real Organics’ business.

[48] The appellants submit the judge failed to appreciate that their claim for breach of the duty of honest performance included a broader timeframe: January 2017 to July 2017, a period during which CPC failed to own up to the significant issues it was having with Real Organics’ chaga project. They say that if Real Organics had known about the problems earlier, it might not have carried on with its extensive marketing

campaign, the development of its online retail website, and the opening of a brick-and-mortar store.

[49] In its cross appeal, CPC challenges the availability of this cause of action altogether, arguing that the \$10,000 award must be set aside in its entirety because breach of the duty of honest performance was never pleaded. However, even if Real Organics' claim is not barred, the argument on appeal must fail because the complaint at trial was limited to CPC's conduct in providing inauthentic production records without disclosing their nature. The judge cannot be faulted for failing to address an argument that was not before him.

### **3. Dismissal of the civil fraud claims**

[50] Civil fraud, also known as fraudulent misrepresentation, is established where: (i) a false representation was made by the defendant; (ii) the defendant had some level of knowledge of the falsehood or was reckless as to whether the representation was true or false; (iii) the false representation caused the plaintiff to act; and (iv) the plaintiff's actions resulted in a loss: *Bruno Appliance and Furniture, Inc. v. Hryniak*, 2014 SCC 8 at para. 21; *Catalyst Pulp and Paper Sales Inc. v. Universal Paper Export Company Ltd.*, 2009 BCCA 307 at paras. 55–60.

#### **(a) The fraud claim against CPC**

[51] The appellants submit the judge mischaracterized the claim in civil fraud against CPC by addressing only: (i) the COA for the Beauty Secret Powder that showed no mould, when Silliker's subsequent analysis showed unacceptably high levels of that substance; and (ii) the misrepresentation regarding the accuracy and authenticity of the production records. The appellants say that their claim is also based on a misrepresentation concerning the COA for the test batch of chaga, which did not disclose CPC's failure to test for heavy metals. Further, in relation to the Second Batch, they submit that the judge focused too narrowly on the period in July 2017 when the production records were presented to Ms. Liou. They say their claim was broader and included representations made by CPC about investigating the quality of the Second Batch.

[52] I would not accede to these arguments. Put simply, Real Organics did not plead that CPC was liable for misrepresenting information pertaining to the test batch COA. Nor did Real Organics plead that CPC made fraudulent representations in relation to the Second Batch beyond the alleged forging of production records presented to Ms. Liou in July 2017.

[53] To support their argument about the test batch COA, the appellants rely on one sentence in their trial brief: “[t]he defendants... provided falsified Certificates of Product Analysis (“COA”) to Real Organics” (emphasis added). The appellants argue that the plural form of “certificates” demonstrates that Real Organics’ claim is not limited to the Beauty Secret Powder COA but also includes the initial batch COA. Importantly, that allegation was not made in the notice of civil claim. It is a fundamental principle that lawsuits are to be decided within the boundaries of the pleadings. An allegation of fraud must be clearly pleaded and supported by material facts: *Grewal v. Sandhu*, 2012 BCCA 26 at para. 19; *Chudy v. Merchant Law Group*, 2008 BCCA 484 para. 168.

**(b) *The fraud claim against Dr. Cai***

[54] In a similar vein, the appellants say the judge restricted their civil fraud claim against Dr. Cai personally by considering only whether she misrepresented the amount of mould in the Beauty Secret Powder. The appellants say the judge failed to engage in a broader analysis of Dr. Cai’s independent liability for civil fraud in relation to the Second Batch.

[55] I would not accede to this argument. The pleadings limited the fraud claim to the alleged forging of the Beauty Secret Powder COA and the Second Batch production records. The judge dismissed the first aspect of the claim, finding “nothing that would support any assertion that Dr. Cai had knowledge that the information [in the Beauty Secret Powder COA] was false”: at para. 324. The second aspect of the claim must also fail. The judge made an express finding that “Dr. Cai had no role in the production records”: at para. 334. He also found that the appellants had not proved the requisite element of reliance on the alleged

misrepresentation, given the short time between the sharing of the production records with Ms. Liou and her employees and Ms. Liou's conclusion that the documents were inaccurate: at para. 326.

#### **4. The costs order**

[56] As noted above, the judge ordered the parties to bear their own trial costs. He reasoned that the appellants should have accepted CPC's offers to settle (delivered two weeks before trial), in particular because the accompanying letters identified the very deficiencies in Real Organics' case that ultimately defeated its claim for lost profits—the appellants' inability to prove that Real Organics' dual extraction process would yield high levels of polysaccharides.

[57] The appellants say the judge's reasoning was flawed because the testing that Ms. Liou conducted in 2020 demonstrated that the dual extraction process gave rise to a polysaccharide concentration of more than 60%.

[58] I have already addressed the trial judge's rejection of Ms. Liou's uncorroborated testimony concerning the 2020 testing. In addition, the judge's conclusion that Real Organics should have accepted CPC's offers was not based exclusively on the causation issue. He observed that the offer provided for a "substantial payment" to Real Organics, and noted that the company did not have a substantive response from an expert to address Dr. Fatehi's opinion.

[59] In my view, the appellants have not established an error in the judge's exercise of his discretion to order the parties to bear their own costs.

[60] I turn now to the cross appeal.

[61] CPC submits that the judge made three errors in his reasoning which caused him to overcompensate Real Organics. It will be remembered that the judge awarded Real Organics: \$39,600—the amount paid by Real Organics to acquire the raw chaga—for CPC's breach of the processing term of the Second Batch contract;

\$30,000 for the loss of anticipated profits from the Beauty Secret Powder; and “nominal damages” of \$10,000 for breach of the duty of honest performance.

[62] CPC contends, first, that the \$10,000 for breach of the duty of honest performance must be set aside because that claim was not pleaded. Second, CPC argues that Real Organic’s losses could have been avoided entirely had Real Organics accepted CPC’s offer to reprocess the same amount of raw chaga at no charge—an argument the judge declined to address. Third, CPC submits that even if Real Organics did not fail to mitigate its damages, the \$30,000 award for the loss of the Beauty Secret Powder exceeded the contractual limitation of liability term in that contract.

[63] I turn first to the \$10,000 award for breach of the duty of honest performance.

**(a) Breach of the duty of honest performance**

[64] I agree with CPC that Real Organics did not plead breach of the duty of honest performance. The amended notice of civil claim contained only a general plea for breach of contract. When the respondents demanded particulars of the breach of contract claim, including “what actions or inactions constituted a breach of contract”, the appellants provided the following particularized allegations:

The contractual relationship between Real Organics and CPC arose by way of execution of the Purchase Orders and communications between Ms. Liou and Ms. Cai concerning the Purchase Orders and the Procedures. There also was an implied term that the concentration would be expected to be close to that of the trial batch result, of April 2016. Material terms were breached. Particularly, CPC failed to adhere to the Procedures and CPC thereby and further, failed to meet the concentration expectation.

[65] The appellants acknowledge that their amended notice of civil claim does not use the words “duty of honest performance”, but they say the pleading put that claim in issue nonetheless because it described the re-created production records and Real Organics’ reliance on CPC’s representation that it had followed Real Organics’ processing instructions. However, the paragraphs they rely on relate to broader claims for breach of contract, as well as claims for breach of fiduciary duty (a claim

subsequently withdrawn), involvement in illegal activity (the forging of documents), negligence and punitive damages.

[66] A party wishing to advance a claim for breach of the duty of honest performance must clearly plead the material terms of the contract as well as the nature of the breach due to the defendant's alleged dishonesty: *Ocean Pacific Hotels Ltd. v. Lee*, 2025 BCCA 57 at paras. 83–86. The dishonesty pleaded must concern a matter directly related to the parties' performance of the contract: *Bhasin v. Hrynew*, 2014 SCC 71 at para. 73.

[67] In closing argument, Ms. Liou handed up a binder of written submissions which consisted almost entirely of case names followed by a number of paragraphs quoted from each decision. The cases included the trial decision in *C.M. Callow Inc. v. Zollinger*, 2020 SCC 45, followed by quoted paragraphs relating to the duty of honest performance and unjust enrichment. Other cases addressed unlawful conduct conspiracy, nuisance, criminal negligence causing bodily harm, piercing the corporate veil, punitive damages and costs. The written submissions also included multiple excerpts from the *Criminal Code*, R.S.C. 1985, c. C-46, including sections related to criminal negligence and the fabrication of evidence. Faced with this wide-ranging review of the law, the respondent advised the judge that it would address only the claims that had been pleaded.

[68] Ms. Liou began her closing submissions by reading from the lengthy written argument. Eventually, the judge asked her to stop reading and to respond to questions instead. Neither he nor the parties addressed the duty of honest performance in oral submissions. Nor were the cases of *Callow* or *Bhasin* mentioned.

[69] At no point did the judge alert the parties to his intention to consider damages for breach of the duty of honest performance, or invite submissions on that point. Accordingly, the respondent did not have an opportunity to address that claim and the very real issues (quite apart from the absence of pleading) of whether the delivery of recreated production records concerned the performance of a contractual

obligation sufficient to ground such a claim, and if so, whether reliance on the allegedly dishonest conduct was a prerequisite to the recovery of damages.

[70] In these circumstances, I respectfully conclude that the judge erred in deciding liability and awarding damages against CPC on a basis that was not pleaded: *Bao v. Welltrend United Consulting Inc.*, 2025 BCCA 3 at paras. 31–32.

[71] The appellants suggest that the award for breach of the duty of honest performance could be upheld nonetheless as “necessarily ancillary” to the judge’s order granting Real Organics damages against CPC for breaching the processing specifications in the Second Batch Contract. However, the court’s discretion to rely on a “basket clause” in a notice of application (for example, “such other relief as this court may deem just”) does not apply here. A basket clause is not a basis for granting relief that was not sought and with respect to which the opposing party has not had proper notice.

[72] In summary on this ground of the cross appeal, the \$10,000 award must be set aside. Given this finding, it is not necessary to address CPC’s alternative argument that an award of \$10,000 is inconsistent with the judge’s conclusion that only “nominal” damages should be awarded.

**(b) *Failure to mitigate***

[73] At trial, CPC pressed an argument that Real Organics failed to mitigate its losses by turning down “option three”—CPC’s offer to process the same quantity of raw chaga at no cost to Real Organics other than the purchase of the material from the supplier. The judge declined to address mitigation, saying:

[321] I appreciate that there were significant submissions about failure to mitigate, including arguments about whether RO should have accepted the offers communicated by Mr. Lim on July 28 and August 3, 2017. Those offers were focused on the Chaga dual extraction project and, in particular, on RO’s claim for lost profits. In my view, given my conclusion with respect to causation, and the limited award of damages I have made in respect of that contract, any failure to mitigate has no impact on that award. The award I have made is probably less than the cost that CPC would have incurred had RO accepted one of those offers.

[Emphasis added.]

[74] The respondent says the underlined portions reveal two interrelated errors. First, the judge impermissibly focused on the potential costs to CPC of carrying out its offer to reprocess the chaga, rather than evaluating the reasonableness of Real Organics' rejection of that offer; and second, the argument on mitigation was not exclusive to Real Organics' claim for lost profits from the Second Batch, but was made generally in relation to all contractual damages sought by Real Organics.

[75] The appellants acknowledge the judge may have erred in focusing on the cost of the reprocessing to CPC, but say that error was not a material one because it was, in any event, reasonable for Real Organics to reject CPC's third option.

[76] A plaintiff cannot recover damages from the defendant that could reasonably have been avoided. In those circumstances, the plaintiff's loss is due to its inaction rather than the defendant's wrong: *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51 at paras. 23–24 [*Southcott Estates*].

[77] CPC submits that Real Organics' refusal to accept its offer was objectively unreasonable because, at the time the offer was made, Real Organics had only paid \$39,600 for 1,000 kg of raw chaga that comprised the Second Batch. It had not paid any of the \$36,000 processing fee. Since CPC's third option contemplated Real Organics purchasing another 1,000 kg of raw chaga and CPC reprocessing that chaga at no cost, Real Organics' total outlay after the reprocessing would have been close to the amount it would have paid if the initial batch had been processed using the correct procedure. Thus, if Real Organics had accepted CPC's offer, it would have received the same amount of processed chaga powder for encapsulation and bottling, and the same amount of residue for processing into Beauty Secret Powder at substantially the same cost—avoiding all losses for both products.

[78] The burden is on the defendant to prove that the plaintiff acted unreasonably.

[79] The appellants point out that the offer did not cover all of the production costs for the Chaga Capsules (such as encapsulation); nor did it cover the processing of the chaga residue into bottled Beauty Secret Powder. Further, Real Organics says it

had lost confidence in CPC, given CPC's delay in responding to Real Organics' concerns about the Second Batch and its obfuscation of the production records. Immediately prior to receiving the offer in issue, Real Organics had learned that the Beauty Secret Powder contained mould and could not be marketed, despite CPC providing Real Organics with a COA saying the product was fine. Real Organics had also filed a complaint with Health Canada, which had decided to conduct compliance inspections at CPC.

[80] CPC argues that even if the offer did not cover all costs of production, CPC did not demand a release of claims, and it therefore remained open to Real Organics to accept the offer and "sue for the difference". CPC also questions the authenticity of Real Organics' reasons for refusing the offer, given that Real Organics' notice of civil claim sought specific performance as its primary remedy and stated its refusal to accept the offer was based on CPC's refusal to pay for the raw chaga. However, the question is not whether the plaintiff stated a sound reason at the time, but is, rather, whether the plaintiff acted reasonably. It must be remembered that the offer was made on August 3, 2017, and withdrawn on August 8, 2017, at which point CPC indicated it would address the dispute through the courts. During the period the offer remained open, CPC acknowledged there were unacceptably high levels of mould in the Beauty Secret Powder.

[81] Mitigation is a doctrine of fairness and common sense "which seeks to do justice between the parties in the particular circumstances of the case": *Cellular Baby Cell Phones Accessories Specialist Ltd. v. Fido Solutions Inc.*, 2017 BCCA 50 at para. 74, citing *Southcott Estates* at para. 25. As this Court observed in *Campbell v. Capital One Financial Corporation*, 2024 BCCA 253:

[129] ... [A] plaintiff is not held to a high standard of conduct in mitigation. Where a defendant's conduct exposes a plaintiff to loss, criticism of the plaintiff's conduct by the defendant will often be viewed with caution.

[82] In the circumstances of this case, I cannot find that the appellants' failure to accept the offer was an unreasonable one amounting to a failure to mitigate.

**(c) Damages for breach of the Beauty Secret Powder contract**

[83] CPC submits that, even if Real Organics did not fail to mitigate, the judge erred in awarding Real Organics \$30,000 in lost profits for the Beauty Secret Powder. First, it says the award was entirely speculative and made in the absence of a proper evidentiary foundation. Second, and in any event, it says the award was precluded by the terms of CPC’s contract which limited liability to the cost of the supplied raw material—a cost Real Organics had already been awarded as damages for breach of the Second Batch Contract.

[84] I will deal with the first argument summarily. It is certainly true, as the judge acknowledged, that “the evidence as to [Real Organics’] ability to sell the product” at \$69.99 a bottle (the basis of Real Organics’ calculation of lost profits) “is somewhat thin”: at para. 312. Real Organics introduced no expert evidence, empirical data, publications forecasting industry growth and profitability, or evidence of actual profit by similar businesses. Nonetheless, there was some evidence of a market for Beauty Secret Powder from Ms. Liou. Further, the record established that the Chaga Capsules from the test batch had sold, and that Real Organics had done extensive marketing to promote Beauty Secret Powder. The judge noted that damages are an assessment and, using Real Organics’ calculations as a starting point, reduced the amount to “an appropriately conservative award” for lost profits. I see no error in the judge’s reasoning.

[85] The second argument relies on the limitation of liability clause in the Contract Manufacturing Terms and Conditions governing the Beauty Secret Powder Contract, which provides:

**8.3** The remedies provided for under this [section] represent all the remedies available to the Client for any defective Products, and under no circumstances will the Manufacturer be liable for anything more than the costs of the Client Supplied Raw Materials.

[Emphasis added.]

[86] The judge found that the “costs of the Client Supplied Raw Materials” were the \$39,600 paid by Real Organics for the raw chaga. He accordingly concluded that

his damages award of \$30,000 in lost profits and \$950 for mould testing was consistent with this clause.

[87] CPC contends the judge failed to account for his earlier order awarding Real Organics damages for breach of the Second Batch Contract equivalent to the entire \$39,600 Real Organics had paid to acquire the raw chaga. CPC says that, accordingly, Real Organics had already received full restitution of that amount and should not be compensated twice for the same loss.

[88] I would not accede to this submission. The judge found there were two distinct contracts: one covering production of the Second Batch and another pertaining to production of the Beauty Secret Powder. The limitation of liability clause only applied to the Beauty Secret Powder Contract. I agree with the appellants that it would be wrong to conflate the two contracts and effectively limit Real Organics' damages for both breaches to the cost of the raw chaga, simply because the judge chose the cost of the raw chaga as a measure of loss in relation to breach of the Second Batch Contract.

[89] In the alternative, the respondent asserts that the judge erred in finding that the "costs of the Client Supplied Raw Materials" amounted to \$39,600. This was the total amount paid by Real Organics for the two separate 500 kg orders of raw chaga that comprised the Second Batch. The respondent says the Second Batch contract only required CPC to process the chaga residue from the first shipment into Beauty Secret Powder. Accordingly, the respondent argues that the "costs of the Client Supplied Raw Materials" for the Beauty Secret Powder was, at most, \$19,800—the amount paid for the first 500 kg shipment.

[90] I would not accede to this argument. CPC's position rests on the judge's observation that the sales confirmation CPC sent to Real Organics for the second 500 kg delivery of raw chaga, unlike the first, did not include a \$5,000 charge to "dry and ground" the residue. However, the judge made no finding as to the meaning or significance of those terms in relation to the Beauty Secret Powder contract. Further, there is no evidence that CPC split the chaga residue after processing the 1,000 kg

of chaga that comprised the Second Batch, or that it used only one-half of the residue in processing the Beauty Secret Powder.

[91] In my view, the respondent has not established an error in the judge's assessment of damages for breach of the Beauty Secret Powder contract. It is accordingly unnecessary to address Real Organics' argument that an alternative interpretation of the limitation of liability clause should be adopted.

**Disposition**

[92] I would dismiss the appeal and allow the cross appeal to the extent of setting aside the award of damages for breach of the duty of honest performance. CPC is entitled to costs of the appeal. Each party should bear their own costs of the cross appeal given that success has been divided.

[93] Although the parties asked for an opportunity to speak to the issue of trial costs once the appeal and cross appeal were determined, in my view, no further submissions are necessary. I would not disturb the judge's order with respect to those costs.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Justice Dickson"

I AGREE:

"The Honourable Justice Iyer"